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-03-68-A
		Date:	3 July 2008
		Original:	English

IN THE APPEALS CHAMBER

Before:	**Judge Wolfgang Schomburg, Presiding** **Judge Mohamed Shahabuddeen** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Theodor Meron**
Registrar:	**Hans Holthuis**
Judgement of:	**3 July 2008**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

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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 "International Tribunal", respectively) is seized of two appeals from the Judgement rendered by Trial Chamber II on 30 June 2006 in the case of *Prosecutor v. Naser Orić*, Case No. IT-03-68-T ("Trial Judgement").[1]

2. The events giving rise to this case took place in the municipality of Srebrenica, Bosnia and Herzegovina ("BiH"), and in its surrounding area, between June 1992 and March 1993. Although Srebrenica had been successfully re-taken from Serb forces by Bosnian Muslims in May 1992, the town remained under siege during all the relevant time.[2] The humanitarian situation in and around Srebrenica was appalling, with a massive influx of refugees, a shortage of food and shelter and abysmal medical, hygiene and living conditions.[3]

3. The Prosecution alleged that between 24 September 1992 and 20 March 1993, members of the military police of the municipality of Srebrenica ("Military Police") under the command and control of Naser Orić ("Orić") detained Serb individuals at the police station in Srebrenica ("Srebrenica Police Station") and at a "building behind the Srebrenica Municipal Building" ("Building").[4] These detainees were found to be confined in overcrowded and unsanitary conditions and subjected to serious abuse and injury by the guards and/or by others with the support of the guards.[5] A number of detainees were beaten to death.[6] The Prosecution also alleged that between 10 June 1992 and 8 January 1993, Bosnian Muslim armed units under the command and control of Orić burned and destroyed buildings, dwellings and other property in the course of military operations.[7]

4. Orić was born on 3 March 1967 in Potočari in the municipality of Srebrenica. In 1990, he joined a police unit for special actions of the Ministry of Interior of the Republic of Serbia in Belgrade. In August 1991, Orić returned to BiH, where he served as a police officer in the Ilidža suburb of Sarajevo. In late 1991, he was transferred to the Srebrenica Police Station. On 8 April

[1] Defence Notice of Appeal, 5 October 2006 ("Orić Notice of Appeal"); Defence Appellant's Brief, public redacted version, 11 May 2007 ("Orić Appeal Brief"); Prosecution's Notice of Appeal, 31 July 2006 ("Prosecution Notice of Appeal"); Prosecution Corrigendum to Appeal Brief, attaching an amended version of The Prosecution's Appeal Brief filed on 16 October 2006, 18 October 2006 ("Prosecution Appeal Brief"); Prosecution's Notice of Withdrawal of its Third Ground of Appeal, 7 March 2008.
[2] Trial Judgement, paras. 102-107.
[3] Trial Judgement, paras. 108-115, 357, 768-769.
[4] *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Third Amended Indictment, 30 June 2005 ("Indictment"), para. 22.
[5] Trial Judgement, paras. 357-474.
[6] Trial Judgement, paras. 382-383, 393-395, 398-399, 402-405, 408-411.
[7] Indictment, paras. 27-35.

1992, he was appointed chief of the police sub-station in Potočari.[8] The Trial Chamber found that he was appointed commander of the Territorial Defence ("TO") of Potočari on 17 April 1992, one day before Srebrenica fell to the Serbian forces, and that he became commander of the Srebrenica TO Staff on 20 May 1992, after Srebrenica was re-taken by the Bosnian Muslims.[9] The Prosecution alleged that the breadth of Orić's command was extended in early November 1992, when he was appointed commander of the Joint Armed Forces of the Sub-Region of Srebrenica where he remained in office until he left the Army of Bosnia and Herzegovina ("ABiH") in August 1995.[10]

5. The Prosecution charged Orić with individual criminal responsibility under Article 7(3) of the Statute of the International Tribunal ("Statute") for murder and cruel treatment (Counts 1 and 2) and for wanton destruction of cities, towns or villages not justified by military necessity (Count 3) as violations of the laws or custom of war. It alleged that Orić knew or had reason to know that his subordinates were about to plan, prepare or execute the killing and/or cruel treatment of Serb detainees and were about to commit the wanton destruction of Bosnian Serb property, or had done so. Orić was alleged to have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The Prosecution also charged Orić with individual criminal responsibility under Article 7(1) of the Statute for instigating and aiding and abetting the crime of unlawful and wanton destruction not justified by military necessity (Count 5).[11]

6. The Trial Chamber found that a chain of superior-subordinate relationships for the purposes of Article 7(3) responsibility descended from Orić to the Military Police through the successive Chiefs of Staff of the Srebrenica Armed Forces subsequent to 27 November 1992.[12] Orić was found guilty pursuant to Articles 3 and 7(3) of the Statute for failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder (Count 1) and cruel treatment (Count 2) from 27 December 1992 to 20 March 1993. More specifically, Orić was found to have failed to take necessary and reasonable measures to prevent the Military Police from failing to fulfill its duty to prevent the cruel treatment and murder of the detainees.[13] The Trial Chamber acquitted Orić of all other charges of the Indictment. Orić was sentenced to a single sentence of two years of imprisonment.[14]

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[8] Trial Judgement, para. 1.
[9] Trial Judgement, para. 768.
[10] Trial Judgement, paras. 2-3.
[11] Trial Judgement, paras. 7-10. In its decision pursuant to Rule 98*bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules") rendered orally on 8 June 2005 ("Rule 98*bis* Ruling"), the Trial Chamber found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the crime of plunder of public or private property, and thus acquitted Orić of Counts 4 and 6: Trial Judgement, para. 820, referring to Rule 98*bis* Ruling, T. 8 June 2005, pp. 9028-9032.
[12] Trial Judgement, paras. 527-532.
[13] Trial Judgement, paras. 490, 565-572, 578.
[14] Trial Judgement, Disposition, para. 783.

II. STANDARD OF APPELLATE REVIEW

7. As most recently expressed by the Appeals Chamber with reference to its settled jurisprudence,[15] on appeal the parties must limit their arguments to errors of law that invalidate the decision of the Trial Chamber and to errors of fact that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute. Only in exceptional circumstances will the Appeals Chamber also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence.

8. Any party alleging an error of law must identify with the utmost possible precision 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. Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may find, for other reasons, that there is an error of law.

9. The Appeals Chamber reviews the Trial Chamber's impugned findings of law to determine whether or not they are correct. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal interpretation and review the relevant factual findings of the Trial Chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but applies the established law to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.

10. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber. In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. 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".[16]

[15] *See Hadžihasanović and Kubura* Appeal Judgement, paras. 7-11.
[16] *See, e.g., Hadžihasanović and Kubura* Appeal Judgement, para. 11; *Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9.

11. The Appeals Chamber reiterates that an appeal is not a trial *de novo*[17] and recalls, as a general principle, the approach adopted in *Kupreškić et al.,* wherein it was stated that:

> Pursuant to the jurisprudence of the [International] 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.[18]

12. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[19] However, since the Prosecution bears the burden at trial of proving the guilt of the accused beyond 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.[20] 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.[21]

13. The Appeals Chamber recalls that it has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and may dismiss arguments which are manifestly unfounded without providing detailed reasoning.[22] A party is not entitled merely to 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 intervention of the Appeals Chamber.[23] Moreover, submissions will be dismissed without detailed reasoning where the appealing party's argument does not have the potential to cause the impugned decision to be reversed or revised[24] or where the appealing party's argument unacceptably seeks to substitute its own evaluation of the evidence for that of the Trial Chamber.[25]

14. 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

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[17] *See, e.g., Halilović* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 15; *Blaškić* Appeal Judgement, para. 13.
[18] *Kupreškić et al.* Appeal Judgement, para. 30.
[19] *Hadžihasanović and Kubura* Appeal Judgement, para. 12.
[20] *Limaj et al.* Appeal Judgement, para. 13.
[21] *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11 and *Limaj et al.* Appeal Judgement, para. 13, referring to the ICTR *Bagilishema* Appeal Judgement, para. 14.
[22] *See*, *e.g., Hadžihasanović and Kubura* Appeal Judgement, para. 16.
[23] *See, e.g., ibid.*, para. 14.
[24] *See, e.g., ibid*., para. 14.

arguments on appeal, the party is expected to present its case clearly, logically and exhaustively.[26] The Appeals Chamber recalls that the formal criteria require an appealing party to provide the Appeals Chamber with exact references to the parts of the records, transcripts, judgements and exhibits to which reference is made.[27] Further, submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies will not be considered by the Appeals Chamber or, if at all, not in detail.[28]

[25] *Halilović* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11.
[26] *Halilović* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 43.
[27] *Cf.* Practice Direction on Formal Requirements for Appeals from Judgement, paras 1(c)(iii), 1(c)(iv), and 4(b)(ii). *See also, e.g., Hadžihasanović and Kubura* Appeal Judgement, para. 15.
[28] *See, e.g., Hadžihasanović and Kubura* Appeal Judgement, para. 15.

III. ORIĆ'S APPEAL

15. The Appeals Chamber notes that, under his first and fifth grounds of appeal, Orić makes submissions which raise the issue as to whether the Trial Chamber failed to make certain findings crucial to his conviction under Article 7(3) of the Statute. Due to their possible impact on the remainder of his appeal, it is appropriate to consider these submissions first.

A. Failure to resolve issues crucial to Orić's conviction under Article 7(3) of the Statute

16. Orić submits that the Trial Chamber erred in law in failing to make clear the basis upon which his alleged subordinates were found criminally liable (Grounds 1(E)(1) and 5 in part).[29] The gist of Orić's arguments is that the Trial Chamber failed to make certain findings pivotal to his conviction, thereby failing to resolve issues crucial to the case. Furthermore, it is at issue whether the Trial Chamber made the finding necessary to establish his knowledge or his reason to know of his subordinate's alleged criminal conduct (Ground 1(F)(2)).[30]

17. This section of the Judgement is strictly limited to the question of whether the Trial Chamber made the findings necessary to enter a conviction under Article 7(3) of the Statute. Accordingly, the Appeals Chamber's subsequent analysis is based solely on the findings of the Trial Chamber as set out in its impugned Judgement. The question of whether those findings withstand other challenges on appeal is left for later consideration as necessary.

1. Introduction

18. Orić was convicted under Article 7(3) of the Statute for failing to prevent the crimes of murder and cruel treatment that occurred at the detention facilities in Srebrenica between 27 December 1992 and 20 March 1993. For a superior to incur criminal responsibility under Article 7(3), in addition to establishing beyond reasonable doubt that his subordinate is criminally responsible, the following elements must be established beyond reasonable doubt:

i) the existence of a superior-subordinate relationship;

ii) that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so; and

iii) that the superior failed to take the necessary and reasonable measures to prevent his subordinate's criminal conduct or punish his subordinate.[31]

[29] Orić Appeal Brief, paras. 311-333. *See also ibid.*, para. 108 and Corrigendum to Defence Reply Brief, attached to the "Defence Response to the Prosecution's Motion to Strike Defence Reply Brief and Annexes A-D" filed 22 December 2006 and recognized as the valid Reply Brief by the Appeals Chamber in the "Decision on the Motion to Strike Defence Reply Brief and Annexes A-D", filed 7 June 2007 ("Orić Reply Brief"), paras. 89-91.
[30] Orić Appeal Brief, paras. 129(d) and (e), 130-137.
[31] *See Nahimana et al.* Appeal Judgement, para. 484; *Halilović* Appeal Judgement, para. 59; *Blaškić* Appeal Judgement, para. 484; *Aleksovski* Appeal Judgement, para. 72. *See also* Trial Judgement, para. 294.

The Trial Chamber was obliged to make findings on each of these elements before being entitled to enter a conviction.[32]

19. Before addressing the Trial Chamber's alleged failure to make the necessary findings, the Appeals Chamber will address two preliminary points of law raised by Orić.

20. First, Orić submits that a superior cannot, as a matter of law, incur criminal responsibility under Article 7(3) of the Statute when the link to the perpetrators of the crimes at issue is "too remote".[33] The Appeals Chamber recalls that the concept of effective control is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[34] Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate. The separate question of whether – due to proximity or remoteness of control – the superior indeed possessed effective control is a matter of evidence, not of substantive law.[35] Likewise, whether the subordinate is found to have participated in the crimes through intermediaries is immaterial as long as his criminal responsibility is established beyond reasonable doubt.

21. Second, Orić argues that superior responsibility under Article 7(3) of the Statute does not encompass criminal conduct by subordinates in the form of aiding and abetting crimes.[36] This is incorrect. The Appeals Chamber has held that superior responsibility encompasses criminal conduct by subordinates under all modes of participation under Article 7(1) of the Statute.[37] It follows that a superior can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime.

22. Orić's submissions on these two preliminary points therefore fail.

[32] *Cf. Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 129.
[33] Orić Appeal Brief, paras. 8 and 9; Orić Reply Brief, paras. 16 and 17; AT. 1 April 2008, pp. 39, 61.
[34] *Halilović* Appeal Judgement, para. 59, referring to *Čelebići* Appeal Judgement, para. 256.
[35] *See Blaškić* Appeal Judgement, para. 69.
[36] Orić Appeal Brief, paras. 317, 340-374. *See also ibid.*, paras. 106 and 109. *See also* AT. 1 April 2008, pp. 131-132.
[37] *Nahimana et al.* Appeal Judgement, paras. 485-486; *Blagojević and Jokić* Appeal Judgement, paras. 280, 282.

2. Findings of the Trial Chamber

(a) Principal perpetrators

23. The Trial Chamber found that crimes of murder and cruel treatment were committed between September and October 1992 and between 15 December 1992 and 20 March 1993 against Serbs detained at the Srebrenica Police Station and at a house referred to as the "Building".[38]

24. The Trial Chamber divided the principal perpetrators of these crimes into three categories: (1) unknown perpetrators; (2) unidentified individuals who were guards or who entered the detention facilities from the outside; and (3) individuals identified by name or nickname.[39] Neither those perpetrators known by name or nickname, nor the guards at the two places of detention, were identified as members of the Military Police.[40]

25. The Trial Chamber did not make findings on the mode of liability under which the principal perpetrators incurred criminal responsibility. However, it is obvious from the Trial Chamber's factual findings that the perpetrators in all three categories above directly committed the crimes attributed to them.[41] On the other hand, in instances where guards allowed people from the outside to enter the cells to beat the prisoners,[42] it remains unclear if and under what form of liability the Trial Chamber considered them criminally responsible.

(b) Orić's subordinates

26. None of the principal perpetrators were found to be subordinated to Orić.[43] The Trial Chamber did not explicitly find the level of control, if any, Orić exercised over the principal perpetrators, including the guards.[44] However, the Trial Chamber took the position that

[38] Trial Judgement, para. 494. *See also ibid.*, paras. 378-474. The "Building" refers to the building behind the municipal building referred to in paragraph 22 of the Indictment: Trial Judgement, Annex A " Glossary".
[39] Trial Judgement, paras. 480, 489.
[40] Trial Judgement, paras. 481, 489, 530.
[41] Regarding the incidents of murder, *see* Trial Judgement, paras. 383, 395, 399, 405, 411. With respect to the cruel treatment, *see ibid.*, paras. 415-417, 422-423, 428, 433, 438, 444-447, 453-454, 459, 467. As to the guards' direct participation in the crimes, *see ibid.*, paras. 446, 489, 492, 495.
[42] Trial Judgement, paras. 422, 454. *See also ibid.*, paras. 489, 495.
[43] *See* Trial Judgement, paras. 480-481, 530-531.
[44] The Trial Chamber merely noted evidence that Orić's presence at the Srebrenica Police Station, as well as his name, "instilled apprehension, if not also fear, amongst the guards" (Trial Judgement, para. 530. *See also ibid.*, para. 567). This, the Trial Chamber held, was indicative that Orić "could influence the events at the Srebrenica Police Station, and this is because obviously, he was respected and feared as Commander" (*ibid.*, para. 530). However, the Trial Chamber immediately thereafter clarified that this was "pointed out for its own merit […] and not because, in the particular circumstances of this case, it is required that there was, or must have been, a direct superior-subordinate relationship between the Accused and the direct perpetrators of murder and cruel treatment. In the present case, the chain of superior-subordinate relationship for the purposes of responsibility pursuant to Article 7(3) descends from the Accused to the Srebrenica military police" (*ibid.,* para. 531).

responsibility under Article 7(3) of the Statute "does not presuppose that the direct perpetrators of a crime punishable under the Statute be identical to the subordinates of a superior."[45]

27. After recalling the Prosecution's allegation that members of the Military Police, "under the command and control" of Orić, were responsible for the crimes, the Trial Chamber proceeded to examine "whether criminal responsibility c[ould] be attached to members of [the Military Police], either for their own acts or for their omissions with respect to others".[46] The Trial Chamber did not specify under which form(s) of criminal liability it would assess whether members of the Military Police incurred individual criminal responsibility.

28. Having found that there was no evidence that any of the identified principal perpetrators, including the guards at the detention facilities, belonged to or were under the effective control of the Military Police,[47] the Trial Chamber focused its analysis on the "identity of the Detaining Force".[48] It held that the Military Police was the body detaining the victims of the crimes at the Srebrenica Police Station and the Building.[49]

29. The Trial Chamber's finding that the Military Police was the "detaining force" appears to have been its crucial link between the Military Police and the actual crimes of murder and cruel treatment against the detainees. This link is critical because the Trial Chamber found that the Military Police had a duty to protect the detainees. It held that "[f]rom the very moment the Srebrenica military police started to detain Serbs, it assumed all duties and responsibilities under international law relating to the treatment of prisoners in time of conflict."[50] In particular, the Military Police was "bound to ensure that the detainees were not subjected to any kind of violence to life and person" such as murder and cruel treatment.[51] The Trial Chamber continued:

> In fulfilment of these obligations, the commander of the Srebrenica military police were [*sic*] required to select suitable guards and provide adequate space and facilities for the detainees. He had a responsibility to ensure that these duties were met at all times.[52]

30. Against this backdrop, the Trial Chamber proceeded to examine the conduct of the successive Commanders of the Military Police, Mirzet Halilović and Atif Krdžić, respectively. With respect to Atif Krdžić, the Trial Chamber found that "his conspicuous absence from the Srebrenica Police Station and the Building at a time when he could not but have been aware of what had

[45] Trial Judgement, para. 478. *See also ibid.*, paras. 301, 305.
[46] Trial Judgement, paras. 476, 479.
[47] Trial Judgement, paras. 481, 489, 530.
[48] Trial Judgement, Section VII.C.1(b)(ii). *See also ibid.*, para. 494.
[49] Trial Judgement, paras. 488, 494.
[50] Trial Judgement, para. 490.
[51] Trial Judgement, para. 490.
[52] Trial Judgement, para. 490.

happened during his predecessor's tenure, coincide[d] with more killings and more maltreatment."[53] It also noted the absence of evidence "of any supervision over the guards, of any disciplinary measures against them, or of any visit by Atif Krdžić, or a person assigned by him, for that matter at any time."[54] In conclusion, the Trial Chamber found that:

> the Srebrenica military police, through its commanders, *i.e.*, Mirzet Halilović and Atif Krdžić respectively, are responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building.[55]

(c) Orić's criminal responsibility

31. The Trial Chamber found that Orić exercised effective control over the Military Police through the successive Chiefs of Staff of the Srebrenica Armed Forces, Osman Osmanović and Ramiz Bećirović, subsequent to 27 November 1992.[56] Having examined Orić's *mens rea* and his alleged failure to prevent or punish,[57] the Trial Chamber concluded that Orić incurred criminal responsibility for failing to prevent the occurrence of murder and cruel treatment committed against Serb detainees from 27 December 1992 to 20 March 1993,[58] when Atif Krdžić, as Mirzet Halilović's successor, headed the Military Police.[59]

3. Identity of Orić's culpable subordinates (Orić's Ground 5)

32. Orić contends that although he was convicted for failing to prevent murder and cruel treatment as a superior, the Trial Chamber failed to specify who his "corresponding subordinates" were.[60]

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[53] Trial Judgement, para. 496 (footnote omitted).
[54] Trial Judgement, para. 495.
[55] Trial Judgement, para. 496. *See also ibid.*, para. 533.
[56] Trial Judgement, paras. 527-532. The Appeals Chamber notes that, although the Trial Chamber found that Orić exercised effective control from 27 November 1992, it held that he had an obligation to prevent from the date of Atif Krdžić's appointment, *i.e.* 22 November 1992: Trial Judgement, para. 570. Because Orić's obligation to prevent hinged on him having effective control, the Appeals Chamber considers that said obligation was incumbent on Orić from 27 November 1992. The Appeals Chamber will therefore disregard the Trial Chamber's erroneous reference to Orić's duty to prevent as beginning on 22 November 1992.
[57] Trial Judgement, paras. 533-577.
[58] Trial Judgement, para. 578.
[59] Incidentally, the Appeals Chamber notes that the Trial Chamber held Orić responsible and convicted him only for the crimes committed from *27 December* 1992 to 20 March 1993 (Trial Judgement, paras. 574, 576, 577, 578, 739 and Disposition, para. 782) although it had found earlier in the Trial Judgement that the crimes committed during Atif Krdžić's tenure occurred between *15 December* 1992 and 20 March 1993 (*ibid.*, para. 494) and that Orić had effective control over Atif Krdžić from *27 November* 1992 onward (*ibid.*, para. 532). The Appeals Chamber believes that a plausible explanation for referring to "27 December" is that the Trial Chamber made a clerical error stemming from an unfortunate confusion between "27 November" – the date when Orić assumed effective control – and "15 December". Because none of the crimes for which Orić was convicted actually occurred between 15 and 27 December 1992 (*ibid.*, paras. 391-411, 441-474), this error as to the dates does not affect any of the Trial Chamber's findings.
[60] Orić Appeal Brief, paras. 309-312. *See also* Defence Submissions in Relation to Issues Identified by the Appeals Chamber, 25 March 2008 ("Orić Written Submissions of 25 March 2008"), paras. 23-24.

33. The Trial Chamber did not find that the principal perpetrators or the guards were subordinated to Orić.[61] Instead, the Trial Chamber specified that Orić had effective control over the Military Police subsequent to 27 November 1992, through his subordinates Osman Osmanović and Ramiz Bećirović.[62] The Trial Chamber identified only two members of the Military Police during this period: Atif Krdžić, its Commander, and Džanan Džananović, its deputy Commander in "early 1993".[63] Unidentified members of the Military Police were referred to by the Trial Chamber, but only in relation to the charge of wanton destruction.[64] While the Trial Chamber said nothing about the role or conduct of Džanan Džananović at this time, it found that subsequent to 27 November 1992 a superior-subordinate relationship existed between Orić and "the head" of the Military Police, Atif Krdžić, who was "ultimately responsible for murder and cruel treatment".[65] It follows that the Trial Chamber found that Orić's subordinate responsible for the crimes of murder and cruel treatment committed between December 1992 and March 1993 was Atif Krdžić. Orić's argument is accordingly dismissed.

34. In response to the Appeals Chamber's questions raised on 10 March 2008,[66] the Prosecution submitted that even if Atif Krdžić had not been identified as Military Police Commander, "Orić could still have been held responsible for members of the [Military Police] who aided and abetted the crimes."[67] In support of its allegation, the Prosecution contends that it is not necessary to establish the exact identity of the subordinates who are responsible for the crimes and that it is sufficient to identify them by reference to their membership of a group.[68]

35. The Appeals Chamber considers that, notwithstanding the degree of specificity with which the culpable subordinates must be identified, in any event, their existence as such must be established. If not, individual criminal liability under Article 7(3) of the Statute cannot arise. In the present case, the Trial Chamber established the existence of the "Military Police" as an entity and repeatedly referred to its responsibility and duties.[69] However, when discussing the conduct of the actual members of the Military Police with respect to detention matters, it only identified its successive Commanders, Mirzet Halilović and Atif Krdžić.[70] Nowhere in the Trial Judgement did

[61] *See supra*, para. 26.
[62] Trial Judgement, paras. 527-532.
[63] Trial Judgement, paras. 182 (fns. 506 and 507), 494, 506.
[64] Trial Judgement, paras. 638, 650 and 663. The Appeals Chamber recalls that Orić was acquitted of the charge of wanton destruction: Trial Judgement, Disposition, para. 782.
[65] Trial Judgement, para. 533, referencing *ibid.*, para. 496.
[66] *Addendum* to Order Scheduling Appeal Hearing, 10 March 2008, p. 2.
[67] Prosecution's Written Submissions Pursuant to Order of 10 March 2008, 25 March 2008 ("Prosecution Written Submissions of 25 March 2008"), para. 5. *See also* AT. 1 April 2008, pp. 14-15. Orić opposed the Prosecution's argument: Orić Written Submissions of 25 March 2008, paras. 46-48; AT. 1 April 2008, pp. 40-44.
[68] Prosecution Written Submissions of 25 March 2008, para. 5; AT. 1 April 2008, p. 14.
[69] *See e.g.* Trial Judgement, paras. 483-491, 531, 532.
[70] Trial Judgement, paras 182, 492-496.

the Trial Chamber mention other potentially culpable members of the Military Police, nor did it suggest that unidentified military policemen were implicated in the crimes at issue. Because the Trial Chamber did not identify any member of the Military Police other than Atif Krdžić who would have taken part in the commission of the crimes for which Orić was found responsible, not even by mere reference to their membership in the Military Police, the Prosecution's argument fails.

4. Criminal conduct of Orić's subordinate (Orić's Grounds 1(E)(1) and 5)

36. Orić submits that it is unclear what theory of criminal liability the Trial Chamber applied to his alleged subordinates,[71] and that this lack of clarity is an error of law in itself.[72] In an attempt to make out the Trial Chamber's reasoning, Orić submits that it may rest on one of five different theories,[73] namely: (i) the Military Police and/or the guards failed to prevent "outsiders" from mistreating the prisoners;[74] (ii) the Military Police or the guards aided and abetted "outsiders" to commit the crimes;[75] (iii) the Military Police or the guards "culpably omitted" to prevent "outsiders" from committing the crimes;[76] (iv) the Military Police was responsible as the "Detaining Power" under Geneva Convention III;[77] or (v) Atif Krdžić, as Commander of the Military Police, incurred criminal responsibility for the crimes.[78] Orić contends that all five of these possible theories are untenable.[79]

37. The Prosecution acknowledges that the "Trial Chamber did not expressly designate a legal classification for the 'responsibility' of the [Military Police] for the crimes of murder and cruel treatment".[80] However, it submits that "it is reasonable to conclude" that the Trial Chamber found that the Military Police through its omissions aided and abetted the murders and cruel treatment committed by the guards and, through them, the outsiders.[81] The Prosecution argues that the Trial Chamber reasoned as follows. The crimes were committed against detainees kept in prisons run by the Military Police. The Military Police was subordinated to Orić. The physical perpetrators of the crimes were guards and outsiders whom the guards allowed in or failed to prevent from entering the prisons. The guards were not members of the Military Police; however, the Military Police had a duty to ensure the humane treatment of prisoners in their custody. Failing to carry out this duty, the

[71] Orić Appeal Brief, paras. 108, 311; AT. 1 April 2008, pp. 33, 127.
[72] Orić Appeal Brief, para. 311.
[73] Orić Appeal Brief, para. 313.
[74] Orić Appeal Brief, paras. 314-315; Orić Written Submissions of 25 March 2008, para. 27.
[75] Orić Appeal Brief, paras. 316-319.
[76] Orić Appeal Brief, paras. 320-322.
[77] Orić Appeal Brief, paras. 323-330.
[78] Orić Appeal Brief, paras. 331-332. *See* Orić Written Submissions of 25 March 2008, paras. 25-28.
[79] Orić Appeal Brief, para. 333. *See also ibid.*, paras. 313-332.
[80] The Prosecution's Response Brief, public redacted version, 29 November 2006 ("Prosecution Response Brief"), para. 126.

Military Police was responsible for the acts and omissions of the guards.[82] In response to the Appeals Chamber's questions,[83] the Prosecution further specified that Atif Krdžić, as Commander of the Military Police, failed to discharge this duty and thereby made a substantial contribution to the crimes in the sense of making their commission substantially less difficult.[84] Atif Krdžić's failure to act, the Prosecution argued, is evidenced by the Trial Chamber's findings that prisoners were continuously mistreated at a time when he was conspicuously absent from the prisons.[85] As for Atif Krdžić's *mens rea*, the Prosecution submitted that the Trial Chamber found that he was at least aware of the probability that crimes were being committed and that his failure to act would probably assist the crimes.[86]

38. The Appeals Chamber notes that the Trial Chamber did not specify the basis for the criminal responsibility of Orić's only identified culpable subordinate from the Military Police, Atif Krdžić; it simply found that he was "responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building" and "ultimately responsible for murder and cruel treatment".[87] The Appeals Chamber is concerned that the Trial Chamber did not make any explicit findings on this fundamental element of Orić's criminal responsibility. Nevertheless, the Appeals Chamber considers that the Trial Judgement must be read as a whole,[88] and so proceeds to examine whether such reading reveals on what basis the Trial Chamber found Atif Krdžić criminally responsible.

39. At the outset, the Appeals Chamber considers that the Trial Chamber did not find Atif Krdžić criminally responsible under Article 7(3) of the Statute. The Trial Chamber did not make any findings as to whether the principal perpetrators were under the effective control of either Atif Krdžić or his predecessor. It expressly found that none of the perpetrators known by name or nickname was identified as members of the Military Police, and it did not find that the guards were military policemen or otherwise under the effective control of that unit.[89] The Trial Chamber could not apply Article 7(3) responsibility to Atif Krdžić when it had recognised itself that the element of a superior-subordinate relationship between him and the principal perpetrators or the guards was not underpinned by facts. Moreover, the Trial Chamber, in its legal findings, did not consider whether a

[81] Prosecution Response Brief, paras. 126, 151. *See also* Prosecution Written Submissions of 25 March 2008, paras. 1-4 and AT. 1 April 2008, pp. 9-11.
[82] Prosecution Response Brief, paras. 125, 150.
[83] *Addendum* to Order Scheduling Appeal Hearing, 10 March 2008, p. 2.
[84] AT. 1 April 2008, p. 10. *See also* Prosecution Written Submissions of 25 March 2008, para. 1.
[85] Prosecution Written Submissions of 25 March 2008, para. 1; AT. 1 April 2008, p. 10.
[86] AT. 1 April 2008, pp. 10-11. *See also* Prosecution Written Submissions of 25 March 2008, paras. 2-4.
[87] Trial Judgement, paras. 496 and 533.
[88] *Naletilić and Martinović* Appeal Judgement, para. 435; *Stakić* Appeal Judgement, para. 344.
[89] *See supra*, paras. 24, 26 and 28.

superior could possibly be held responsible under Article 7(3) in relation to his subordinate's criminal responsibility under the same article.[90]

40. The Trial Chamber did consider, however, that an accused may be held responsible under Article 7(3) of the Statute for a subordinate's commission by omission[91] and aiding and abetting.[92] With respect to aiding and abetting, the Trial Chamber further held that this mode of liability may take the form of encouragement or approval, as well as omission.[93]

41. The Appeals Chamber considers that the Trial Chamber did not hold Atif Krdžić criminally responsible for commission by omission. At a minimum, the *actus reus* of commission by omission requires an elevated degree of "concrete influence".[94] Such was not the case here, where the Trial Chamber merely found that Atif Krdžić's absence from the detention facilities "coincide[d] with more killings and more maltreatment".[95] Furthermore, the Trial Chamber clearly distinguished Atif Krdžić from the principal perpetrators who physically committed the crimes.[96]

42. Turning to whether the Trial Chamber applied the theory of aiding and abetting by tacit approval and encouragement, the Appeals Chamber notes that in cases where this theory has been applied, the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[97] Here, the Trial Chamber did not find that Atif Krdžić was present at the scene of the crimes. Rather, it focused on his "conspicuous absence" from the detention facilities, and how it "coincide[d] with more killings and more maltreatment."[98] Similarly, the Trial Chamber emphasised the absence of evidence "of any supervision over the guards, of any disciplinary measures against them, or of any visit by Atif Krdžić, or a person assigned by him, for that matter at any time."[99] The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by tacit approval and encouragement.

43. The Prosecution submits that the Trial Chamber found Atif Krdžić responsible for aiding and abetting by omission.[100] The Appeals Chamber recalls that omission proper may lead to

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[90] *See* Trial Judgement, paras. 299-301.
[91] Trial Judgement, para. 302.
[92] Trial Judgement, para. 301.
[93] Trial Judgement, paras. 283, 303.
[94] *See Blaškić* Appeal Judgement, para. 664.
[95] Trial Judgement, para. 496.
[96] *See supra*, paras. 24, 25, 27-30.
[97] *Brdanin* Appeal Judgement, para. 273, with references at fns. 553, 555. *See also Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.
[98] Trial Judgement, para. 496.
[99] Trial Judgement, para. 495.
[100] Prosecution Response Brief, para. 126, 151; Prosecution Written Submissions of 25 March 2008, paras. 1-4; AT. 1 April 2008, pp. 9-11. Orić disputes the existence of a notion of aiding and abetting by "pure omission" in international

individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[101] The Appeals Chamber has never set out the requirements for a conviction for omission in detail.[102] However, at a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (*actus reus*).[103] The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator[104] and must be aware of the essential elements of the crime which was ultimately committed by the principal (*mens rea*).[105]

44. The Trial Chamber found a legal duty to act on the part of Atif Krdžić as Commander of the Military Police, and that his omissions "coincide[d] with more killings and more mistreatment".[106] However, it does not follow from the fact that Atif Krdžić's omissions "coincided" with an increase in crimes that his omissions had a "substantial effect" thereupon, as required for liability for aiding and abetting to incur. The Trial Chamber remained silent on the issue.

45. Regarding Atif Krdžić's *mens rea*, the Trial Chamber found that "there is no reason why Atif Krdžić […] should not have become aware of the crimes committed, except for wilful blindness".[107] Atif Krdžić was thus found to have been aware of the crimes committed by the principal perpetrators. However, the Trial Chamber made no finding on whether Atif Krdžić knew that his omissions assisted in the crimes. In this regard, the Appeals Chamber notes that the Trial Chamber's finding regarding Atif Krdžić's "conspicuous absence" from the detention facilities[108] refers not to his *mens rea*, but to his failure to comply with his duty to care for the prisoners.[109] The Prosecution understands this finding in the same way.[110]

46. The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by omission.

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humanitarian law and that a superior can be held responsible for subordinates who aid and abet by omission: AT. 1 April, pp. 60-62, 131-136.

[101] *Brđanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Ntagerura et al.* Appeal Judgement, paras. 334, 370; *Blaškić* Appeal Judgement, para. 663.

[102] *Cf. Simić* Appeal Judgement, para. 85, fn. 259; *Blaškić* Appeal Judgement, para. 47.

[103] *See, e.g., Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, para. 85.

[104] *See* for the general definition of aiding and abetting*, e.g., Seromba* Appeal Judgement, para. 56; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127.

[105] *Cf. Simić* Appeal Judgement, para. 86; *Aleksovski* Appeal Judgement, para. 162.

[106] Trial Judgement, paras. 490, 495, 496.

[107] Trial Judgement, para. 496.

[108] Trial Judgement, para. 496.

[109] *See* Trial Judgement, para. 495.

[110] *See* AT. 1 April 2008, p. 10.

47. Having considered the Trial Judgement as a whole, the Appeals Chamber is left with only a small number of general findings – for instance, that Atif Krdžić might have been "wilfully blind" to the crimes and that he was "conspicuously absent" from the detention facilities – without any indication of whether and how they relate to any form of criminal liability under the International Tribunal's Statute. These scattered fragments do not allow the Appeals Chamber to conclude on what basis the Trial Chamber found Orić's only identified culpable subordinate criminally responsible. Such finding would have been required to determine Orić's guilt. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to resolve the issue of whether Orić's subordinate incurred criminal responsibility.

48. In the absence of a finding on the basis on which Orić's only identified culpable subordinate was found criminally responsible, Orić's convictions under Article 7(3) of the Statute cannot stand. The Trial Chamber's error therefore invalidates the decision.

49. Having granted Orić's appeal in this part, the Appeals Chamber would not necessarily need to address Orić's arguments pertaining to his knowledge or reason to know of his subordinate's alleged criminal conduct. However, the Appeals Chamber deems it necessary to give full consideration of the issue of Orić's *mens rea* raised under his sub-ground of appeal 1(F)(2).

5. Orić's knowledge or reason to know of his subordinate's alleged criminal conduct (Orić's Ground 1(F)(2))

50. Under his ground of appeal 1(F)(2), Orić submits that there was no evidence that he knew that the Military Police was criminally responsible for the commission of the crimes committed in the detention facilities.[111] Before it can turn to Orić's submissions, the Appeals Chamber must first consider whether the Trial Chamber actually made the challenged finding.

51. The Appeals Chamber recalls that to hold a superior criminally liable under Article 7(3) of the Statute it must be found that he knew or had reason to know of his subordinate's criminal conduct:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[112]

[111] Orić Appeal Brief, paras. 129(e), 130-137. *See also* Prosecution Response Brief, paras. 50 and 53.
[112] Article 7(3) of the Statute.

52. The Appeals Chamber notes that the Trial Chamber made no explicit finding as to whether Orić knew or had reason to know of his subordinate's alleged criminal responsibility for the mistreatment of Serb detainees.[113] As such a pivotal finding was required, the Appeals Chamber will examine whether a holistic reading of the Trial Judgement reveals that the Trial Chamber was satisfied that Orić had the required *mens rea* under Article 7(3) of the Statute.

53. In its analysis of Orić's "imputed knowledge", the Trial Chamber found that Orić "appears to have had no doubt that the killing of a detainee was a matter that concerned him as he discussed it with Hamed Salihović and Ramiz Bećirović with a view to prevent reoccurrence."[114] The Trial Chamber further found that Orić was "instrumental in promoting an investigation of this incident, which ultimately resulted in the removal of Mirzet Halilović, a decision in which the Accused took an active part."[115] The Appeals Chamber considers that these findings imply that the Trial Chamber was satisfied that Orić had knowledge of Mirzet Halilović's criminal conduct, but notes that the latter was not found to be Orić's subordinate.[116]

54. Regarding Orić's only identified culpable subordinate, Atif Krdžić, the Trial Chamber held that Orić "was aware that, responding to problems with the Srebrenica military police, Mirzet Halilović had been replaced by Atif Krdžić as its commander."[117] It also found that Orić knew that his deputy, Zulfo Tursunović, was visiting the Serb detainees at the detention facilities.[118] The Trial Chamber continued: "The reality of the situation is that more Serb detainees were killed and cruelly treated after Atif Krdžić was appointed commander of the Srebrenica military police than before. In addition, this occurred at a time when the Srebrenica military police was assigned a new commander, and was undergoing structural changes, supposedly to resolve previous problems."[119] The Trial Chamber concluded by holding that "[a]gainst the backdrop of the Accused's prior notice, it appears that the Accused did not deem it necessary to verify if further Serb detainees were killed or cruelly treated and acted on that assumption."[120]

55. Read in isolation, these findings might be understood to mean that the Trial Chamber was satisfied that Orić had "prior notice" – in other words, reason to know – that Atif Krdžić would continue his predecessor's failure to ensure that the Serb detainees were not subjected to murder and cruel treatment. However, the Appeals Chamber considers that, read in context, the finding on

[113] *See* Trial Judgement, paras. 533-560.
[114] Trial Judgement, para. 550.
[115] Trial Judgement, para. 550.
[116] Trial Judgement, paras. 492, 532. *See infra*, para. 166.
[117] Trial Judgement, para. 552.
[118] Trial Judgement, para. 552.
[119] Trial Judgement, para. 558. *See also ibid.*, paras. 495, 505-506.
[120] Trial Judgement, para. 558.

Orić's "prior notice" relates to his knowledge that "Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed."[121] Thus, the finding did not concern Orić's reason to know of his subordinate's conduct, but, instead, his notice of the crimes committed by others at the Srebrenica Police Station.

56. On such a crucial element of the accused's criminal responsibility under Article 7(3) of the Statute as his knowledge or reason to know of his subordinate's criminal conduct, the Appeals Chamber emphasises that neither the Parties nor the Appeals Chamber can be required to engage in this sort of speculative exercise to discern findings from vague statements by the Trial Chamber.

57. The difficulty in detecting the necessary Trial Chamber findings on this issue appears to arise from the approach taken in the Trial Judgement. Rather than examining Orić's knowledge or reason to know of his own subordinate's alleged criminal conduct, the Trial Chamber concentrated its entire analysis on Orić's knowledge of the crimes themselves,[122] which were not physically committed by Atif Krdžić, his only identified culpable subordinate:[123]

> Having established that subsequent to 27 November 1992, a superior-subordinate relationship existed between the Accused and *the head of the Srebrenica military police* ultimately responsible for the murder and cruel treatment, the Trial Chamber must now examine to what extent, if any, the Accused had knowledge or should have been aware of *the occurrence of murder and cruel treatment at the Srebrenica Police Station and the Building* between December 1992 and March 1993.[124]

This approach was ultimately reflected in the Trial Chamber's conclusion as to Orić's *mens rea*, which was squarely limited to the question of whether he knew or had reason to know of the actual crimes committed at the two detention facilities, to the exclusion of any finding on his knowledge of the alleged criminal conduct of his subordinate, Atif Krdžić.[125]

58. The Prosecution submits that, in the context of crimes such as those at issue which occur in a prison setting, knowledge of the crimes and knowledge of the subordinates' criminal conduct "are one and the same."[126] It argues that "[a]s soon as Orić knew or had reason to know that prisoners were being mistreated and killed, he must also be considered to have known that his subordinates in charge of the prisoners were criminally responsible for that mistreatment."[127]

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[121] Trial Judgement, para. 557. *See also ibid.*, para. 550: "His knowledge about this killing incident, as well as of the cruel treatment of the other detainees, put him on notice that the security and the well-being of all Serbs detained henceforth in Srebrenica was at risk".
[122] Trial Judgement, paras. 533-560. *See also ibid.*, paras. 574, 576, 577.
[123] *See supra*, paras. 24, 25, 33-35.
[124] Trial Judgement, para. 533 (emphasis added; footnote omitted).
[125] Trial Judgement, para. 560.
[126] AT. 1 April 2008, p. 22.
[127] Prosecution Written Submissions of 25 March 2008, para. 19. *See also ibid.*, para. 18; AT. 1 April 2008, pp. 23-24; AT. 2 April 2008, pp. 192-193.

59. The Appeals Chamber stresses that knowledge of a crime and knowledge of a person's criminal conduct are, in law and in fact, distinct matters. Although the latter may, depending on the circumstances, be inferred from the former, the Appeals Chamber notes that such an inference was not made by the Trial Chamber.[128] Its enquiry was limited to Orić's knowledge or reason to know of the crimes committed in the detention facilities, and so was its conclusion. Therefore, the Appeals Chamber need not consider the Prosecution's assertion that Orić knew or had reason to know of the crimes themselves.[129]

60. In conclusion, the Appeals Chamber finds that, in order to establish Orić's responsibility under Article 7(3) of the Statute, the Trial Chamber was under the obligation to make a finding on whether he knew or had reason to know that Atif Krdžić, the only identified culpable subordinate, was about to or had engaged in criminal activity. The Trial Chamber's failure to do so constitutes an error of law.

6. Conclusion

61. The Appeals Chamber grants Orić's grounds 1(E)(1) and 5 insofar as he alleges therein that the Trial Chamber failed to resolve the issue of his subordinate's criminal responsibility. In relation to Orić's sub-ground of appeal 1(F)(2), the Appeals Chamber finds that the Trial Chamber also failed to resolve the issue of whether Orić knew or had reason to know that his subordinate was about to or had committed crimes. These errors invalidate the Trial Chamber's decision to find Orić criminally responsible for failing to prevent the crimes of murder and cruel treatment committed against Serb detainees between 27 December 1992 and 20 March 1993.

[128] Regarding the possibility of making such an inference in the circumstances of the case, the Appeals Chamber refers to its analysis of the Prosecution's appeal, *infra* paras. 172-174.
[129] *See* AT. 1 April 2008, pp. 19-22, 24-25.

B. Alleged alternative basis for Orić's convictions

62. The Prosecution submits that, notwithstanding Atif Krdžić's criminal responsibility, the Trial Chamber could have convicted Orić for failing to prevent the guards at the detention facilities from committing the crimes or aiding and abetting the crimes of others.[130] It argues that the Trial Chamber should not have stopped its enquiry after concluding that the guards were not members of the Military Police, but should have gone further and found that they were nevertheless under Orić's effective control.[131]

63. Orić submits that the Prosecution should have raised its submission that he could have been held responsible for the conduct of the guards in its Notice of Appeal.[132] The Prosecution posits that it was not permitted to do so because the error would have had no impact on the verdict given that the Trial Chamber convicted Orić on another basis.[133] It submits that it was only by virtue of Orić's appeal that the question arose, which is why the alternative basis for liability was raised for the first time in the Prosecution Response Brief.[134] The Prosecution argues that "a respondent to an appeal must be able to put forward additional bases upon which to sustain the same conclusion already reached by the Chamber in the event [the Appeals Chamber] were to decide the Trial Chamber's reasoning was, in fact, incorrect."[135] In this context, it also refers to cases where the Appeals Chamber allegedly sustained a conviction on an alternative basis in the absence of a formal appeal lodged by the Prosecution.[136] The Prosecution further argues that the Defence had notice of the additional basis of liability and the chance to develop its arguments during the Appeal Hearing.[137]

64. The Appeals Chamber notes that the Prosecution effectively alleges that the Trial Chamber erred in failing to convict Orić for the criminal conduct of the guards. Such an error would have affected the verdict in that Orić, in addition to the Trial Chamber's finding that he failed to prevent the criminal conduct of the Military Police, would stand convicted for failing to prevent the crimes of the guards. The Prosecution's argument that this error would have no impact on the verdict and that, as a result, it was prevented from raising the argument in its Notice of Appeal, is therefore rejected.

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[130] Prosecution Written Submissions of 25 March 2008, para. 6, referencing Prosecution Response Brief, paras. 131-132. *See also* AT. 1 April 2008, p. 15; AT. 2 April 2008, p. 194.
[131] AT. 1 April 2008, pp. 15 and 67.
[132] AT. 1 April 2008, p. 34; AT. 2 April 2008, p. 157.
[133] AT. 1 April 2008, pp. 17-18; AT. 2 April 2008, pp. 158-159.
[134] AT. 1 April 2008, p. 18; AT. 2 April 2008, pp. 158-159.
[135] AT. 1 April 2008, p. 17. The Prosecution argues that the principle entitling an accused to file additional reasons for an acquittal applies equally where the Prosecution can put forward additional bases to support a conviction: AT. 2 April 2008, p. 159; Prosecution Response Brief, para. 132.
[136] AT. 2 April 2008, pp. 159-160, referring to *Blaškić* Appeal Judgement; *Simić* Appeal Judgement; *Vasiljević* Appeal Judgement; *Kordić and Čerkez* Appeal Judgement; *Krstić* Appeal Judgement.
[137] AT. 1 April 2008, p. 18.

65. The Appeals Chamber notes that the proper avenue for a party to allege an error in a Trial Judgement is through the notice of appeal.[138] This procedure ensures the adverse party enough time to respond and guarantees due litigation of the matter before the Appeals Chamber. In the present case, the Prosecution raised the alternative basis for liability for the first time in its Response Brief and did not elaborate on the details thereof until its Written Submissions of 25 March 2008.[139] The fact that the matter came to the Prosecution's attention only in connection with Orić's appeal did not relieve the Prosecution from following the procedures on appeal, including if necessary requesting a variation of its grounds of appeal.

66. In any event, the Appeals Chamber finds that Orić is correct in arguing that the alternative basis for liability the Prosecution relies on was not pleaded in the Indictment.

67. Orić submits that the Prosecution did not plead in the Indictment or at trial that the guards were individually subordinated to him or that there was an identifiable unit of guards under his command.[140] The basis of the case, Orić argues, was that the guards were subordinated to him by being members of the Military Police.[141] He contends that, according to the Indictment, the only unit allegedly under his command "involved in the detention" of Serbs was the Military Police.[142] Orić further submits that the Prosecution Pre-Trial Brief only mentioned the guards as being either members of the Military Police or soldiers of the ABiH[143] and that the Trial Chamber found that he had effective control solely over 20 to 30 fighters in Potočari.[144] Orić adds that he only mentioned different bases of liability in his Closing Brief to cover all possible scenarios diligently, and that he reiterated in that Brief that all these bases were not pleaded.[145]

68. The Prosecution argues that the theory it now relies on was encompassed within the Indictment and pre-trial documents.[146] It asserts that the Military Police was but one link alleged between Orić and the guards; it was not a material fact but only one evidentiary basis to prove the Prosecution's allegation in the Indictment that Orić was the superior of the guards.[147] The Prosecution further posits that the Indictment did not allege that the Military Police and the guards

[138] *See* Rule 108 of the Rules; Practice Direction on Formal Requirements for Appeals from Judgement, para. 1(c)(i) and (ii).
[139] AT. 1 April 2008, p. 18; Prosecution Response Brief, paras. 131-132; Prosecution Written Submissions of 25 March 2008, paras. 6-9.
[140] AT. 1 April 2008, p. 47. *See also ibid.*, paras. 34, 119 and AT. 2 April 2008, p. 156.
[141] AT. 1 April 2008, pp. 41 and 120-121.
[142] AT. 1 April 2008, p. 120, referencing Indictment, para. 15.
[143] AT. 1 April 2008, pp. 121-122, referring to *Prosecutor v. Naser Orić,* Case No. IT-03-68-PT, Pre-Trial Brief of the Prosecution pursuant to Rule 65*ter*(E)(i), 5 December 2003 ("Prosecution Pre-Trial Brief"), paras. 54, 56 and 63.
[144] AT. 1 April 2008, p. 122, referring to Trial Judgement, para. 162. *See also* AT. 2 April 2008, p. 205.
[145] AT. 2 April 2008, pp. 203-204, referencing *Prosecutor v. Naser Orić,* Case No. IT-03-68-T, Defence Closing Brief, 17 March 2006 ("Orić Closing Brief"), paras. 494, 507 and 508.
[146] AT. 1 April 2008, pp. 65-66 and 2 April 2008, pp. 162-168, referencing Indictment, paras. 15, 16, 18, 21, 22, 23 and 26.

were one and the same. Moreover, it contends that Orić was put on notice and in fact defended himself against this charge at trial.[148]

69. The Appeals Chamber notes that, with respect to the counts of murder and cruel treatment, the Trial Chamber understood the Prosecution as alleging a superior-subordinate relationship solely between Orić and the Military Police.[149] It appears from the Trial Chamber's reasoning that it did not interpret the Indictment as pleading that Orić had control over the guards regardless of their membership in the Military Police.[150] Read in context, the Trial Chamber's reference in its Rule 98*bis* Ruling to Orić's authority over the guards relied on by the Prosecution does not indicate otherwise.[151]

70. The superior-subordinate relationship giving rise to Orić's alleged criminal responsibility under Article 7(3) of the Statute is set forth in paragraphs 15 to 17 of the Indictment:

> 15. At all times relevant to the charges in this indictment, by virtue of his position and authority as Commander, **Naser ORIĆ** commanded all units that were operating within his area of responsibility. This includes all units involved in combat activities in the municipalities of Srebrenica and Bratunac, […] and all units including the Military Police involved in the detention and custody of Serb individuals in Srebrenica.
>
> 16. **Naser ORIĆ** demonstrated both *de jure* and *de facto* command and control in military matters in a manner consistent with the exercise of superior authority, by issuing orders, instructions and directives to the units, by ensuring the implementation of these orders, instructions and directives and bearing full responsibility for their implementation.
>
> 17. **Naser ORIĆ** exercised effective control over his subordinates.

71. In these paragraphs, units involved in combats and "units including the Military Police involved in the detention and custody of Serb individuals in Srebrenica" are identified as being subordinated to Orić.

72. The Prosecution argues that, by alleging that Orić had command over all units involved in the detention of Serbs in Srebrenica and by mentioning the guards as the only other unit or group apart from the Military Police dealing with detention matters, the Indictment pleaded a superior-

[147] AT. 2 April 2008, p. 165, referencing Indictment, paras. 15, 22 and 23. *See also ibid.*, p. 168.
[148] AT. 1 April 2008, p. 66, referencing Prosecution Response Brief, para. 209 with references; AT. 2 April 2008, pp. 165-168, referencing *Prosecutor v. Naser Orić,* Case No. IT-03-68-PT, Defence Pre-Trial Brief, 4 March 2003, para. 68; T. 2721-2722, 4180 and Orić Closing Brief, paras. 216, 489, 492, 507, 508, 512-517, 525 and 584-586.
[149] Trial Judgement, paras. 5, 476, 479.
[150] The Trial Chamber did not enquire into Orić's effective control over the guards after concluding that there was no evidence to prove that they were part of the Military Police: Trial Judgement, para. 489 *et seq*. *See also ibid.*, paras. 530-531.
[151] AT. 1 April 2008, p. 66, referencing Rule 98*bis* Ruling, T. 8 June 2005, pp. 8999, 9004-9005. *See also* AT. 2 April 2008, pp. 165-166.

subordinate relationship between Orić and the guards, regardless of their membership in the Military Police.[152]

73. The Appeals Chamber does not find the vague reference to "units including the Military Police involved in the detention and custody of Serb individuals in Srebrenica" conclusive in this respect. While the guards were identified in relation to the detention facilities in the Indictment,[153] nothing therein suggests that they were considered as a "unit" under Orić's command. On the contrary, paragraph 21 of the Indictment only refers to "military units" as being under Orić's command and control and paragraph 22 – which deals with the specific charges of murder and cruel treatment – mentions only members of the Military Police as being subordinated to Orić:

> 22. Between 24 September 1992 and 20 March 1993, members of the Military Police under the command and control of **Naser ORIĆ** detained several Serb individuals in the Srebrenica Police Station and in the building behind the Srebrenica Municipal Building.

These pleadings suggest that the Prosecution was not alleging a separate superior-subordinate relationship between Orić and the guards, as distinct from that alleged between him and the Military Police.

74. This conclusion is buttressed by the Prosecution Pre-Trial Brief, wherein the Prosecution, when recalling the charges against Orić, specified that Orić "commanded the Military Police units involved in the detention and custody of Serb individuals in Srebrenica."[154]

75. The guards as such are only mentioned once in the Indictment:

> 23. These detainees were subjected to physical abuse, serious suffering and serious injury to body and health, and inhumane treatment by the guards and / or by others with the support of the guards. In some instances, prisoners were beaten to death. […]

While the Prosecution clearly pleaded that the guards were directly implicated in the crimes of murder and cruel treatment committed in the detention facilities, it did not allege with the necessary preciseness that they were directly subordinated to Orić,[155] even if one reads paragraphs 15, 16, 17, 23 and 26 of the Indictment together.[156]

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[152] AT. 2 April 2008, p. 162.
[153] Indictment, para. 23.
[154] Prosecution Pre-Trial Brief, para. 21. *See also ibid.*, para. 54 ("The evidence will show that between 24 September 1992 and 20 March 1993, the Bosnian Military Police detained Serb males […].") and para. 63 ("While detained, the Serb men were at the mercy of the military police guards, and other persons who physically and continuously abused the [*sic*] them.").
[155] *See also* Prosecution Pre-Trial Brief, in particular Section IV.G. "Command Responsibility – Article 7(3) of the Statute", sub-sections (i) "Superior-Subordinate relationship and the Effective Control over the perpetrators" to (iii) "Commander *de jure* and *de facto*".
[156] Paragraph 26 of the Indictment reads in its relevant part:

76. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's submission that Orić could have been convicted based on a superior-subordinate relationship between him and the guards, as this relationship was not pleaded in the Indictment.

C. Conclusion

77. The Appeals Chamber has found that the Trial Chamber failed to resolve the issues of Orić's subordinate's criminal responsibility and whether Orić knew or had reason to know that an individual subordinated to him was about to commit crimes. The Appeals Chamber has further dismissed the Prosecution's submission that Orić's convictions can be sustained on an alternative basis. Accordingly, the Appeals Chamber need not consider at this juncture Orić's remaining challenges to the Trial Chamber's factual and legal findings.

78. The Appeals Chamber notes however that the Prosecution has raised a number of objections regarding the findings of the Trial Chamber, which, if accepted, could lead to a reversal of Orić's acquittal in some respects. Therefore, before addressing any implications of its findings set out above, the Appeals Chamber will first consider the Prosecution's appeal.

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26. **Naser ORIĆ** from about September 1992 to August 1995 knew or had reason to know that his subordinates were about to plan, prepare or execute the imprisonment, killing and/or cruel treatment of Serbs detained at the Srebrenica Police Station and the building behind the Srebrenica Municipal Building, or had done so, and he failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. […]

IV. PROSECUTION'S APPEAL

79. The Appeals Chamber notes that the Prosecution's second ground of appeal (alleging an error of law in finding Orić guilty for the separate offence of failing to discharge his duty to prevent) and fourth ground of appeal (alleging errors in sentencing) are premised on Orić's conviction for his failure to prevent his subordinate's alleged criminal conduct in relation to the crimes committed between December 1992 and March 1993.[157] Consequently, these grounds of appeal are rendered moot as a result of the Appeals Chamber's conclusion above on Orić's grounds of appeal 1(E)(1), 1(F)(2) and 5. Noting further that the Prosecution has withdrawn its third ground of appeal (alleging errors pertaining to wanton destruction in Ježestica),[158] the Appeals Chamber therefore limits its analysis to the Prosecution's first and fifth grounds of appeal.

A. Orić's effective control over the Military Police between 24 September and 16 October 1992 (Prosecution's Ground 1(1))

80. The Trial Chamber found that the Military Police was responsible for crimes of murder and cruel treatment committed against Serb individuals detained by the Military Police during two periods: between 24 September and 16 October 1992 and between 15 December 1992 and 20 March 1993.[159] The Trial Chamber was not satisfied beyond reasonable doubt that Orić exercised effective control over the Military Police between 24 September and 16 October 1992.[160] It therefore acquitted him of the charges under Counts 1 and 2 relating to the crimes committed during that period.[161]

81. Under this part of its first ground of appeal, the Prosecution submits that the Trial Chamber erred in both law and fact in finding that Orić did not have effective control over the Military Police between 24 September and 16 October 1992.[162] It requests the Appeals Chamber to overturn Orić's partial acquittal on Counts 1 and 2, substitute the appropriate convictions and impose a sentence.[163]

[157] *See* Prosecution Notice of Appeal, paras. 23-24, 29-37.
[158] Prosecution's Notice of Withdrawal of its Third Ground of Appeal, 7 March 2008.
[159] Trial Judgement, paras. 378-474, 488, 492, 494.
[160] Trial Judgement, para. 504.
[161] Trial Judgement, Disposition, para. 782.
[162] Prosecution Notice of Appeal, paras. 2-8.
[163] Prosecution Notice of Appeal, paras. 9-10.

1. Alleged errors of law

(a) Misapplication of the burden of proof

82. The Prosecution submits that the Trial Chamber erred in law by applying the standard of proof "beyond reasonable doubt" to each individual fact underlying Orić's alleged effective control between 24 September and 16 October 1992, rather than to the evidence as a whole.[164] It argues that it need not prove individual factual allegations beyond reasonable doubt unless they are essential to an element of the offence or the mode of liability and that, in analysing individual pieces of evidence in isolation, the Trial Chamber failed to address the cumulative effect of the evidence as a whole.[165] Orić responds that the Trial Chamber did not apply the "beyond reasonable doubt" standard to every individual fact but conducted a careful analysis of the evidence.[166]

83. The Trial Chamber set out the law regarding the burden of proof as follows:

> Article 21(3) of the Statute bestows a presumption of innocence on the Accused. The burden of establishing the guilt of the Accused lies firmly on the Prosecution. Rule 87(A) of the Rules provides that, in so doing, the Prosecution must prove beyond reasonable doubt each element of a crime with which the Accused is charged. The approach taken by the Trial Chamber has been to determine whether the ultimate weight of the admitted evidence is sufficient to establish beyond reasonable doubt the elements of the crimes charged in the Indictment, and ultimately, the guilt of the Accused. In making this determination, the Trial Chamber has carefully considered whether there is any other reasonable interpretation of the admitted evidence other than the guilt of the Accused. If so, he must be acquitted.[167]

The Appeal Chamber finds that the standard enunciated is a correct statement of the law applicable before this International Tribunal and the International Criminal Tribunal for Rwanda.[168]

84. The Prosecution alleges that the Trial Chamber misapplied this burden by considering the following pieces of evidence in isolation from each other:[169] (i) Bećir Bogilović's testimony that Mirzet Halilović formally answered to "the army" prior to 14 October 1992;[170] (ii) the testimony by Slavoljub Žikić, who was detained at the Srebrenica Police Station between 5 October and 16 October 1992, that the beatings ceased and that there was a "deadly silence" every time an individual he presumed to be Orić entered;[171] (iii) the general chaotic circumstances and the erratic

[164] Prosecution Notice of Appeal, paras. 6-7; Prosecution Appeal Brief, paras. 78 and 83, referring to Trial Judgement, paras. 499-504, 532.
[165] Prosecution Appeal Brief, paras. 79-82, 88, citing, *e.g.*, *Čelebići* Appeal Judgement, paras. 207-208 and *Ntagerura et al.* Appeal Judgement, para. 174.
[166] Defence Respondent's Brief, 27 November 2006 ("Orić Response Brief"), paras. 389-394.
[167] Trial Judgement, para. 15 (footnote omitted).
[168] *See*, *e.g.*, *Ntagerura et al.* Appeal Judgement, para. 170; *Kordić and Čerkez* Appeal Judgement, para. 834.
[169] Prosecution Appeal Brief, paras. 84-87.
[170] Prosecution Appeal Brief, para. 84, referring to Trial Judgement, para. 503.
[171] Prosecution Appeal Brief, para. 85, referring to Trial Judgement, para. 502.

behaviour of Mirzet Halilović; and (iv) the evidence regarding the involvement of the Srebrenica Armed Forces Staff in establishing the Military Police.[172]

85. The Trial Chamber provided its analysis of the evidence in question at paragraph 503 of the Trial Judgement:

> However, there is no evidence as to how, if at all, the Srebrenica Armed Forces Staff exercised authority over the Srebrenica military police prior to 14 October 1992. With the exception of Bečir Bogilović, none of the witnesses were able to provide specific information about the relationship between these two bodies regarding this time period. The documentary evidence does not provide any valuable clarification either. Regarding the possible presence of the Accused at the Srebrenica Police Station and any effect it might have had on the perpetrators, although one plausible inference could be that of an indication of effective control, there are other plausible deductions, and the evidence of Slavoljub Žikić alone is not persuasive enough to conclude that the Accused in fact exercised effective control over the Srebrenica military police. Moreover, taking into account the chaotic circumstances prevailing during the early months of the Srebrenica siege, and the erratic behaviour of Mirzet Halilović, the Trial Chamber simply cannot come to the conclusion that the Srebrenica Armed Forces Staff had effective control over the Srebrenica military police on the sole basis of its involvement in establishing that body in July 1992.

86. Paragraph 503 addresses factors indicative of how the Srebrenica Armed Forces Staff and Orić might have exercised effective control. The evidence of these factors had been set out previously in the Trial Judgement.[173] Because the factors were factually distinct, the Trial Chamber dealt with the evidence underpinning them separately. However, there is no indication that in so doing it required each factor to be proven "beyond reasonable doubt" or that it considered them in isolation from one another for the purpose of establishing Orić's effective control. The Appeals Chamber notes that a cursory reading of the phrase "the evidence of Slavoljub Žikić alone is not persuasive enough to conclude that the Accused in fact exercised effective control" might suggest otherwise. Yet, read in the context of paragraph 503 and the overall discussion of Orić's effective control, it does not indicate that the Trial Chamber considered Žikić's testimony in isolation from the other evidence. Instead, it is clear from the Trial Chamber's analysis that it approached Žikić's testimony, as it did the evidence of the other indicators, with a view to establishing whether the evidence as a whole demonstrated beyond reasonable doubt that Orić had effective control prior to 14 October 1992.[174] Therefore, the Appeals Chamber finds that the Prosecution fails to demonstrate a misapplication of the burden of proof.

[172] Prosecution Appeal Brief, para. 87, referring to Trial Judgement, para. 503.
[173] Trial Judgement, paras. 499-502 and Section III.B.4 "Srebrenica Under Siege".
[174] Trial Judgement, paras. 504 and 532.

(b) Presumption of effective control based on *de jure* command

87. The Prosecution submits that the Trial Chamber erred in law in failing to consider that Orić's *de jure* command over the Military Police between 24 September and 16 October 1992 created a rebuttable presumption that he exercised effective control over that unit.[175] Relying on the *Čelebići* Appeal Judgement, the Prosecution contends that *de jure* authority creates a presumption of effective control.[176] The Prosecution argues that, had the Trial Chamber made a finding on Orić's *de jure* command over the Military Police and applied the presumption of effective control, it would have found that Orić had effective control over the Military Police.[177]

88. Orić responds that the alleged presumption would exempt the Prosecution from proving effective control beyond reasonable doubt and require the Defence to prove a negative.[178] He argues that the *Čelebići* Appeal Judgement makes clear that effective control must always be proven and that even if the alleged presumption existed the Trial Chamber had discretion to apply it.[179] Orić posits that *de jure* authority alone is insufficient to establish command responsibility and asks which standard the Defence would have to meet to rebut the alleged presumption.[180] Orić further submits that even if there were such presumption it was amply rebutted by the evidence.[181] Finally, he argues that because the Trial Chamber did not find that he was *de jure* commander over the Military Police before 14 October 1992, the Prosecution's argument is moot.[182]

89. The Prosecution replies that the evidence supported a finding that Orić had *de jure* command and that the Trial Chamber was obliged to pronounce on the issue.[183] It agrees that the presumption is discretionary, but argues that the Trial Chamber erred in failing to consider the presumption at all.[184] Moreover, the Prosecution argues for an "evidentiary presumption", which, it submits, would not exempt it from proving effective control beyond reasonable doubt.[185] It contends that the Appeals Chamber has recognised such presumptions in other areas, and that they have been approved by the European Court of Human Rights as well as domestic courts.[186]

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[175] Prosecution Notice of Appeal, paras. 3-5; Prosecution Appeal Brief, para. 64.
[176] Prosecution Appeal Brief, para. 69, referring to *Čelebići* Appeal Judgement, para. 197, but also to *Bagilishema* Appeal Judgement, para. 51, fn. 85 and *Kayishema and Ruzindana* Appeal Judgement, para. 294. *See also* Prosecution Appeal Brief, para. 67.
[177] Prosecution Appeal Brief, paras. 73-77.
[178] Orić Response Brief, paras. 369-375.
[179] Orić Response Brief, paras. 376-378, citing in particular the phrase "a court *may* presume that possession of such power *prima facie* results in effective control" in the *Čelebići* Appeal Judgement, para. 197 (emphasis added).
[180] Orić Response Brief, paras. 380-382.
[181] Orić Response Brief, paras. 384-388.
[182] Orić Response Brief, para. 383. *See also* AT. 1 April 2008, pp. 107-108.
[183] The Prosecution's Reply Brief, 12 December 2006 ("Prosecution Reply Brief"), para. 28.
[184] Prosecution Reply Brief, paras. 35-36.
[185] Prosecution Reply Brief, paras. 30-32.
[186] Prosecution Reply Brief, paras. 32-33.

90. The Trial Chamber made no express finding that Orić had *de jure* control over the Military Police between 24 September and 16 October 1992. At this juncture, however, the Appeals Chamber need not determine whether the Trial Chamber erred in failing so to find because, for reasons stated below, it considers the Prosecution's argument to be incorrect in law.

91. It is well established that the Prosecution must prove effective control beyond reasonable doubt in establishing a superior-subordinate relationship within the meaning of Article 7(3) of the Statute.[187] For that purpose, *de jure* authority is not synonymous with effective control.[188] Whereas the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove such ability.[189] If *de jure* power always results in a presumption of effective control, then the Prosecution would be exempted from its burden to prove effective control beyond reasonable doubt.[190] The Appeals Chamber is therefore unable to agree with the Prosecution's proposed legal presumption.

92. The Appeals Chamber acknowledges that its jurisprudence might have suggested otherwise, using the terms "presume" or "*prima facie* evidence of effective control".[191] The import of such language has not always been clear. Although in some common law jurisdictions "*prima facie* evidence" leads by definition to a burden-shifting presumption,[192] the Appeals Chamber underscores that before the International Tribunal the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates.[193] The possession of *de jure* authority, without more, provides only some evidence of such effective control. Before the International Tribunal there is no such presumption to the detriment of an accused.

93. For these reasons, the Appeals Chamber dismisses this part of the Prosecution's appeal.

[187] As most recently recalled in *Hadžihasanović and Kubura* Appeal Judgement, para. 20.
[188] *Halilović* Appeal Judgement, para. 85.
[189] *See Halilović* Appeal Judgement, para. 85: "In fact, [de jure power] may not in itself amount to [effective control]." *Cf. also Nahimana et al.* Appeal Judgement, paras. 625 and 787, fn. 1837.
[190] *See Hadžihasanović and Kubura* Appeal Judgement, para. 21.
[191] *Čelebići* Appeal Judgement, para. 197; *Hadžihasanović and Kubura* Appeal Judgement, para. 21
[192] *See* Brian Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004).
[193] *Hadžihasanović and Kubura* Appeal Judgement, para. 21.

2. Alleged errors of fact

94. The Prosecution submits that no reasonable trier of fact could have concluded that Orić did not have effective control over the Military Police between 24 September and 16 October 1992.[194] In sum, it contends that the evidence establishes beyond reasonable doubt that Orić had effective control over the Military Police.[195]

95. The Appeals Chamber observes that the Prosecution's submissions are basically divided into two categories. First, the Prosecution argues that the Trial Chamber gave no weight to crucial evidence of a *de jure* superior-subordinate relationship between Orić and the Military Police, ignored substantial evidence showing Orić's effective control and failed to draw proper conclusions from its own findings indicating such control.[196] Second, it challenges the Trial Chamber's findings regarding factors justifying the conclusion that Orić did not have effective control over the Military Police during the relevant period.[197] The Appeals Chamber will address the Prosecution's arguments accordingly.

(a) Alleged errors regarding evidence and findings indicating effective control

(i) Orić's alleged *de jure* command over the Military Police

96. The Prosecution submits that, since Orić had *de jure* command and effective control over the Srebrenica Armed Forces and since the Military Police was *de jure* subordinated to the Srebrenica Armed Forces, the Trial Chamber should have found that Orić was *de jure* Commander of the Military Police.[198] Orić disputes these allegations, largely by repeating arguments raised under his own grounds of appeal.[199]

97. As held above, *de jure* authority is not a necessary element of effective control.[200] Therefore, the issue in the instant case is whether the Trial Chamber reasonably considered the

[194] Prosecution Notice of Appeal, para. 8; AT. 1 April 2008, p. 69. The Appeals Chamber takes note of a certain discrepancy in dates. While the Trial Chamber's analysis of Orić's effective control over the Military Police that the Prosecution challenges concerns the period "prior to 14 October 1992" (Trial Judgement, Section VII.C.1(c)(i)), the Trial Chamber's impugned finding emanating from that analysis relates to the period "between 24 September and *16* October 1992": *ibid.*, para. 504 (emphasis added). This discrepancy is due to the fact that the crimes for which Orić was allegedly responsible occurred between 24 September and 16 October 1992 (*ibid.*, para. 492), and that the Military Police underwent a reorganisation beginning on 14 October 1992, which latter the Trial Chamber addressed in a separate section of its discussion on Orić's effective control over that unit (*ibid.*, Section VII.C.1(c)(ii)). The Appeals Chamber will therefore consider, where relevant, the reorganisation of the Military Police as part of the Trial Chamber's analysis of Orić's alleged effective control during the period between 24 September and 16 October 1992.
[195] Prosecution Appeal Brief, Section I.C. *See also* AT. 1 April 2008, p. 76.
[196] Prosecution Appeal Brief, paras. 18-50.
[197] Prosecution Appeal Brief, paras. 51-62.
[198] Prosecution Appeal Brief, paras. 19-26. *See also* Prosecution Reply Brief, paras. 3, 5, 15, 25 and 27.
[199] Orić Response Brief, paras. 82-178. *See also* Prosecution Reply Brief, para. 2.
[200] *See supra*, para. 91.

evidence and the facts alleged by the Prosecution to underlie the existence of *de jure* authority in its analysis of Orić's effective control, not whether it failed to qualify that evidence and those facts as "*de jure* authority". To show an error, the Prosecution must demonstrate that no reasonable trier of fact could have found that Orić did not have effective control over the Military Police between 24 September and 16 October 1992. With this in mind, the Appeals Chamber now turns to consider the Prosecution's arguments.

98. The first step of the Prosecution's argument – that Orić had *de jure* command and effective control over the Srebrenica Armed Forces – is based on the Trial Chamber's findings. The Appeals Chamber notes that the Trial Chamber found that, by virtue of his election as commander of the Srebrenica TO Staff in May 1992, Orić was *de jure* Commander of the Srebrenica Armed Forces.[201] However, it did not make any explicit finding on whether Orić had effective control over the Srebrenica Armed Forces, but found only that he "asserted authority" over its Staff[202] and exercised effective control over the Chief of that Staff.[203]

99. The second step, and the bulk of the Prosecution's argument, is that the Military Police was *de jure* subordinated to the Srebrenica Armed Forces.

100. In support of this assertion, the Prosecution first submits that the Srebrenica Armed Forces Staff (which was at that time the Srebrenica TO Staff[204]), commanded by Orić, created the Military Police as a unit subordinated to it. Consequently, the Prosecution contends, the Srebrenica Armed Forces Staff and Orić had *de jure* authority over that unit.[205] In this respect, the Prosecution argues that the Trial Chamber failed to analyse Exhibit P590, which is a document signed by Mirzet Halilović dated 31 July 1992 identifying 67 members of the Military Police and describing that unit as subordinated to the "Armed Forces of Bosnia and Herzegovina."[206] This list, it claims, is confirmed by Exhibit P80, which provides an overview of the Srebrenica Armed Forces from "17 April to mid-October 1992" and shows that the Military Police was attached to the Srebrenica TO.[207] It also argues that Exhibit P80 confirms the 1 July 1992 decision to create the Military Police under the authority of the Srebrenica Armed Forces[208] and that Enver Hogić's testimony

[201] Trial Judgement, para. 528.
[202] Trial Judgement, para. 528.
[203] Trial Judgement, para. 529.
[204] Trial Judgement, paras. 145-147.
[205] Prosecution Appeal Brief, paras. 22-26, referring to Prosecution Appeal Brief, Annex A listing "Trial exhibits relevant to the issue of Orić's effective control over the Srebrenica Military Police". *See also* AT. 1 April 2008, pp. 69-70.
[206] Prosecution Appeal Brief, paras. 25 and 29, referring to Trial Judgement, para. 498, fn. 1388. *See also* AT. 1 April 2008, p. 72.
[207] Prosecution Appeal Brief, para. 30.
[208] Prosecution Appeal Brief, para. 31.

corroborated Exhibit P80.[209] Moreover, the Prosecution asserts that Exhibits P84, P591 and P595 support the continuous subordination of the Military Police to the Srebrenica Armed Forces.[210] It contends that the Trial Chamber ignored this evidence.[211]

101. Orić responds that there was no evidence that the Srebrenica Armed Forces Staff created the Military Police as a unit subordinated to it, that it created that unit at all[212] or that he was *de jure* Commander or Chief of the Srebrenica Armed Forces Staff.[213] Orić submits that the alleged *de jure* subordination of the Military Police to the Srebrenica Armed Forces Staff never existed and could not exist.[214] He also contends that no witness testified that he had effective control over the Military Police before 16 October 1992.[215] As to the evidence relied on by the Prosecution, Orić argues that Exhibit P590 was unauthenticated and unreliable,[216] that Exhibit P80 was impeached by several witnesses,[217] and that Enver Hogić, who was not in Srebrenica at the relevant time, merely repeated what was written on documents and testified to knowing nothing of the military structures in Srebrenica.[218] Regarding Exhibits P591 and P595, Orić responds that they were impeached and contradict Exhibits P4 and P109.[219]

102. As a preliminary matter, the Appeals Chamber notes that the Trial Chamber expressly found that the Military Police was established by the Srebrenica TO Staff at a meeting on 1 July 1992[220] and that Mirzet Halilović was appointed Commander of the Military Police at the same meeting.[221]

103. As for the allegedly ignored evidence, the Appeals Chamber notes that the Trial Chamber took into account the information in Exhibit P590 regarding the identity of Military Police members in its analysis of Orić's effective control over that unit[222] and referred at length to Exhibit P80 when discussing the composition of the Srebrenica Armed Forces Staff as of 14 October 1992.[223] The Trial Chamber did not refer explicitly to the invoked parts of Enver Hogić's testimony, but the Appeals Chamber is not satisfied that a reasonable trier of fact was required to attach any

[209] Prosecution Appeal Brief, para. 31, referring to Enver Hogić, T. 12 May 2005, pp. 8210-8211.
[210] Prosecution Appeal Brief, para. 32. *See also* AT. 1 April 2008, p. 71.
[211] Prosecution Appeal Brief, paras. 27 and 33.
[212] Orić Response Brief, para. 152. *See also* AT. 1 April 2008, p. 105.
[213] Orić Response Brief, paras. 168.
[214] Orić Response Brief, paras. 169-175.
[215] Orić Response Brief, paras. 181-182.
[216] Orić Response Brief, paras. 154-156.
[217] Orić Response Brief, paras. 157-162; AT. 1 April 2008, p. 97.
[218] Orić Response Brief, paras. 209-212.
[219] Orić Response Brief, paras. 214-218.
[220] Trial Judgement, paras. 181 and 189.
[221] Trial Judgement, paras. 182, 189 and 499.
[222] Trial Judgement, fn. 1388.
[223] Trial Judgement, fn. 365.

significant weight to these portions of his testimony.[224] In its analysis of whether Orić had effective control over the Military Police before 14 October 1992, the Trial Chamber expressly referred to the fact – apparent from the invoked parts of Exhibits P595 and P591 – that Mirzet Halilović was the Commander of the Military Police from early July 1992.[225] It also acknowledged the information in those exhibits that Mirzet Halilović had taken part in battles together with his military policemen[226] and took into account that he formally answered to "the army" in its said analysis.[227] As regards the invoked parts of Exhibit P84, the Appeals Chamber notes that they include an order pronounced during the meeting of the Srebrenica Armed Forces Staff on 15 October 1992 that requisitioned weapons and ammunition should be handed over "to the units or to the military police".[228] However, this evidence does not unequivocally support that the Military Police was effectively controlled by the Srebrenica Armed Forces. Therefore, the Appeals Chamber cannot find that the Trial Chamber acted unreasonably in disregarding those parts of Exhibit P84.

104. There is therefore no indication that the Trial Chamber ignored Exhibits P590, P80, P595 and P591 or that it erred in not relying on Enver Hogić's testimony. The Prosecution's further contentions, without more, that the Trial Chamber "inexplicably" gave no weight to Exhibits P4, P24, P73, P74, P266 and P343, and that the additional evidence in Annex A to the Prosecution Appeal Brief "confirms that [the Military Police] was subordinated to the [Srebrenica Armed Forces Staff] from its inception"[229] fall short of the formal requirements for arguments on appeal.[230] These arguments of the Prosecution are therefore dismissed.

105. The Prosecution also challenges the Trial Chamber's finding that "no conclusive evidence has been adduced which would shed light on the internal structure" of the Military Police.[231] It claims that Exhibits P590, P458/P561 and P329, all allegedly confirmed by Exhibit P80, "directly

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[224] In the invoked parts of his testimony, apart from one instance, Enver Hogić merely repeated the information apparent on the face of Exhibit P80: Enver Hogić, T. 12 May 2005, pp. 8210-8211. The one instance where Enver Hogić might have given his own view concerns a question put to him regarding the structure of the Srebrenica Armed Forces between 17 April 1992 to mid-October 1992, as apparent from Exhibit P80. He testified: "This means that at this point in time, at least based on this document, there was a military police unit that had been organised comprising this number of conscripts. That's in as far as the document is accurate and *I have no reason to assume otherwise*": Enver Hogić, T. 12 May 2005, p. 8211 (emphasis added).

[225] Exhibit P595, p. 18; Trial Judgement, paras. 182 and 499. The Trial Judgement does not refer to Exhibit P591. However, as the Prosecution itself points out, Exhibit P591 uses "virtually the same words" as those in Exhibit P595 now at issue: Prosecution Appeal Brief, fn. 46; Exhibit P591, p. 1. Because the Trial Chamber expressly noted the relevant information in Exhibit P595, its failure to mention the same information in Exhibit P591 does not, in the circumstances, constitute an error.

[226] Exhibit P595, p. 18; Trial Judgement, paras. 638, 650 and 663, fns. 1736, 1790 and 1855, all referring to Exhibit P595. The Trial Chamber also made extensive reference to Exhibit P595 in other parts of its Judgement: *see ibid.*, fns. 1609, 1735, 1737, 1745, 1854. *See* Exhibit P591, p. 1.

[227] Trial Judgement, para. 500. *See* Prosecution Appeal Brief, para. 27.

[228] Exhibit P84, p. 12.

[229] Prosecution Appeal Brief, paras. 26 and 27.

[230] *See supra*, para. 13. In addition, the Appeals Chamber notes that Exhibit P343 is not on the trial record.

[231] Prosecution Appeal Brief, para. 28, referring to Trial Judgement, para. 498; Prosecution Reply Brief, p. 2, para. 7.

contradict" this finding and "shed enough light on the internal structure of [the Military Police] to confirm its subordination to Orić and the [Srebrenica Armed Forces] Staff."[232] Orić responds that Exhibits P590, P458/561 and P329 are contradictory[233] and that Exhibit P458/561 was unauthenticated and impeached and that its content was, if anything, exculpatory.[234] As to Exhibit P80, he adds that it has no bearing on reality.[235]

106. In making the impugned finding, the Trial Chamber noted that Exhibits P590 and P458/P561 provided information about who might have been among the members of the Military Police.[236] It also noted the information in Exhibit P329 (Orić's Interview)[237] regarding the identity of five members of the Military Police.[238] Exhibit P590 is entitled "List of the Military Police Staff" and dated 31 July 1992 and Exhibit P458/P561 is a 33-page document referred to by the Trial Chamber as a "Military Police Log".[239] The Prosecution does not explain how or in which parts Exhibits P590, P458/P561, P329 and P80 contradict the Trial Chamber's finding, why the Trial Chamber erred in deciding to "not attach undue weight" to Orić's alleged admission in his Interview that the Military Police fell under his command,[240] or why it erred in considering that these exhibits were inconclusive as to the internal structure of the Military Police. The Prosecution's challenge is therefore dismissed.

107. Finally, referring to Exhibits P4 and P109, the Prosecution argues that the Trial Chamber ignored the significance of Orić's role in creating the Military Police and in appointing Mirzet Halilović.[241] Orić responds that he did not have any role in these activities.[242]

108. The Appeals Chamber finds that the Prosecution's assertion is incorrect. The Trial Chamber recalled its findings based on, *inter alia*, Exhibits P4 and P109 regarding the creation of the Military Police and Mirzet Halilović's appointment in its evaluation of Orić's effective control before 14 October 1992.[243] Having thus considered those two exhibits, there is no indication that the Trial Chamber ignored the information they contained regarding Orić's role in said activities for its

[232] Prosecution Appeal Brief, para. 28.
[233] Orić Response Brief, paras. 196-198.
[234] Orić Response Brief, paras. 199-202.
[235] Orić Response Brief, paras. 206-207.
[236] Trial Judgement, fn. 1388.
[237] From 2 to 6 April 2001 and from 14 to 24 May 2001, Orić was interviewed at the United Nations Field Office in Sarajevo by representatives of the Prosecution. At trial, the Prosecution tendered into evidence the video-recording and transcripts of "what appears to be a suspect interview with the Accused", which were admitted by the Trial Chamber as Exhibits P328 and P329: Trial Judgement, para. 52, fn. 103.
[238] Trial Judgement, fn. 1388.
[239] Trial Judgement, fn. 1388.
[240] Trial Judgement, para. 497.
[241] Prosecution Appeal Brief, paras. 23, 24 and 34.
[242] Orić Response Brief, para. 219, referring to the testimony of Witnesses Bogilović, Šačirović, Smajlović and Đilović.
[243] Trial Judgement, para. 499, cross-referencing *ibid.*, paras. 181 (on the creation of the Military Police) and 182 (regarding Mirzet Halilović's appointment).

analysis of his effective control.[244] In addition, it explicitly took into account the Srebrenica Armed Forces Staff's involvement in the establishment of the Military Police in the same analysis.[245]

109. In sum, the Appeals Chamber finds no error in the Trial Chamber's analysis of the evidence and the facts that allegedly underlie Orić's *de jure* power and, ultimately, Orić's effective control over the Military Police before 16 October 1992. The Prosecution's submission therefore remains an unsubstantiated request that the Appeals Chamber replace the Trial Chamber's considered analysis of that evidence and those facts with that of the Prosecution. The Appeals Chamber is unable to entertain such a request and therefore dismisses the Prosecution's submission.

(ii) The Srebrenica Armed Forces Staff's alleged authority over the Military Police

110. In further support of its contention that Orić had effective control over the Military Police between 24 September and 16 October 1992, the Prosecution submits that the Trial Chamber ignored evidence that the Srebrenica Armed Forces Staff, and nobody else, exercised authority over the Military Police.[246] It also submits that the Trial Chamber itself made findings to that effect.[247]

a. Evidence suggesting that the Srebrenica Armed Forces Staff exercised authority over the Military Police

111. The Prosecution argues that the plain meaning of the term "military" police suggests that the unit belonged to the military. This meaning, it contends, was reinforced by the Srebrenica TO Staff's decision of 1 July 1992 (admitted as Exhibit P109[248]), which created a "Wartime Srebrenica Military Police", and by Exhibit P112.[249] It also refers to the testimony of Bećir Bogilović that Mirzet Halilović answered "[a]s a rule, to the Army".[250] Orić responds that the Prosecution's "linguistic" theory is too simplistic because nothing functioned properly in terms of military structure in Srebrenica at that time.[251] Exhibit P112, he argues, refers to the Tuzla District Territorial Defence Staff and does not indicate whether it was sent to or received in Srebrenica.[252]

[244] The document admitted as Exhibit P109 is signed by Naser Orić and the indication "COMMANDER /illegible/ Srebrenica TO Naser /illegible/" appears at the bottom of Exhibit P4.
[245] Trial Judgement, para. 503.
[246] Prosecution Appeal Brief, para. 36.
[247] Prosecution Appeal Brief, paras. 43-44.
[248] The Prosecution refers to the 1 July 1992 Decision as Exhibit "P270/343/100/109": Prosecution Appeal Brief, fn. 31. For ease of reference, the Appeals Chamber will refer to this decision using the exhibit number employed by the Trial Chamber, namely, P109: Trial Judgement, para. 181, fn. 497.
[249] Prosecution Appeal Brief, para. 37, referring to Trial Judgement, paras. 181-182, 499 and, *e.g.*, Exhibit P109. *See also* AT. 1 April 2008, pp. 69-71.
[250] Prosecution Appeal Brief, para. 38, citing Bećir Bogilović, T. 18 March 2005, p. 6259 and Trial Judgement, para. 500.
[251] Orić Response Brief, paras. 222-226. *See also* AT. 1 April 2008, pp. 105-106.
[252] Orić Response Brief, para. 227.

He asserts that Bećir Bogilović's statement must be seen against his testimony that nothing functioned according to the rules.[253]

112. The Trial Chamber did not mention Exhibit P112, nor did it infer anything from the classification of the police as "military". However, the Appeals Chamber notes that the Trial Chamber took account of other evidence, particularly Bećir Bogilović's testimony, indicating that the Military Police was formally part of "the army"[254] and it clearly appreciated the significance of Exhibit P109 in its analysis of Orić's effective control over the Military Police prior to 14 October 1992.[255]

113. The Trial Chamber thus duly considered evidence that the Military Police was formally part of the military when evaluating the effective control over that unit. However, as previously noted, it would not necessarily follow from that evidence that Orić or the Srebrenica Armed Forces Staff actually possessed such control.[256] It was therefore reasonable for the Trial Chamber to take a further step in its analysis, and enquire "as to how", if at all, the Srebrenica Armed Forces Staff exercised authority over the Military Police prior to 14 October 1992; in other words, whether it had the material ability to control the Military Police before that date.[257]

114. The Prosecution challenges the Trial Chamber's finding that there was no evidence as to how the Srebrenica Armed Forces Staff exercised authority over the Military Police prior to 14 October 1992. It argues that the Trial Chamber erred by "losing sight of the evidence as to how the military police functioned as a military unit throughout" when considering how the Srebrenica Armed Forces Staff and Orić exercised control over the Military Police.[258] In support, it refers to the testimony of Enver Hogić and Exhibit P609.[259] It further posits that the involvement of Hamed Salihović and Ramiz Bećirović, both involved in the Srebrenica Armed Forces Staff since September 1992, with the prisoners shows the continued military involvement with the detention of prisoners.[260] According to the Prosecution, in Exhibit P329 (Orić's Interview) Orić referred to Hamed Salihović and Ramiz Bećirović as persons to whom Mirzet Halilović would report.[261] Orić

[253] Orić Response Brief, paras. 228-229.
[254] Trial Judgement, para. 500.
[255] Trial Judgement, para. 499, cross-referencing paras. 181-182, wherein Exhibit P109 was extensively relied on. The Military Police's activites are also noted elsewhere in the Trial Judgement: paras. 188, 638, 650, 663.
[256] *See supra*, para. 91.
[257] Trial Judgement, para. 503.
[258] AT. 1 April 2008, p. 69.
[259] AT. 1 April 2008, pp. 71-72, referencing Enver Hogić, T. 11 May 2005, p. 8120.
[260] AT. 1 April 2008, p. 74, referencing Exhibits P79 and P255.
[261] AT. 1 April 2008, p. 74, referencing Exhibit P329, tape 3.

responds that Enver Hogić was not in Srebrenica[262] and that two witnesses impeached the content of Exhibit P609.[263]

115. The Appeals Chamber notes that Enver Hogić gave evidence about the functions of the military police within the 2nd Corps of the ABiH.[264] He testified that its duties included "all the usual military police tasks", including organising and securing the rear of the units, bringing in perpetrators and securing prisoners of war in detention.[265] However, given the difficulties surrounding the implementation of the formal structures of the ABiH in Srebrenica before 14 October 1992,[266] it is uncertain whether this evidence also applied to the Srebrenica Military Police.[267]

116. The Trial Chamber did not refer to Exhibit P609. This exhibit contains a report of August 1992 to the Commander of the Military Police describing military functions being carried out by the Military Police between 7 and 13 August 1992. However, because the exhibit does not indicate on whose orders the activities reported had been carried out, the mere fact that it shows that the Military Police carried out military functions is of limited relevance to the question of whether Orić or the Srebrenica Armed Forces Staff effectively controlled that unit.

117. The Prosecution's further allegation that Hamed Salihović and Ramiz Bećirović were involved both in the Srebrenica Armed Forces Staff and in detention matters[268] does not necessarily imply that the Srebrenica Armed Forces Staff had effective control over the body found by the Trial Chamber to be responsible for the detention, *i.e.* the Military Police. The Trial Chamber acted reasonably in requiring evidence of decisions and orders from the Srebrenica Armed Forces Staff concerning the Military Police before it could reach that conclusion beyond reasonable doubt.[269]

118. Next, the Prosecution invokes other evidence allegedly showing that the Srebrenica Armed Forces Staff had effective control over the Military Police before 16 October 1992.[270] It refers to the following entry in Exhibit P84 regarding a Srebrenica Armed Forces Staff meeting on 3 October 1992:

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[262] AT. 1 April 2008, p. 100.
[263] AT. 1 April 2008, p. 98.
[264] Enver Hogić, T. 11 May 2005, pp. 8055, 8120.
[265] Enver Hogić, T. 11 May 2005, p. 8120.
[266] *See* Trial Judgement, paras. 128-129 and 171.
[267] The Prosecution does not dispute the existence of these difficulties: *see* Prosecution Appeal Brief, para. 55 ("[T]he reality in the Srebrenica enclave was that the Srebrenica TO set up and began to manage its own military formations and command structure.")
[268] *See* Trial Judgement, paras. 514-517, 519-520.
[269] *See* Trial Judgement, paras. 512, 524-527.
[270] Prosecution Appeal Brief, paras. 36, 39-40.

> 9. Communications: the military police must take mobile radio transmitters and walkie-talkies. They must be distributed. The command post is at the anti-aircraft machine-gun site. The password is the same […].[271]

It also cites another entry in the same exhibit concerning a joint meeting between the War Presidency and the Srebrenica Armed Forces Staff on 14 October 1992, which reads:

> Commanding takes place through the Staff. It is directly /a word crossed out/ the command of the military police, but at the same time, the military police is subordinated to the Armed Forces Staff.[272]

As to this latter entry, the Prosecution also refers to Bećir Bogilović's testimony that "[u]p until that time, [the Military Police] was under the military command. But the discussion was, at that time, that it should continue to be so."[273] During the Appeal Hearing, the Prosecution added another entry from Exhibit P84, dated 23 October 1992, which it argued demonstrates the consistent involvement of the Srebrenica Armed Forces Staff with the Military Police.[274]

119. Regarding the 3 October 1992 meeting, Orić argues that it was held between local leaders and the War Presidency and that no witness confirmed that the original text of the entry referred to the Military Police.[275] Moreover, he argues that Bećir Bogilović was a TO Staff member only until 1 July 1992,[276] and that Mensud Omerović denied the accuracy of Exhibit P84.[277]

120. The Appeals Chamber notes that the evidence in question to some extent concerned how the Srebrenica Armed Forces Staff might have exercised authority over the Military Police before 14 October 1992, but that the Trial Chamber did not mention it explicitly in its analysis of Orić's effective control before that date. Nevertheless, the Trial Chamber referred extensively to the three meetings mentioned in Exhibit P84 in other parts of its Judgement[278] and so it must be presumed that it did not disregard this evidence for its analysis now at issue.[279] Moreover, it is apparent from the Trial Chamber's analysis of Orić's effective control after 27 November 1992 that it did not consider the invoked parts of Exhibit P84, of themselves, conclusive in respect of the control the Srebrenica Armed Forces Staff exercised over the Military Police.[280] Rather, the Trial Chamber was

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[271] Prosecution Appeal Brief, para. 39, citing Exhibit P84, "Memo Pad", p. 5. *See also* AT. 1 April 2008, p. 73.
[272] Prosecution Appeal Brief, para. 40, citing Exhibit P84, "Memo Pad", p. 7.
[273] Prosecution Appeal Brief, para. 40, citing Bećir Bogilović, T. 18 March 2005, p. 6267.
[274] AT. 1 April 2008, p. 73.
[275] Orić Response Brief, paras. 230-232.
[276] Orić Response Brief, para. 238.
[277] Orić Response Brief, paras. 239-241.
[278] *See e.g.* Trial Judgement, paras. 147, 187 (expressly noting the content of the 23 October 1992 meeting) and 249, fns. 361, 364, 365, 366, 516, 543 (explicitly citing the invoked part of Exhibit P84).
[279] *Cf. Kvočka et al.* Appeal Judgement, paras. 23-24.
[280] *See* Trial Judgement, paras. 518 (referring to the 3, 14 and 23 October 1992 meetings for its finding regarding "discussions" during meetings of the Srebrenica Armed Forces Staff concerning the Military Police) and 528 (referencing the 3 October 1992 meeting for its finding that "evidently, the Srebrenica Armed Forces Staff was a collegiate body […] which provided co-ordination and logistical support for combat action.").

only satisfied beyond reasonable doubt as to the effective control over the Military Police in view of other evidence regarding the Srebrenica Armed Forces Staff's increased involvement in issuing orders and instructions to the Military Police after 27 November 1992.[281] The Appeals Chamber does not find this evaluation of the evidence unreasonable.

121. With regard to Bećir Bogilović's testimony, the Trial Chamber noted that he was the one witness who provided specific information about the relationship between the Srebrenica Armed Forces Staff and the Military Police.[282] It also expressly noted his testimony that Mirzet Halilović formally answered to "the army" before 14 October 1992.[283]

122. For these reasons, the Appeals Chamber cannot find any error committed by the Trial Chamber based on the submissions of the Prosecution summarised *supra* at paragraph 118.

b. Absence of evidence that the Military Police was subordinated to any other entity than the Srebrenica Armed Forces Staff

123. The Prosecution asserts that there was no evidence that the Military Police was subordinated to any other entity than the Srebrenica Armed Forces Staff, or that it was free of any military control.[284] The Appeals Chamber rejects this argument. The Trial Chamber was not required to enquire whether another body might have effectively controlled the Military Police, or whether the Military Police acted independently from the military, before it could conclude beyond reasonable doubt that Orić did not have such control. It sufficed to find that the evidence did not show that Orić had effective control.

c. The Trial Chamber's findings as to the authority of the Srebrenica Armed Forces Staff over the Military Police

124. The Prosecution refers to paragraphs 508 and 511 of the Trial Judgement to argue that the Trial Chamber itself found that the Military Police "was always under the authority of the [Srebrenica Armed Forces] Staff."[285]

125. The Appeals Chamber agrees with Orić that the invoked portions of the Trial Judgement deal with the period *after* 14 October 1992.[286] More specifically, at paragraph 508, the Trial Chamber considered the minutes of a joint meeting between the War Presidency and the Srebrenica

[281] *See* Trial Judgement, paras. 512, 526 and 529.
[282] Trial Judgement, para. 503.
[283] Trial Judgement, para. 500.
[284] Prosecution Appeal Brief, paras. 25 and 37. *See also* Prosecution Reply Brief, paras. 3 and 27. For Orić's response *see* AT. 1 April 2008, pp. 107-108.
[285] Prosecution Appeal Brief, para. 43.

Armed Forces Staff on 9 November 1992 as part of its analysis of the reorganisation of the Military Police from 14 October to 27 November 1992.[287] The parts of this paragraph referred to by the Prosecution are squarely limited to the view of the meeting's participants on the Military Police's subordination to the Srebrenica Armed Forces Staff at the time of that meeting.[288]

126. At paragraph 511, the Trial Chamber held that "[a]ll of the above [regarding the reorganisation] indicates that, even when Mirzet Halilović was personally under the authority of Bećir Bogilović, the Srebrenica Armed Forces Staff never relinquished its authority over the Srebrenica military police." The Appeals Chamber considers that this finding primarily signifies the Trial Chamber's view that it was only Mirzet Halilović, as opposed to the entire Military Police, who was placed under Bećir Bogilović's command after 14 October 1992.[289] Furthermore, the Prosecution fails to mention the sentence immediately following this holding, which reads: "Rather, it appears that the Srebrenica Armed Forces Staff attempted to secure the proper and efficient functioning of the military police". This latter finding must be appreciated in light of the Trial Chamber's finding, discussed above, on the lack of evidence "as to how" the Srebrenica Armed Forces Staff exercised authority over the Military Police before 14 October 1992.[290] Against that backdrop, paragraph 511 can only be understood as part of the Trial Chamber's description of how the Srebrenica Armed Forces Staff gradually became more involved with the Military Police in the period after 14 October 1992.[291]

d. Conclusion

127. For the above reasons, the Appeals Chamber finds that the Prosecution fails to demonstrate both that the Trial Chamber erred in assessing the evidence regarding the alleged authority of the Srebrenica Armed Forces Staff over the Military Police in its analysis of Orić's effective control before 16 October 1992, and that it found that the Military Police "always" came under the authority the Srebrenica Armed Forces Staff. As a result, the Prosecution's submission is dismissed in its entirety.

[286] Orić Response Brief, para. 246.
[287] *See* Trial Judgement, paras. 505-511.
[288] The relevant portions of paragraph 508 read: "At no time is there an indication that any of the members present believed or maintained that the Srebrenica military police fell under the jurisdiction of the Srebrenica War Presidency or the civilian authorities. […] Zulfo Tursunović reminds everyone present that the military police belong to the armed forces, and not to the Srebrenica War Presidency".
[289] *See* Trial Judgement, para. 505.
[290] Trial Judgement, para. 503.
[291] *See* Trial Judgement, paras. 512 and 527.

(iii) Orić's alleged control over the Military Police absent intermediary officers

128. The Prosecution's next argument in support of its allegation that Orić had effective control over the Military Police between 24 September and 16 October 1992 relates to the existence of intermediary officers between him and the Military Police. It submits that the Trial Chamber's description of Orić's effective control over the Military Police after 27 November 1992 through Osman Osmanović, Ramiz Bećirović and Hamed Salihović "does not detract from the conclusion that Orić had effective control before 14 October 1992."[292] It contends that, as Commander of the Srebrenica Armed Forces since 20 May 1992 and through other members of the Srebrenica Armed Forces Staff, Orić had effective control over the Military Police even in the absence of intermediate officers.[293]

129. Orić responds that, since the Prosecution failed to prove effective control prior to 14 October 1992, "[t]here is nothing to be detracted from."[294] He further argues that the Military Police could not be formed under the applicable rules until a Chief of Intelligence and Security had been appointed, and that the Prosecution's assertion that he exercised effective control notwithstanding intermediate officers is unsubstantiated.[295] The Prosecution replies that Orić denies the Military Police's existence because of a definitional military rule and that, in any event, both Osman Osmanović and Hamed Salihović were appointed between 3 September and 16 October 1992.[296]

130. The Trial Chamber's finding that Orić did not have effective control over the Military Police before 14 October 1992 did not depend on whether or not intermediary officers had been appointed. Moreover, Osman Osmanović's effective control over the Military Police did not turn simply on his position as Chief of Staff, as the Prosecution seems to suggest.[297] Rather, he exercised effective control by virtue of the orders and directions he issued to the Military Police.[298] Hamed Salihović was not found ever to have had effective control over the Military Police.[299] Therefore, the Appeals Chamber dismisses the Prosecution's argument.

[292] Prosecution Appeal Brief, para. 46. *See also ibid.*, para. 45.
[293] Prosecution Appeal Brief, para. 46, referring to *Čelebići* Appeal Judgement, para. 254.
[294] Orić Response Brief, para. 259. *See also ibid.*, para. 258.
[295] Orić Response Brief, paras. 260-261.
[296] Prosecution Reply Brief, para. 19.
[297] *See* Prosecution Reply Brief, para. 19.
[298] *See* Trial Judgement, paras. 512 and 526.
[299] Hamed Salihović's role was limited to linking Osman Osmanović and his successor Bećir Bećirović to the detention of Serb detainees: *see* Trial Judgement, para. 527.

(iv) The alleged conduct of Orić and the Military Police in prisoner exchanges

131. The Prosecution submits that the Trial Chamber ignored the significance of the prisoner exchanges to the issue of effective control.[300] It argues that troops under Orić's command captured prisoners in combat and delivered them to the Military Police who, in turn, incarcerated them and on Orić's orders delivered them for exchanges.[301] The Prosecution asserts that "it is unreasonable to conclude that the [Military Police] were not acting under Orić's orders" in fulfilling their part of the military functions of incarcerating, caring for and exchanging the prisoners.[302] The Prosecution refers to Exhibit P99/P100, a letter from Orić to a Serb adversary dated 10 June 1992 wherein he asserts having control over the prisoners, and to Exhibit P77, a letter from a Serb adversary to "Naser Orić, personally" allegedly offering a prisoner exchange.[303] The Prosecution also submits that Orić was personally involved in the prisoner exchanges as early as 10 June 1992, and relies on Exhibits P339, P100, P77, P78 and P97 in support.[304] It also argues that Enver Hogić testified that the Military Police took the prisoners to be exchanged under orders from military authorities,[305] and relies on Exhibits P83 and P386 for its contention that Orić personally visited, interrogated and beat the prisoners on 15 October 1992, prior to the exchange on 16 October 1992.[306] In addition, the Prosecution asserts that the Trial Chamber erroneously dismissed the significance of Slavoljub Žikić's testimony that there was a "deadly silence" every time Orić entered the Srebrenica Police Station.[307]

132. Orić responds that the groups who captured the Serb prisoners were unidentified fighting groups not under his *de facto* command.[308] He contends that the prisoners were not turned over to the Military Police, but brought to the "Civilian Police Building".[309] There was no finding, he argues, that troops under his command delivered prisoners who were captured in combat, and Exhibits P83 and P386 do not support such a proposition.[310] Next, Orić argues that the Prosecution does not support its claim that the Military Police delivered the prisoners for exchange on his order.[311] He further argues that Exhibit P99/P100 relates to events before the Indictment period and that the letter in Exhibit P77 did not mention any exchange and challenges the authenticity of both

[300] Prosecution Appeal Brief, para. 47.
[301] Prosecution Appeal Brief, para. 47; Prosecution Reply Brief, para. 7.
[302] Prosecution Appeal Brief, para. 47.
[303] Prosecution Appeal Brief, para. 48.
[304] AT. 1 April 2008, pp. 74-75.
[305] Prosecution Appeal Brief, para. 49, referring to Enver Hogić, T. 11 May 2005, p. 8120. *See also* AT. 1 April 2008, p. 71.
[306] Prosecution Appeal Brief, para. 49, also referring to Trial Judgement, paras. 418, 536-537.
[307] Prosecution Appeal Brief, para. 50, referring to Trial Judgement, paras. 502 and 503.
[308] Orić Response Brief, paras. 267-269.
[309] Orić Response Brief, paras. 270-271.
[310] Orić Response Brief, paras. 272-274. *See also ibid.*, paras. 275-280.
[311] Orić Response Brief, paras. 281-282.

exhibits.[312] Enver Hogić, he argues, was not in Srebrenica at the relevant time, and gave evidence about the military police of the 2nd Corps in Tuzla.[313] As to his alleged visit on 15 October 1992, Orić challenges his identification and argues that there was no evidence that he interrogated and beat the prisoners.[314] He asserts that the "silence" was not indicative of effective control.[315]

133. The Trial Chamber did not identify who captured the prisoners (other than as "Bosnian Muslims" or "Bosnian Muslim fighters"[316]), to which unit they belonged, or under whose command they were. It identified two individuals as having taken part in or been present during the exchange on 16 October 1992,[317] but found that these persons were not members of the Military Police and made no finding on whose order they acted.[318]

134. The Prosecution does not substantiate its assertion that the capturers were part of the Srebrenica Armed Forces and that they were under Orić's command. With respect to the Military Police's involvement in the exchanges, the Appeals Chamber notes that the Trial Chamber did not refer to the specific portion of Enver Hogić's testimony the Prosecution invokes. In that part, Enver Hogić testified that the military police of the 2nd Corps of the ABiH secured the prisoners of war in detention and "would take them to be exchanged".[319] However, given the difficulties surrounding the implementation of the formal structures of the ABiH in Srebrenica before 14 October 1992,[320] it is uncertain whether this evidence regarding the involvement of the ABiH 2nd Corps' military police in exchanges also applied to the Srebrenica Military Police. The Prosecution itself does not dispute the existence of these difficulties, as evidenced by its argument that "the reality in the Srebrenica enclave was that the Srebrenica TO set up and began to manage its own military formations and command structure."[321] The Trial Chamber therefore acted reasonably when it did not rely on this evidence in respect of who delivered the prisoners for the exchanges. The Prosecution fails to prove that the Military Police took the prisoners to be exchanged.

[312] Orić Response Brief, paras. 287-290.
[313] Orić Response Brief, paras. 292-294; AT. 1 April 2008, pp. 100-101.
[314] Orić Response Brief, paras. 298-299, 304-305. Orić challenges the identification of him by reference to his second ground of appeal: *ibid.*, paras. 300, 306.
[315] Orić Response Brief, paras. 302-303.
[316] Trial Judgement, paras. 260, 466 and 472. The Trial Chamber used similar language with respect to the other instances for which it made findings on who the captors were: *ibid.*, paras. 260, 386, 392, 397, 402 ("Bosnian Muslims"), 442 ("uniformed Bosnian Muslims"), 452 ("armed Bosnian Muslims") and 458 ("armed and uniformed Bosnian Muslims"). There were also numerous instances for which the Trial Chamber did not specifiy who captured the prisoners: *see ibid*., paras. 379, 407, 413, 421 ("two armed men wearing uniforms"), 428, 433 and 438.
[317] Trial Judgement, paras. 418 and 424. *See also ibid.*, paras. 429, 434 and 439.
[318] Trial Judgement, paras. 481, 489.
[319] Enver Hogić, T. 11 May 2005, p. 8120.
[320] *See* Trial Judgement, paras. 128-129 and 171.
[321] Prosecution Appeal Brief, para. 55.

135. As a result, the Appeals Chamber fails to see how the indication in Exhibit P99/P100 of Orić's involvement in the exchanges[322] and his intercepted conversation regarding the exchange of Serb prisoners in Exhibit P97[323] are relevant to his effective control over that unit. As to Exhibit P77, it does not relate to the issue of prisoner exchanges at all. Exhibit P78, while mentioning the issue of prisoner exchange, does not mention either Orić or the Military Police.[324] Moreover, the Appeals Chamber finds that the general implication in these exhibits that Orić was involved in matters relating to the prisoners, thereby linking him to the Military Police as the body responsible for their detention, does not render unreasonable the Trial Chamber's finding that he did not have effective control over that body before 14 October 1992.

136. Exhibits P83 and P386 are records of witness interviews with former detainees Veselin Šarac and Ratko Nikolić, respectively. The Trial Chamber relied on P83 for its findings regarding the mistreatment and interrogation of Veselin Šarac at the Srebrenica Police Station in September 1992.[325] In making its findings on his capture and exchange, however, the Trial Chamber relied on the testimony of Slavoljub Žikić and Nedeljko Radić.[326] The Prosecution indicates neither on which parts of Exhibit P83 it relies nor why it was unreasonable for the Trial Chamber to prefer the live testimony over Exhibit P83 for those findings. Neither does the Prosecution attempt to explain whether the Trial Chamber acted unreasonably in relying on Ratko Nikolić's *viva voce* evidence instead of on his interview admitted as Exhibit P386.[327]

137. In any event, the Trial Chamber evaluated Orić's possible presence at the Srebrenica Police Station in its analysis of his effective control over the Military Police prior to 14 October 1992 and the Prosecution does not explain how the Trial Chamber erred in rejecting Slavoljub Žikić's testimony regarding the "deadly silence" in that analysis.[328]

138. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber acted reasonably in not considering the alleged involvement of Orić and the Military Police in the prisoner exchanges for its analysis of Orić's effective control prior to 14 October 1992. The Prosecution's appeal is dismissed in these parts.

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[322] Exhibit P99/P100 is a handwritten note by Orić dated 10 June 1992, which reads in relevant parts: "Conditions regarding Sandići – we cannot fulfil. We agree to the ALL FOR ALL exchange and we agree to the exchange without weaponry. Failing that, we shall not feed your people. We shall act summarily."
[323] *See* Trial Judgement, paras. 202, 540, fns. 551, 1497.
[324] Exhibit P77 is a letter dated 15 July 1992 "[f]or Naser Orić, personally" wherein the President of the Bosnian Serb War Commission of Bratunac expresses his readiness "for personal contact regarding an agreement for more humane conduct towards prisoners and the dead." Exhibit P78 is a letter dated 15 July 1992 from the Commander of a military post in Bratunac addressed to the "Territorial Defence Command, Srebrenica". The Appeals Chamber notes that Exhibit P339, also invoked by the Prosecution, is not on the trial record.
[325] Trial Judgement, para. 438, fns. 1267-1269. Veselin Šarac was not called to testify himself: *ibid.*, para. 437.
[326] Trial Judgement, paras. 438 and 439, fns. 1266 and 1273.

(v) Other indications of effective control allegedly ignored by the Trial Chamber

139. The Prosecution submitted at the Appeal Hearing that the Trial Chamber failed to consider evidence of factors the Trial Chamber itself found could indicate effective control.[329] First, it referred to the formal procedures of appointing Orić as a superior.[330] Second, the Prosecution argued that Orić had the power to issue orders, including to the Military Police.[331] Third, it posited that Orić had the ability to take disciplinary action, as evidenced by his initiation of the investigation of Mirzet Halilović.[332] Fourth, the Prosecution asserted that Orić also had the capacity to transmit reports to competent authorities.[333] Lastly, the Prosecution argued that Orić had a "high profile" as shown by his involvement in the negotiations of prisoner exchanges[334] and his position as commander.[335]

140. The Trial Chamber found that Sefer Halilović, Chief of the Supreme Command Staff of the ABiH, officially confirmed the appointment of Orić as commander of the Srebrenica TO Staff on 27 June 1992, and that, on 8 August 1992, Orić's position was re-confirmed by the BiH President, Alija Izetbegović.[336] The Appeals Chamber considers that these findings might be relevant to Orić's authority over the Srebrenica TO Staff/Srebrenica Armed Forces Staff; however, they do not, as such, necessarily reflect his control over the Military Police.

141. Regarding Orić's alleged power to issue orders to the Military Police, the Appeals Chamber has already dismissed the Prosecution's allegation that the Trial Chamber ignored the significance of Exhibit P109 in its analysis of Orić's effective control.[337] The Trial Chamber further considered Exhibit P5, an order by Orić to the Military Police to carry out activities in Krušev Do dated 29 October 1992, but in light of other evidence it found "serious doubts that this was ever enforced", because Krušev Do was not part of the Srebrenica enclave at the time.[338] The same reason would explain why the Trial Chamber did not rely on Exhibit P167, a handwritten document by the Krušev Do military police. The Prosecution does not attempt to explain why this assessment of the evidence was unreasonable.

[327] Trial Judgement, para. 452.
[328] Trial Judgement, paras. 502 and 503. *See also ibid.*, para. 530.
[329] AT. 1 April 2008, p. 75, referencing Trial Judgement, para. 312.
[330] AT. 1 April 2008, p. 75, referencing Trial Judgement, paras. 141-144. *See also ibid.*, p. 70.
[331] AT. 1 April 2008, pp. 75-76, referencing Exhibits P109, P5, P167, allegedly corroborated by Exhibits P80 and P84.
[332] AT. 1 April 2008, p. 75, referencing Exhibit P329, tape 3, p. 2.
[333] AT. 1 April 2008, p. 75, referencing Exhibit P266.
[334] AT. 1 April 2008, p. 76, referencing Exhibits P339, P77, P78 and P97.
[335] AT. 1 April 2008, p. 76.
[336] Trial Judgement, para. 144.
[337] *Supra*, para. 108.
[338] Trial Judgement, para. 188.

142. As to Orić's alleged ability to take disciplinary action, the Appeals Chamber notes that the Trial Chamber held that Orić "was […] instrumental in promoting an investigation" of Mirzet Halilović.[339] However, it did not find that Orić took this measure, or was able to do so, as a result of an authority on his part over the Military Police, and neither the evidence the Prosecution refers to nor that relied on by the Trial Chamber indicates otherwise.[340]

143. The evidence the Prosecution invokes to argue that Orić also had the capacity to transmit reports to competent authorities does not support its assertion.[341] In any event, even if this argument were accepted, the Appeals Chamber fails to see how it relates to Orić's authority over the Military Police specifically. The Prosecution's claim that the Trial Chamber failed to appreciate Orić's "high profile" as Commander and in negotiations in its analysis of his effective control before 16 October 1992 has been addressed elsewhere.[342]

144. The Appeals Chamber therefore dismisses the Prosecution's arguments summarised *supra* at paragraph 139.

(b) Alleged errors regarding evidence justifying the conclusion that Orić did not have effective control

(i) The chaotic circumstances in Srebrenica

145. The Prosecution submits that there is no evidence that the chaotic circumstances prevailing in Srebrenica at the relevant time prevented Orić from exercising his authority over the Military Police.[343] The Prosecution argues that the TO Staff was established in May 1992 and created the Civilian and Military Police in June and July 1992. Despite the chaotic conditions, the Prosecution contends, Exhibit P84 shows that the TO Staff met regularly, discussed military issues including the Military Police, planned and ordered combat operations and issued a steady stream of orders and communications.[344] The Prosecution also avers that the Trial Chamber, notwithstanding the prevailing conditions, held that the Military Police "was operational as early as August 1992."[345] It concludes that "'chaotic conditions' are part of war. They do not negate Orić's effective control over the [Military Police]."[346]

[339] Trial Judgement, para. 550, referencing Exhibit P329, tape 3 pp. 4-6 and tape 17, p. 2.
[340] *See* Exhibit P329, tape 3 pp. 2, 4-6 and tape 17, p. 2.
[341] *See* Exhibit P266.
[342] *Supra*, paras. 100-109, 133-138.
[343] Prosecution Appeal Brief, paras. 51-53, referring to Trial Judgement, para. 503.
[344] Prosecution Appeal Brief, para. 52.
[345] Prosecution Appeal Brief, para. 52, citing Trial Judgement, para. 181.
[346] Prosecution Appeal Brief, para. 53.

146. Orić responds that it is a non-issue whether anything "prevented" him from exercising effective control, because he did not have such control.[347] Moreover, he asserts that there was abundant evidence showing his inability to exercise any command due to the chaotic conditions and that Exhibit P84 does not support the Prosecution's assertions.[348] Further, Orić submits that he had no burden of proving that effective control did not exist, which, he argues, is impossible and would reverse the burden of proof.[349]

147. The Prosecution replies that chaotic conditions might be raised in relation to failure to prevent or punish, but they "do not tend to disprove" that the Military Police was *de jure* subordinated to Orić.[350] Despite these circumstances, it argues, Orić attended Srebrenica Armed Forces Staff meetings regularly, was instrumental in the formation of the Military Police and admitted that he did not spend enough time in the office and said that he would be there more often in the future.[351]

148. The Prosecution's argument appears to be based on the presumption that Orić must have had effective control over the Military Police unless something "negated" such control or "prevented" him from exercising it.[352] Such a presumption is untenable.[353] The primary question before the Trial Chamber was not whether there was evidence contradicting Orić's alleged effective control, but, rather, whether the evidence established beyond reasonable doubt that he had such control.

149. In its assessment of that question, the Trial Chamber found that, given *inter alia* the chaotic circumstances prevailing in Srebrenica at the time, the involvement of the Srebrenica TO Staff/Srebrenica Armed Forces Staff in establishing the Military Police in July 1992 was insufficient to prove the Srebrenica Armed Forces Staff's effective control over that body.[354] The Prosecution does not specify on which parts of Exhibit P84 it relies to challenge this assessment of the evidence, or whether the orders of the Srebrenica TO Staff allegedly contained therein concerned the Military Police. In itself, the fact that the Military Police was "operational as early as August 1992" does not necessarily imply that the chaotic circumstances in Srebrenica did not prevent the Srebrenica Armed Forces Staff or Orić from having effective control over it. The Prosecution thus fails to demonstrate an error. Its argument is dismissed.

[347] Orić Response Brief, para. 311.
[348] Orić Response Brief, paras. 312-321 and 326.
[349] Orić Response Brief, paras. 329-331.
[350] Prosecution Reply Brief, para. 21.
[351] Prosecution Reply Brief, para. 22.
[352] Prosecution Appeal Brief, paras. 52 and 53.
[353] *See supra*, paras. 91-92.
[354] Trial Judgement, para. 503.

(ii) The formal regional and national structures

150. The Prosecution submits that the Trial Chamber erred in paragraph 180 of the Trial Judgement in giving weight to ABiH regional and national directives not to establish the military police at the municipal level, because these directives had little effect on or relevance to the existing Srebrenica military structure.[355] It argues that the Trial Chamber itself acknowledged that there was a duly established and functioning military police in Srebrenica and that the Srebrenica enclave was mostly separated from Tuzla and the rest of Muslim controlled Bosnia.[356] The reality, it argues, was that the Srebrenica TO began to manage its own military formations and command structure[357] and that most orders from Tuzla and Sarajevo were not received by the Srebrenica command.[358] More importantly, the Prosecution argues that the Trial Chamber found that the Military Police was operational as early as August 1992.[359]

151. Orić responds that the Trial Chamber properly considered the directives as showing the absence of *de jure* authority.[360] He further submits that the Trial Chamber only found that the Military Police was "operational", not duly established, in August 1992.[361] In addition, he refers to Mensud Omerović's testimony to argue that the Military Police could not function properly.[362]

152. Paragraph 180 of the Trial Judgement reads:

> There is no evidence that the ABiH Rules of Service, as other rules and regulations, were ever received in the Srebrenica area before demilitarisation and that members of the military police, including Hamed Salihović, Chief of Security of the Srebrenica Armed Forces Staff, were informed of their contents. The Prosecution has not proven this fact to the Trial Chamber's satisfaction.

153. The Appeals Chamber notes that this paragraph contains no reference to national or regional directives not to establish a military police at the municipal level and that the Trial Chamber did not rely on such directives to find that Orić did not have effective control prior to 14 October 1992.[363] Therefore, the Prosecution's argument that the Trial Chamber erred in giving weight to the directives in question is dismissed.

[355] Prosecution Appeal Brief, para. 54, referring to Trial Judgement, para. 180.
[356] Prosecution Appeal Brief, paras. 54-55, referring to Trial Judgement, paras. 102-107, 181, 202-205.
[357] Prosecution Appeal Brief, para. 55, referring to Trial Judgement, paras. 139-148.
[358] Prosecution Appeal Brief, para. 55, referring to Trial Judgement, paras. 153, 180, 202-205.
[359] Prosecution Appeal Brief, para. 56, referring to Trial Judgement, para. 181.
[360] Orić Response Brief, para. 336.
[361] Orić Response Brief, para. 334.
[362] Orić Response Brief, paras. 339-340.
[363] *See* Trial Judgement, paras. 499-504.

(iii) Mirzet Halilović's erratic behaviour

154. The Prosecution submits that the Trial Chamber erroneously construed Mirzet Halilović's misbehaviour, and Orić's failure to respond to it promptly, as evidence of a lack of effective control.[364] It argues that the fact that the Srebrenica Armed Forces Staff did not try to control Mirzet Halilović before 14 October 1992, when he was put under Bećir Bogilović's supervision, does not mean that it did not have the material ability to do so earlier.[365] Because Mirzet Halilović was subordinated to the Srebrenica Armed Forces Staff, the Prosecution argues that the failure to discipline him promptly is evidence of Orić's failure to take reasonable measures to prevent or punish his subordinate's criminal behaviour (the third element of Article 7(3) responsibility), *i.e.* failure to exercise effective control, and not evidence of lack of effective control (the first element of such liability).[366] It asserts that the fact that the superior did not punish does not mean that he could not punish.[367] Moreover, it argues, Article 7(3) of the Statute applies also where the behaviour of the perpetrators is difficult to control and that it is the commander's duty to make subordinates follow orders.[368] In addition, the Prosecution submits that Orić and the Srebrenica Armed Forces Staff took steps to control Mirzet Halilović as early as 14 October 1992, and that the Trial Chamber ignored that, as only Mirzet Halilović was eventually put under Bećir Bogilović's control, the Military Police remained, as it had been before 14 October 1992, under the control of Orić.[369]

155. Orić responds that the Prosecution attempts to reverse the burden of proof by requiring him to prove that Mirzet Halilović's erratic behaviour showed absence of effective control.[370] He also argues that the Trial Chamber referred to Mirzet Halilović's behaviour and replacement merely as background information, not as a reason for not finding effective control.[371]

156. The Prosecution replies that Orić need not show that Mirzet Halilović's erratic behaviour proved the absence of effective control.[372] It argues that it was by considering Mirzet Halilović's behaviour as a factor in determining effective control that the Trial Chamber erred.[373]

157. The Trial Chamber considered evidence that Mirzet Halilović formally answered to "the army" before 14 October 1992 in its analysis of Orić's effective control over the Military Police

[364] Prosecution Appeal Brief, para. 57, referring to Trial Judgement, para. 501.
[365] Prosecution Appeal Brief, para. 42.
[366] Prosecution Appeal Brief, paras. 57, 60 and 62.
[367] Prosecution Appeal Brief, para. 60.
[368] Prosecution Appeal Brief, paras. 60-61, referring to *Hadžihasanović and Kubura* Trial Judgement, para. 87.
[369] Prosecution Appeal Brief, paras. 58-59.
[370] Orić Response Brief, para. 344.
[371] Orić Response Brief, paras. 345-347 and 357.
[372] Prosecution Reply Brief, para. 24.

before that date.[374] There is no indication that the Trial Chamber in that analysis disregarded evidence that Orić and the Srebrenica Armed Forces Staff took steps to put Mirzet Halilović under Bećir Bogilović's supervision on 14 October 1992 and that it was only Mirzet Halilović, as opposed to the entire Military Police, which was thus put under civilian supervision.[375] Moreover, the Appeals Chamber notes that it would not necessarily follow from the fact, if true, that Mirzet Halilović and the Military Police formally answered to the army prior to 14 October 1992 that Orić or the Srebrenica Armed Forces Staff had effective control over them before that date.[376] Therefore, the Trial Chamber acted reasonably in noting that Mirzet Halilović might have been formally subordinated to the army before being placed under Bećir Bogilović's supervision as one part of its analysis of whether the Srebrenica Armed Forces Staff and Orić had effective control over the Military Police before 14 October 1992.[377]

158. The Appeals Chamber now turns to the Prosecution's argument that the Trial Chamber misconstrued the relevance of Mirzet Halilović's behaviour. The Trial Chamber noted evidence that, in October 1992, Mirzet Halilović "started behaving erratically, developed a propensity for violence, and became difficult to control."[378] It took the erratic behaviour of Mirzet Halilović into account as one factor for its conclusion that the Srebrenica Armed Forces Staff did not have effective control over the Military Police before 14 October 1992.[379]

159. Whether Orić and the Srebrenica Armed Forces Staff had effective control over Mirzet Halilović depended on their "material ability to prevent and punish" the crimes.[380] The Appeals Chamber considers that if a superior-subordinate relationship existed, it cannot be relevant to ask whether the subordinate's behaviour was erratic. However, if it is not clear whether that relationship existed, it can be relevant to take into account the erratic behaviour of the subordinate in determining whether the superior had the "material ability to prevent or punish" necessary for effective control. The Trial Chamber therefore did not misconstrue the first and the third elements of Article 7(3) of the Statute when it assessed Mirzet Halilović's erratic behaviour in analysing Orić's effective control over the Military Police. The Prosecution's bare assertion that Orić's failure to prevent or punish "is not evidence of lack of effective control"[381] fails to demonstrate an error in that assessment.

[373] Prosecution Reply Brief, para. 24.
[374] Trial Judgement, para. 500.
[375] Trial Judgement, paras. 491, 501 and 505, fn. 1377.
[376] *See supra*, para. 91.
[377] Trial Judgement, para. 500.
[378] Trial Judgement, para. 501. As to the period of Mirzet Halilović's tenure, *see ibid.*, paras. 492-493.
[379] Trial Judgement, paras. 503-504.
[380] *See Halilović* Appeal Judgement, para. 59; *Blaškić* Appeal Judgement, para. 484.
[381] Prosecution Appeal Brief, para. 62.

3. Conclusion

160. The Prosecution fails to demonstrate an error on the part of the Trial Chamber under the first part of its first ground of appeal. The Trial Chamber's finding that Orić did not exercise effective control over the Military Police between 24 September and 16 October 1992 is therefore upheld. As a result, the Appeals Chamber need not consider the Prosecution's arguments that the other elements of Article 7(3) of the Statute were met during this period.[382]

[382] Prosecution Appeal Brief, paras. 89-96. *See also* Orić Response Brief, paras. 395-401.

B. Orić's duty to punish crimes committed before he had effective control (Prosecution's Ground 1(2))

161. Under this part of its first ground of appeal, the Prosecution submits that the Trial Chamber erred in law in concluding that Orić could not be held responsible under Article 7(3) of the Statute for failing to punish the crimes of murder and cruel treatment perpetrated between 24 September and 16 October 1992 at the Srebrenica Police Station, of which he had knowledge, because they were perpetrated before he assumed effective control over the Military Police.[383] It argues that the Trial Chamber reached this conclusion because it applied the governing law in the *Hadžihasanović* Appeal Decision on Jurisdiction that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate.[384] The Prosecution argues that there are cogent reasons for the Appeals Chamber to depart from this position.[385]

162. Orić responds that following binding precedent of the Appeals Chamber cannot be an error of law[386] and that, in any event, there are no cogent reasons for the Appeals Chamber to depart from its precedent.[387] He also submits that this ground of appeal is irrelevant to the facts of the case because Mirzet Halilović, the only perpetrator identified who could have been punished, died soon after he committed the crimes and therefore Orić could not have punished him even if a duty to do so existed.[388]

163. The Prosecution replies that Mirzet Halilović was not the only identified perpetrator of the crimes. It argues that the Trial Chamber found the Military Police responsible for the crimes, which entails Orić's duty to identify and punish his Military Police subordinates who failed to protect the prisoners.[389]

164. The Trial Chamber itself was explicitly of the view that "for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to

[383] Prosecution Notice of Appeal, paras. 14-15; Prosecution Appeal Brief, para. 102, mentioning the murder of Dragutin Kukić and the cruel treatment of Nedeljko Radić, Slavoljub Žikić, Zoran Branković, Nevenko Bubanj and Veselin Šarac.
[384] Prosecution Appeal Brief, para. 104, citing *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction"), para. 51.
[385] Prosecution Appeal Brief, paras. 105-119.
[386] Orić Response Brief, para. 402.
[387] Orić Response Brief, paras. 404-409.
[388] Orić Response Brief, para. 410. In response to the Appeals Chamber's question identified in the *Addendum* to Order Scheduling Appeal Hearing of 10 March 2008, Orić specified that Mirzet Halilović died on 16 January 1993: Orić Written Submissions of 25 March 2008, para. 51, referencing Exhibit P507; Hakija Meholjić, T. 7 April 2005, pp 6900-6901. The Prosecution agreed and referred to Exhibits P507 and P329, tape 11, p. 4: AT. 1 April 2008, p. 87.
[389] Prosecution Reply Brief, para. 44.

their committing the crime."[390] However, considering that the Appeals Chamber had taken a different approach in the *Hadžihasanović* Appeal Decision on Jurisdiction, the Trial Chamber "f[ound] itself bound to require that with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken."[391]

165. The Appeals Chamber recalls that the *ratio decidendi* of its decisions is binding on Trial Chambers.[392] The Trial Chamber was therefore correct in considering that it was bound to follow the precedent established in the *Hadžihasanović* Appeal Decision on Jurisdiction, even though it disagreed with it.

166. Turning to the Prosecution's challenge to the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction, the Appeals Chamber notes that the only member of the Military Police identified by the Trial Chamber before Orić assumed effective control over it was its Commander, Mirzet Halilović.[393] Mirzet Halilović was never found to be Orić's subordinate: Orić was found to have exercised effective control over the Military Police from 27 November 1992, five days after Mirzet Halilović was replaced by Atif Krdžić as Military Police Commander,[394] and there is no indication that Mirzet Halilović remained a member of the Military Police thereafter.[395] In the absence of any other military policeman who would have committed a crime in the detention facility prior to 27 November 1992,[396] Orić's duty to punish, presuming its existence, was without subject.[397]

167. The Appeals Chamber, Judge Liu and Judge Schomburg dissenting, declines to address the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction, which, in light of the conclusion in the previous paragraph, could not have an impact on the outcome of the present case.

168. The Prosecution's sub-ground of appeal is dismissed.

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[390] Trial Judgement, para. 335.
[391] Trial Judgement, para. 335. *See also ibid.*, paras. 574-575.
[392] *Aleksovski* Appeal Judgement, para. 113. *See also Galić* Appeal Judgement, paras. 116-117.
[393] *See* Trial Judgement, paras. 491, 496. Unidentified military policemen were referred to by the Trial Chamber but only in relation to the charge of wanton destruction: Trial Judgement, paras. 638, 650 and 663.
[394] Trial Judgement, *e.g.*, paras. 189, 491, 496, 506, 507, 510, 532. The Appeals Chamber notes that the circumstances under which Mirzet Halilović was replaced remain unclear. The Trial Chamber found that "[t]here appears to have been a request for his dismissal as well as one for resignation by Mirzet Halilović" but left the question as to what exactly led to Mirzet Halilović's replacement in ambiguity (Trial Judgement, para. 510); although the Trial Chamber referred to Exhibit P84, which mentions Mirzet Halilović's resignation (*ibid.*, fn. 1403, para. 510, fn. 1411) and to his dismissal in his absence (*ibid.*, fn. 1403, referring to Bećir Bogilović's testimony), its "finding" was limited to stating that Mirzet Halilović "was removed" (*ibid.*, paras. 506, 491, 510, 550, 764).
[395] *See* Trial Judgement, fn. 505.
[396] The "Building" was operational as a detention facility as of January 1993: Trial Judgement, para. 486.
[397] *See supra*, para. 35.

C. Orić's responsibility for failure to punish the crimes committed between 27 December 1992 and 20 March 1993 (Prosecution's Ground 1(3))

169. The Trial Chamber found that Orić did not have the required *mens rea* to be held criminally responsible for failing to punish his subordinates for the crimes committed between December 1992 and March 1993 at the detention facilities.[398] Under this sub-ground of appeal, the Prosecution alleges that, had the Trial Chamber applied the "had reason to know" standard correctly, it would have concluded that Orić had reason to know that crimes of murder and cruel treatment had occurred between 27 December 1992 and 20 March 1993, and convicted him for failing to punish.[399]

170. The Appeals Chamber first notes that, whereas responsibility under Article 7(3) of the Statute requires proof of the superior's knowledge or reason to know of his subordinate's criminal conduct,[400] the Prosecution contends that Orić had reason to know that the crimes of murder and cruel treatment themselves had occurred.[401] In line with this, it mostly relies on the Trial Chamber's finding that, as of 27 December 1992, Orić had reason to know that *crimes* of murder and cruel treatment were about to be committed at the detention facilities.[402]

171. The Prosecution clarified at the Appeal Hearing that it did not base its argumentation on the incorrect assumption that responsibility under Article 7(3) of the Statute requires the superior's knowledge that the actual crimes themselves have been committed or were about to be committed rather than the superior's knowledge of his subordinate's criminal conduct.[403] It submitted instead that in the context of crimes such as those at issue which occur in a prison setting, knowledge of the crime and knowledge of the subordinates' criminal conduct are "one and the same."[404]

172. In support of this assertion, the Prosecution argued that "[p]risoners cannot be cruelly mistreated in a locked environment without the assistance of the person at the door" and that "[t]he visible injuries of these prisoners and the death of some raises the strong inference that either the guards are perpetrating the criminal mistreatment and inflicting the injuries that accuse the death, or that they are assisting others to cruelly mistreat the prisoners by letting them in."[405] In the Appeals Chamber's view, this argument fails to address the central issue at hand, namely, Orić's knowledge of the alleged criminal conduct of his subordinate, Atif Krdžić, who was not a guard and was not

[398] Trial Judgement, paras. 577-578.
[399] Prosecution Notice of Appeal, paras. 17-19; Prosecution Appeal Brief, paras. 123-143.
[400] *See supra*, para. 51.
[401] Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, "I" on p. 30, paras. 123 and 126, "c" on p. 32.
[402] Prosecution Appeal Brief, paras. 124-126, referring to Trial Judgement, para. 560.
[403] AT. 1 April 2008, pp. 22, 24; AT. 2 April 2008, p. 192.
[404] AT. 1 April 2008, p. 22.
[405] AT. 1 April 2008, pp. 22-23.

found to ever have been present in any of the detention facilities.[406] Likewise, the Prosecution's reliance on the *Krnojelac* case,[407] in which the accused was the warden of a prison facility and his subordinates were prison guards under his authority,[408] is inapposite.

173. The Prosecution further posited that the prisons were run by subordinates under Orić's command and argued that in "that kind of environment where the prisoners are kept in locked cells […] the inevitable conclusion must be that there is reason to know the subordinates involved in running those prisons are implicated in the crimes".[409] The Appeals Chamber is unable to agree with such a general statement. Depending on the circumstances, there might be reason to know, for instance, that the crimes were perpetrated among inmates or because of mere negligence by the individuals immediately responsible for guarding the detainees. The Prosecution has not explained why, in the circumstances of this specific case, the only reasonable inference was that Orić's knowledge of the crimes committed during Mirzet Halilović's tenure gave him reason to know that Mirzet Halilović's successor, Atif Krdžić, was implicated in the subsequent crimes committed during his own tenure. Incidentally, the Appeals Chamber also notes that, to Orić's knowledge, measures were taken that resulted in Mirzet Halilović's replacement at the meeting of the Srebrenica Armed Forces Staff of 22 November 1992 held in Orić's presence.[410]

174. For the aforementioned reasons, the Appeals Chamber considers that the Prosecution fails to substantiate its assertion that, in the present case, knowledge of the crimes and knowledge of the subordinate's criminal conduct were "one and the same". The Prosecution's argument is dismissed. As a result, the Appeals Chamber need not consider any further the Prosecution's present sub-ground of appeal, which pertains to Orić's knowledge of the crimes themselves as opposed to the alleged criminal conduct of his subordinate, Atif Krdžić.

[406] *See* Trial Judgement, paras. 494-496, fn. 1385.
[407] AT. 1 April 2008, pp. 23-24, referencing, *e.g., Krnojelac* Appeal Judgement, para. 169.
[408] *See Krnojelac* Trial Judgement, para. 107.
[409] AT. 2 April 2008, pp. 192-193. *See also* Prosecution Written Submissions of 25 March 2008, paras. 15 ("Evidence of prisoner abuse necessarily implicates those entrusted with their detention and care") and 18 ("The commission of crimes against prisoners within the prison itself means those responsible for their detention and care perpetrated the crimes or failed to prevent them").
[410] Trial Judgement, paras. 493, 506, 510, 550 (referring to P329, tape 17, p. 2), 552, 764.

D. Issues of general significance (Prosecution's Ground 5)

175. Under its fifth ground of appeal, the Prosecution alleges two errors of law that have no impact on the verdict or the sentence against Orić but are, in its view, matters of general importance to the case law of the International Tribunal.[411] Orić opposes both grounds, asserting that the Prosecution has not shown that the Trial Chamber committed the alleged errors of law and that the questions it raises are ripe for consideration by the Appeals Chamber.[412]

176. First, the Prosecution submits that the Trial Chamber erred in law in distinguishing between a "general" and a "specific" obligation under Article 7(3) of the Statute concerning the duty to prevent crimes as well as in stating that the superior's failure to implement "general" preventative measures cannot give rise to criminal responsibility.[413] It argues that the Appeals Chamber should intervene to ensure that the Trial Chamber's alleged error does not take hold to misdirect the development of the law and undercut the fundamental protections accorded by the doctrine of superior responsibility.[414]

177. The Appeals Chamber considers that it need not discuss the merits of this sub-ground of appeal. It only recalls its finding in the *Halilović* Appeal Judgement that the general duty of commanders to take the necessary and reasonable measures is well rooted in customary international law and stems from their position of authority.[415] The Appeals Chamber stresses again that "'necessary' measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and 'reasonable' measures are those reasonably falling within the material powers of the superior" and that what constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.[416] The correct legal standard is solely whether the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[417] While this single standard will have to be applied differently in different circumstances, "the artificial distinction between 'general' and 'specific' obligations creates a confusing and unhelpful dichotomy."[418]

178. Second, the Prosecution submits that the Trial Chamber erred in law in allowing for the possibility that military necessity could, in certain circumstances, excuse the destruction of civilian

[411] Prosecution Notice of Appeal, paras. 38-41.
[412] Orić Response Brief, paras. 553-554.
[413] Prosecution Notice of Appeal, para. 38; Prosecution Appeal Brief, paras. 283-305.
[414] Prosecution Appeal Brief, para. 306.
[415] *Halilović* Appeal Judgement, para. 63, referring to *Aleksovski* Appeal Judgement, para. 76, as an example.
[416] *ibid.*, para. 63, referring to *Blaškić* Appeal Judgement, para. 72.
[417] *Ibid.*, para. 64.

houses that occurred after the cessation of hostilities and the retreat of the inhabitants "in order to prevent the inhabitants, including combatants, to return and resume the attacks."[419] It requests that the Appeals Chamber correct the Trial Chamber's erroneous statement of the law as a matter of general importance in the development of the case law of the International Tribunal.[420]

179. The Appeals Chamber acknowledges the significance of the principles of distinction between civilian and military objects and of discrimination in international humanitarian law. However, the Prosecution fails to demonstrate how the particular issue it raises is of general significance to the International Tribunal's jurisprudence.[421] In addition, the Appeals Chamber considers that the issue raised cannot be properly discussed *in abstracto* in the context of the present case. Accordingly, the Appeals Chamber declines to address the Prosecution's submission.

E. Conclusion

180. For the foregoing reasons, the Prosecution's first ground of appeal is dismissed in its entirety. The Appeals Chambers declines to consider the Prosecution's fifth ground of appeal and considers that the Prosecution's remaining grounds of appeal are rendered moot as a result of the Appeals Chamber's discussion and conclusion on Orić's appeal.

181. The Appeals Chamber recalls its conclusion that the Trial Chamber erred in failing to resolve the issues of whether Orić's subordinate incurred criminal responsibility and whether Orić knew or had reason to know of his subordinate's alleged criminal conduct. In the absence of such findings, Orić's conviction under Article 7(3) of the Statute cannot be sustained. Further, the Appeals Chamber has dismissed the Prosecution's challenges to Orić's acquittal in their entirety. The Appeals Chamber now turns to the implications of these conclusions.

[418] *Ibid.*, para. 64.
[419] Prosecution Notice of Appeal, para. 40, referring to Trial Judgement, para. 588. *See also* Prosecution Appeal Brief, paras. 307-325.
[420] Prosecution Appeal Brief, para. 325.
[421] *See supra*, Standard of appellate review, para. 7. On the issue of matters of general significance to the International Tribunal's jurisprudence, s*ee e.g, Akayesu* Appeal Judgement, paras 19, 21-24; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3.

V. IMPLICATIONS OF THE APPEALS CHAMBER'S FINDINGS

182. Prior to the Appeal Hearing, the Parties were requested to present submissions to the Appeals Chamber, responding *inter alia* to the following questions:

> What evidence on the trial record, if any, supports or rebuts the allegation that Naser Orić's subordinates, in particular the Commander of the Military Police Atif Krdžić, incurred criminal responsibility?
>
> What evidence on the trial record, if any, supports or rebuts the allegation that Naser Orić knew or had reason to know that the Military Police detained Serbs and that his subordinate(s) aided and abetted crimes against them?
>
> If the Appeals Chamber were to uphold the Defence's appeal insofar as they allege that the Trial Chamber failed to make the proper factual findings on legal elements required for his conviction under Article 7(3) of the Statute, what would be the appropriate course of action?[422]

183. With respect to the course of action, Orić submitted that it would be appropriate for the Appeals Chamber to reverse his convictions and find him not guilty.[423] He argued that if the Appeals Chamber were to substitute its own findings, in fairness it would have to re-evaluate all the evidence and thus effectively sit as a second Trial Chamber.[424]

184. The Prosecution submitted that the appropriate course of action would be for the Appeals Chamber to determine whether the Trial Chamber's ultimate findings with respect to Orić's conviction are sustained on the trial record. It argued that this approach would be consistent with the Appeals Chamber's corrective function under Article 25 of the Statute and accord with its role to prevent miscarriages of justice.[425] Further, in its view, an acquittal is not in the interests of justice where the evidence proves the legal elements underlying the conviction.[426] Regarding Orić's concern that the Appeals Chamber would be sitting as a second Trial Chamber, the Prosecution submitted that the Appeals Chamber would still owe deference to the Trial Chamber's factual findings and would evaluate the evidence in that context.[427] The Prosecution referred to a number of cases where, it argued, the Appeals Chamber ascertained whether all legal elements were established on the evidence when the Trial Chamber had failed to make express or proper findings.[428]

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[422] *Addendum* to Order Scheduling Appeal Hearing, 10 March 2008, p. 2.
[423] Orić Written Submissions of 25 March 2008, para. 49.
[424] Orić Written Submissions of 25 March 2008, para. 49.
[425] AT. 1 April 2008, pp. 26-27.
[426] AT. 1 April 2008, p. 27.
[427] AT. 1 April 2008, p. 27.
[428] AT. 1 April 2008, pp. 28-32, referencing *Kordić and Čerkez* Appeal Judgement, paras. 384, 386, 410-413; *Aleksovski* Appeal Judgement, paras. 165-172; *Blaškić* Appeal Judgement, paras. 659-670; *Simić* Appeal Judgement, paras. 75-77, 130-138, fn. 391.

185. The Appeals Chamber adjudicates each case on its own merits. In some cases, the circumstances have warranted the Appeals Chamber to ascertain itself whether the Trial Chamber's findings on their own or in combination with relevant evidence sustain the conviction.[429] In the present case, the Trial Chamber failed to resolve whether two legal elements required to hold Orić criminally responsible under Article 7(3) of the Statute were met. Yet Orić's entire conviction rested on that mode of liability. Therefore, and given the factually complex circumstances of this case, an appellate assessment of whether the two legal elements were fulfilled would require the Appeals Chamber to re-evaluate the entire trial record.

186. However, an appeal is not a trial *de novo* and the Appeals Chamber cannot be expected to act as a primary trier of fact. Not only is the Appeals Chamber not in the best position to assess the reliability and credibility of the evidence, but doing so would also deprive the Parties of their fundamental right to appeal factual findings. In the present case, the re-evaluation of the trial record would affect the vast majority of the findings necessary to establish all the three elements of criminal responsibility pursuant to Article 7(3) of the Statute and would, in effect, require the Appeals Chamber to decide the case anew. The Appeals Chamber does not consider that such task lies within its functions.

187. While Rule 117(C) vests the Appeals Chamber with discretion to order a retrial in appropriate circumstances, none of the Parties advocate that Orić be retried. The Appeals Chamber reiterates that the Prosecution was asked to point to evidence in support of its allegations that Orić's subordinates, in particular the Commander of the Military Police Atif Krdžić, incurred criminal responsibility and that Orić knew or had reason to know that his subordinates aided and abetted crimes against the detained Serbs.[430] The Appeals Chamber finds that the Prosecution has not pointed to any such evidence or presented additional evidence under Rule 115 of the Rules. Therefore, in the circumstances of this particular case, a remand would serve no purpose.

188. In light of the foregoing, the Appeals Chamber finds that the appropriate course of action is a reversal of Orić's convictions under Article 7(3) of the Statute for failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder (Count 1) and cruel treatment (Count 2) from 27 December 1992 to 20 March 1993. Orić is found not guilty on these counts.

[429] *See Simić* Appeal Judgement, paras. 75, 84; *Kordić and Čerkez* Appeal Judgement, paras. 385-386; *Blaškić* Appeal Judgement, paras. 659, 662; *Aleksovski* Appeal Judgement, paras. 170-172.
[430] *Addendum* to Order Scheduling Appeal Hearing, 10 March 2008, p. 2, which also gave Orić an opportunity to respond.

189. Like the Trial Chamber, the Appeals Chamber has no doubt that grave crimes were committed against Serbs detained at the Srebrenica Police Station and the Building between September 1992 and March 1993. The Defence did not challenge that crimes were committed against Serb detainees.[431] However, proof that crimes have occurred is not sufficient to sustain a conviction of an individual. Criminal proceedings require evidence establishing beyond reasonable doubt that the accused is responsible for the crimes before a conviction can be entered. Where an accused is charged with command responsibility pursuant to Article 7(3) of the Statute, as in the present case, the Prosecution must prove, *inter alia*, that his subordinate(s) bore criminal responsibility and that he knew or had reason to know of his/their criminal conduct. The Trial Chamber made no findings on either of these two fundamental elements. The Prosecution, when asked on appeal if there was evidence to support the two elements, failed to point to evidence that could sustain Orić's convictions for the crimes against Serb detainees. Consequently, the conclusion of the Appeals Chamber is the Disposition that follows.

[431] *See* Trial Judgement, para. 752; AT. 2 April 2008, p. 204.

VI. DISPOSITION

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

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

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 1 and 2 April 2008;

SITTING in open session;

ALLOWS, in part, Orić's grounds of appeal 1(E)(1), 1(F)(2) and 5;

DISMISSES the Prosecution's first ground of appeal in its entirety;

DECLINES to consider all other grounds of appeal raised by the Parties;

REVERSES Orić's convictions under Article 7(3) of the Statute for failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder (Count 1) and cruel treatment (Count 2) from 27 December 1992 to 20 March 1993; and

FINDS Orić not guilty on these counts.

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

Judge Wolfgang Schomburg Presiding	Judge Mohamed Shahabuddeen	Judge Liu Daqun
Judge Andrésia Vaz		Judge Theodor Meron

Judge Mohamed Shahabuddeen appends a declaration.
Judge Liu Daqun appends a partially dissenting opinion and declaration.
Judge Wolfgang Schomburg appends a separate and partially dissenting opinion.

Dated this third day of July 2008
At The Hague, The Netherlands

[Seal of the International Tribunal]

VII. DECLARATION OF JUDGE SHAHABUDDEEN

1. I support the judgement of the Appeals Chamber in this case, and append this declaration to explain my position on three points.

A. Whether the existing decision of the Appeals Chamber in *Hadžihasanović* should continue to stand

2. The first point relates to the unexceptionable statement in paragraph 165 of the judgement of the Appeals Chamber to the effect that the Trial Chamber in this case was correct in considering that, as a Trial Chamber, it was bound to follow the precedent established by the Appeals Chamber in *Hadžihasanović*,[1] even though it disagreed with it. In the cited decision, the Appeals Chamber, by majority, held that a commander had no duty to punish a subordinate for a crime committed by the subordinate before the commander assumed his command but of which the latter knew. The minority was of the opposing view.

3. However, the fact that the Trial Chamber considered, rightly, that it was bound by the Appeals Chamber did not oblige it to suppress its own different thinking. One is accustomed to hearing a trial judge say that, were it not for authority, his own views would be different. Divergent views are in the interests of the development of the jurisprudence. I share those of the Trial Chamber and adhere to the conclusion reached in the dissenting opinions in *Hadžihasanović*. Also, I support the conclusions of the partially dissenting opinion and declaration of Judge Liu and the separate and partially dissenting opinion of Judge Schomburg appended to today's judgement. Thus, there is a new majority of appellate thought. The question is whether that new majority of appellate thought should be translated into a formal decision of the present bench of the Appeals Chamber acting through a bare majority.

4. There are difficulties. To some, I can offer an answer consistent with the view that *Hadžihasanović* should be reversed; to one I can find no such answer. Those to which I can find answers are as follows:

5. An initial difficulty is that it may be said that the question of punishment for prior crimes has not been fully debated and that accordingly the Appeals Chamber has not had the benefit of full argument. But the issue concerning prior crimes was explicitly raised in the notice of appeal by the prosecution[2] and argued by both parties in their appeal briefs.[3] It is true that the defence limited its

[1] *Hadžihasanović,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.
[2] Prosecution Notice of Appeal, paras 14-16.
[3] Prosecution Appeal Brief, paras 102-118; Orić Response Brief, paras 402-411.

discussion of the issue, but this was because it contended that, for one reason or another, the issue of punishment for prior crimes did not arise in this case. This was a strategic decision by the defence.

6. Naturally, the present judgement of the Appeals Chamber on the point was not known to the defence during previous argument. Had the Appeals Chamber accepted the prosecution's alternative argument that Mr Orić was required to punish those responsible for murder and cruel treatment upon his acquiring effective control over the Military Police, the issue of prior crimes would certainly have become relevant to the outcome of the appeal.[4] There was no oral argument on the substance by either party.[5] The Appeals Chamber took the view that there was no need for it, given, I think, that there had been an opportunity for written arguments, even though, in the case of the defence, that opportunity had only been partially used.

7. In sum, Mr Orić had the opportunity to argue in full, and elected not to do so; he could not be compelled to argue. Thus, lack of argument from the defence as to the existence of a duty to punish prior crimes cannot bar the Appeals Chamber from deciding the point as one of importance, whether or not it affected the outcome.

8. Next, can the Appeals Chamber act by a bare majority to effect a reversal? That question is answered by the circumstance that it is settled that the Appeals Chamber can act by majority and by the further circumstance that courts (including the Appeals Chamber of the ICTY) have reversed previous decisions by a bare majority.[6]

9. Nor do I see any objection, in a case (such as the present) where the point will not affect the outcome of the appeal, to the Appeals Chamber reversing a decision taken in another case in which the point affected the outcome: the power to correct the law exists whatever may be the basis on which the incorrect statement of the law stands. There is jurisdiction or there is not; it is trite that jurisdiction exists in a case where the point will not affect the result but is important. There being jurisdiction, it is difficult to appreciate why it may be exercised to correct some important errors and not all important ones.

10. Then there are difficulties of a more general nature. In an oft-cited remark, it was said that 'doubtful issues have to be resolved and the law knows no better way of resolving them than by the

[4] Prosecution Appeal Brief, para. 102.
[5] AT. 1 April 2008, p. 88
[6] For example, *Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, in which a bare majority of three judges of the ICTY Appeals Chamber reversed the Appeals Chamber on the subject of cumulative convictions. See also the U.S. Supreme Court case of *Roper v. Simmons*, 543 U.S. 551 (2005), reversing an earlier U.S. Supreme Court case,

considered majority opinion of the ultimate tribunal'.[7] In particular, changes should not be made just because 'a differently constituted [bench] might be persuaded to take the view which its predecessors rejected'[8]. By contrast, it has been pointed out that, in the case of the Supreme Court of the United States, 'Overrulings of precedent rarely occur without a change in the Court's personnel'.[9] But there is truth in the general comment; certainly, nothing would prevent a third panel from restoring the original view. The thrust of the overall considerations goes against making a change in this case.

11. However, it is not always so clear that a departure is the result of a simple change of judicial personnel. Learned commentators, citing authorities, have observed that the restraint against changing the law is not 'absolute';[10] the 'fundamental'[11] importance of the principle involved has to be regarded. In the present case, it is difficult to describe the principle involved as anything but fundamental. Further, there is a view that reversal may be justified where the original decisions were made 'by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions',[12] as was the position in *Hadžihasanović*. These competing considerations go in favour of making a change in the statement of the law as laid down in that case.

12. An argument could also be made that, in declining to reverse *Hadžihasanović*, the Appeals Chamber will be requiring Trial Chambers to act on a basis considered incorrect by most members of the present bench of the Appeals Chamber and by the weight of judicial thinking in the ICTY. Accepting their want of authority to prevail, I observe that fourteen ICTY judges[13] (four of whom were at different times at the appellate level, with the remaining ten being at the trial level) have expressed judicial views contrary to the view of the majority in *Hadžihasanović*. It is true that other members of the Appeals Chamber may think differently; in addition, the majority view in *Hadžihasanović* has been acted on in other cases over these past five years. These considerations are important, but, in my view, they are not enough to neutralise the duty of the Appeals Chamber to state fundamental law correctly: there is no legislature to which the task can be left.

Stanford v. Kentucky, 492 U.S. 361 (1989), by holding the juvenile death penalty unconstitutional. Both the *Stanford* and *Roper* decisions were decided by 5-4 votes.

[7] *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes),* [1977] 3 All ER 996 at 999, per Lord Wilberforce.

[8] *Ibid.*

[9] *South Carolina v. Gathers*, 490 U.S. 805 (1989), 824, per Justice Scalia, dissenting.

[10] Rupert Cross and J.W.Harris, *Precedent in English Law*, 4th ed. (Oxford, 1994), 40.

[11] *Ibid.*

[12] *Payne v. Tennessee*, 501 U.S. 808 (1991), para. 19.

[13] The total of fourteen judges is arrived at by considering the three trial judges in *Kordić and Čerkez* (IT-95-14/2-T, Judgement, 26 February 2001); the three judges of the original trial bench in *Hadžihasanović* (IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002); the two dissenting judges in the *Hadžihasanović* Appeal Decision (IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003); the three trial judges in *Orić* (IT-03-68-T, Judgement, 30 June 2006); the three trial judges in *Hadžihasanović* (IT-01-47-T, Judgement, 15 March 2006), and Judge Liu's Partially Dissenting Opinion and Declaration to the current Judgement; less one for the reason that the same judge appeared in two of the cases.

13. Thus, the difficulties examined above can all be resolved in favour of reversing *Hadžihasanović* in accordance with the majority thinking in the present case. It would certainly seem contradictory to maintain the variant decision in the earlier case.[14] So I come to the remaining difficulty alluded to above: can a judge who dissented in *Hadžihasanović* now properly form part of a reversing majority?

14. A decision to reverse turns upon more than theoretical correctness; it turns upon larger principles concerning the maintenance of the jurisprudence, judicial security and predictability. Included in those principles is, I believe, a practice for a judge to observe restraint in upholding his own dissent. Thus, in *Queensland v. The Commonwealth*[15] Gibbs and Stephen, JJ., declined to form, on the basis of their previous dissents, a majority with a newly composed bench of the High Court of Australia. I do not assert that a dissenting judge can never form part of a subsequent majority upholding his earlier dissent, but I think that the preferred lesson of the cases is that he is expected to do so with economy.[16]

15. Since I was one of the two dissenting judges in the earlier case (the other has since demitted office in the ICTY), I consider that, in the circumstances of the present case, a reversal should await such time when a more solid majority shares the views of those two judges. Meanwhile, the decision in *Hadžihasanović* continues to stand as part of the law of the Tribunal.

B. The minority in *Hadžihasanović* did not assert that customary international law could be expanded by the Tribunal

16. The second point concerns the reasoning of the minority in *Hadžihasanović*; I intend not to develop that reasoning but only to clarify one aspect of it, in case there is doubt. This is that the minority did not assert that the Tribunal was competent to change customary international law, as it may be supposed they did. The position was that the majority thought that customary international law did not cover the case. It took the view that there was no relevant state practice and *opinio juris;* there was no record of a commander being held liable for failure to punish his subordinate for a crime committed by the subordinate before the commander assumed duty. The minority thought that a new factual situation could be cognisable by an established principle of customary international law even if that principle was not previously used to cover a like situation, and that this applied in the particular case.

[14] Justice Scalia likewise protested: 'I would think it a violation of my oath to adhere to what I consider a plainly unjustified' error. See *South Carolina v. Gathers*, 490 U.S. 805 (1989), 825.
[15] (1977) 139 CLR 585; see in particular Stephen J., at p. 603, para. 6.
[16] See generally Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia', 27 (2003) *Melbourne University Law Review*, 724.

17. In this respect, what the minority relied on was a view, unanimously[17] expressed by the Appeals Chamber in *Hadžihasanović* itself, that 'where a principle can be shown to have been established [as customary international law], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'.[18] That view has been followed: in *Karemera,*[19] Trial Chamber III of the ICTR correctly opined 'that this is a well-established approach in international law'. The minority fully recognised that the Tribunal had no power to expand customary international law; the recognition was explicit.[20] What it thought was that the principle of command responsibility, well established in customary international law, reasonably covered the particular case, even if it had never before been applied to facts corresponding to those of that case.

C. The nature of the criminal liability of the commander

18. The third point concerns an argument about the nature of the criminal liability of a commander.[21] Is the commander being punished for failing in his duty to exercise proper control over his subordinate? Or, is the commander being punished for participating in the crime actually committed by his subordinate? Several commentators (perhaps the majority) agree with the latter view; so does the prosecution.[22] The issue was argued on appeal in this case. However, as a result of the Appeals Chamber's reversal of Mr Orić's convictions under article 7(3) of the Statute on other grounds, a determination of the issue became unnecessary. Considering that the issue is nonetheless an important one, I offer the following view.

19. On accepted principles of criminal responsibility, the commander could only be punished for the actual crime committed by his subordinate if the commander himself participated in the commission of the crime. Consequently, in *Krnojelac* the Appeals Chamber of the ICTY expressed this view:

> It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.[23]

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[17] On the particular point, the decision was unanimous, although on some matters there were dissenting opinions.
[18] *Hadžihasanović,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.
[19] *Karemera*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, para. 37.
[20] See Partial Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović,* para. 9, stating that '[t]here is no question of the Tribunal having power to change customary international law'. See also, *ibid.*, paras 10 and 39; and see Separate and Partially Dissenting Opinion of Judge David Hunt on Command Responsibility in the same case.
[21] Paragraphs 163 *et seq.* of the judgement of the Appeals Chamber in this case.
[22] See Prosecution Appeal Brief, paras 152-204.
[23] *Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 171.

20. Interesting attempts might be made to distinguish that case, but the view expressed was a studied, deliberate and unanimous one. The rigidities associated in some domestic jurisdictions with the concept of *ratio decidendi* do not extend to international law[24]: the question is whether the view expressed by the court was a careful one with some reasonable connection with the circumstances of the case, and not simply an academic one bearing no such connection. On this basis, I do not consider that the view expressed in *Krnojelac* can be dismissed as 'a passing reference', as the prosecution proposes.[25]

21. Thus, the question has already been answered by the Appeals Chamber. However, assuming that it is still open, the opposing view cannot be right for the following reasons.

22. It is true that there have been cases holding that a commander, though not personally involved, is liable for the lawless acts of his troops as if they had been committed by him. However, as it was said by the United States Military Commission in *Yamashita*, 'It is absurd… to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape'.[26] The physical improbability of a commander being able to commit, say, a thousand rapes in a single day leads to the view that, when it is said that the commander is himself guilty of the crimes of his subordinates, what is meant is not that he himself personally committed the crimes but that the punishment for his crime of failing to control his subordinates should be measured by the punishment of his subordinates for the actual crimes committed by them. This may well lead to similarity of punishment, but similarity of punishment does not justify a transfer of actual criminal conduct from the subordinate to the superior.

23. The matter was put well by the *Halilović* Trial Chamber, when it said:

> Thus 'for the acts of his subordinates' as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.[27]

[24] See Judge Anzilotti's well-known statement in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow),* 1927, PCIJ, Series A, No. 13, p. 24; Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958), p. 61; and Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, Vol. III*, *Procedure* (The Hague, 1997), p. 1613.
[25] Prosecution Appeal Brief, para. 162.
[26] *Yamashita*, cited in Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford, 2008), 238. The passage goes on to notice that, nevertheless, a commander may in circumstances be held criminally liable for the lawless acts of his troops.
[27] IT-01-48-T, 16 November 2005, para. 54 (footnotes omitted).

The *Hadžihasanović* Trial Chamber agreed with that statement, adding that the commander 'will not be convicted for crimes committed by his subordinates but for failing in his obligation to prevent the crimes or punish the perpetrators'.[28] This finding was not disturbed on appeal.[29]

24. It is one thing to say that the punishment for a commander's non-compliance with his duty to control his subordinate has to correspond to the punishment of the subordinate for his crime; that is directed to the measure of punishment of the commander for his crime of failing to control, not to his participation in the crime of the subordinate. It is another thing to say that the commander is being punished for committing the subordinate's own crime; that is both untrue in fact and erroneous in law. In particular, it offends the governing principle that an accused is punishable for 'his criminal conduct, and only for his criminal conduct'.[30] That is the supreme principle not only of modern systems of domestic criminal law but also of international criminal law. The Appeals Chamber in *Krnojelac* had it right when it made the careful statement cited above, namely, that it 'cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'.[31]

25. As has been recognised, the language of several cases does suggest that the commander himself committed the crime of the subordinate. However, in my view, those cases are to be construed as resting on the basis that punishment for the actual crime committed by the subordinate is only the measure of punishment of the commander for his failure to control the subordinate. Considered in this way, those cases are correct. If they are not to be so construed and have as a result led to punishment of the commander for participating in the actual crimes committed by his subordinates, they have misrepresented the true meaning of the doctrine of command responsibility in international criminal law. Practitioners are familiar with the procedure of construing a case so as to reconcile it, if possible, with common sense. One should speak of a contradiction only where such a procedure fails to achieve harmony. I do not consider that there is a contradiction in this case, and so do not propose to express a view on the assumption that there is.

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[28] IT-01-47-T, 15 March 2006, para. 2075. A forceful, and learned, criticism of the dissenters' views in the Appeals Chamber's decision in *Hadžihasanović* states: 'In a command responsibility case, the commander is punished for his failure to control those under his command – not for participation in the crimes which they commit. Yet, the commander is punished not for a separate offence of failure to control, but for the actual offences committed by his subordinates'. See Christopher Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision', JICJ 2 (2004), 598–605, 599. I agree with the first sentence; the second sentence is difficult.

[29] *Hadžihasanović*, IT-01-47-A, Judgement, 16 July 2003, paras 312–318.

[30] See *Delalić ('Čelebići Case')*, IT-96-21-A, Judgement, 20 February 2001, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 27: 'The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct'. That has always been accepted by the Tribunal in practice.

[31] *Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 171.

26. As I have said, I appreciate that the Appeals Chamber has not found it necessary to express a view on the point, given that it reversed Mr Orić's convictions under article 7(3) of the Statute on other grounds. But the point was raised. If it was necessary to answer it, my own thinking would be as above.

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

Judge Mohamed Shahabuddeen

Dated this third day of July 2008
At The Hague, The Netherlands

[Seal of the International Tribunal]

VIII. PARTIALLY DISSENTING OPINION AND DECLARATION OF JUDGE LIU

1. I agree with the reasoning and verdict in the Appeal Judgement. I write this partially dissenting opinion to express my disagreement with the majority's finding that it is not appropriate to discuss the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction[1] in the present circumstances.[2] Contrary to the majority view in this case, the reasoning of the *Hadžihasanović* Appeal Decision on Jurisdiction should have been addressed in the present circumstances because i) it was properly pleaded and briefed by the parties; ii) it is a matter of general significance to this International Tribunal's jurisprudence; iii) the Appeals Chamber as an appellate court, has the obligation to correct its own errors as soon as cogent reasons in the interests of justice are identified; and iv) because it would not affect the verdict, no prejudice would be caused to any party deprived of the right to appeal the Appeals Chamber's decision.

2. Furthermore, I append a declaration to express my disagreement with the holding of the *Hadžihasanović* Appeal Decision on Jurisdiction that a superior can only incur criminal responsibility if the underlying crimes were committed at a time the accused had effective control over the direct perpetrators. In my view, there need not be a temporal concurrence between the commission of the crime forming the basis of the charge and the existence of the superior-subordinate relationship between the accused and physical perpetrator. Instead, such concurrence should be between the time at which the commander exercised effective control over the perpetrator and the time at which the commander is said to have failed to exercise his powers to punish.

A. The procedural basis for addressing the error of law in the Judgement

3. While this legal issue would not have had an impact on the verdict in this particular case,[3] it should have been addressed by the Appeals Chamber in the present Judgement as a question of law raised by a party as part of his ground of appeal. This would seem to be the logical consequence of the application by the majority in this case of the standard of review spelt out in the present

[1] *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction"), para. 51, in which the Appeals Chamber considered whether Amir Kubura, who was an acting commander in the army of Bosnia and Herzegovina, could be charged with command responsibility in connection with offences committed or started more than two months before he became the commander of the troops on 1 April 1993.

[2] Appeal Judgement, para. 167: "The Appeals Chamber, Judge Liu and Judge Schomburg dissenting, declines to address the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction, which, in light of the conclusion in the previous paragraph, could not have an impact on the outcome of the present case."

[3] In this regard, I note the Appeals Chamber's finding that the only member of the Military police identified as possibly having committed crimes in the detention facility was Mirzet Halilović who was never found to be Orić's subordinate: Appeal Judgement, para. 169. In the present case, the Prosecution argued on appeal that the Trial Chamber erred in

Judgement, according to which "[w]here the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal interpretation and review the relevant factual findings of the Trial Chamber accordingly."[4] Even though the Prosecution's ground of appeal was ultimately dismissed, in order to give full consideration of the Prosecution's argument, the Appeals Chamber should have addressed and corrected the relevant law prior to dismissing the entire ground on the facts. This is even more so in that, as part of this ground of appeal, the Prosecution argued that there are cogent reasons in the interests of justice to depart from the legal standard articulated in the *Hadžihasanović* Appeal Decision on Jurisdiction.[5] The value of addressing the law on this point is further demonstrated by the Trial Chamber in this case which applied the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction with some reluctance in the Trial Judgement under consideration.[6] By keeping silent about the applicable law, despite a challenge to it by a party and an express difference of opinion by the Trial Chamber, the Appeals Chamber gives the impression not only that it considers such challenge unfounded or that it disagrees with the challenge, but the Appeals Chamber also avoids its responsibility to address legal challenges to its own decisions.

4. Alternatively, the Appeals Chamber should have addressed the *Hadžihasanović* Appeal Decision on Jurisdiction as a matter of general significance to the International Tribunal's jurisprudence. As stated in the Standard of Review section of this present Judgement, the Appeals Chamber may "also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence."[7] This principle has consistently been observed by Appeals Chambers which have explained that they may consider legal issues that are of general significance to the International Tribunal's jurisprudence, even if they do not affect the verdict, so long as they have a *nexus* with the case at hand, and that such determinations are of general significance to this International Tribunal's jurisprudence and to the overall development of international criminal law.[8]

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finding that Orić had no legal obligation to punish crimes committed before he had effective control: Prosecution Notice of Appeal, paras. 14 and 15.

[4] Appeal Judgement, para. 9.

[5] Prosecution Appeal Brief, paras. 105-108.

[6] *See infra* para. 4.

[7] Appeal Judgement, para. 7.

[8] This corrective function of the Appeals Chamber has been carried out on a number of occasions. *See Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3: "CONSIDERING that although the principal mandate of the Appeals Chamber is to consider legal errors invalidating the Trial Chamber's Judgement or factual errors occasioning a miscarriage of justice, it has repeatedly held that it may also consider legal issues that are 'of general significance to the Tribunal's jurisprudence,' even if they do not affect the verdict, so long as they have a 'nexus with the case at hand' and that such determinations do not constitute impermissible 'advisory opinions', but are instead necessary means of moving forward this ad hoc International Tribunal's jurisprudence within the limited time in which it operates and contributing meaningfully to the overall development of international criminal law" (footnotes omitted); in *Stakić* Appeal Judgement, para. 59, the Appeals

5. The exceptional nature and general significance of the question whether a commander can be held responsible under Article 7(3) of the Statute for failing to punish the crimes of which he had knowledge, but were perpetrated before he assumed command is undoubtledy of fundamental importance to our jurisprudence.[9] The failure to correct an erroneous decision relating to the scope of command responsibility will only serve to generate uncertainty, and cause confusion in the determination of the law by parties to cases before the International Tribunal.

6. Furthermore, there is a strong *nexus* between the *Hadžihasanović* Appeal Decision on Jurisdiction and this case. Firstly, as stated above, not only was this decision mentioned and criticised in the Trial Judgement, but it was applied by the Trial Chamber to the present case. Secondly, the Prosecution properly challenged it in its notice of appeal,[10] and made detailed arguments concerning whether it is the correct legal principle, to which arguments the Defence responded.[11] These circumstances not only warrant a reasoned decision on this point, but provide more than a sufficient *nexus* to allow the Appeals Chamber to address the *Hadžihasanović* Appeal Decision on Jurisdiction.

7. Moreover, in practice, the Trial Chambers have correctly respected the decision, but repeatedly expressed their dissatisfaction and reluctance to apply the legal principle in the *Hadžihasanović* Appeal Decision on Jurisdiction. For example, in the *Hadžihasanović* Trial Judgement, the Trial Chamber quite subtly considered that "the reasons given by the dissenting Judges merit further examination", supporting the pragmatic consideration set out by Judge Shahabuddeen in his partially dissenting opinion.[12] In the present case, the Trial Chamber explained in the Trial Judgement, that,

> […] a superior's duty to punish is not derived from a failure to prevent the crime, but rather is a subsidiary duty of its own. The cohesive interlinking of preventing and punishing would be disrupted if the latter were made dependent on the superior's control at the time of commission of

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Chamber considered that "[n]either party has appealed the Trial Chamber's application of this mode of liability. However, the question of whether the mode of liability developed and applied by the Trial Chamber is within the jurisdiction of this Tribunal is an issue of general importance warranting the scrutiny of the Appeals Chamber *proprio motu*."

[9] To date, many Judges of this International Tribunal have expressed views different from the three Judges in the Majority in the *Hadžihasanović* Appeal Decision on Jurisdiction. These are the two Judges in the *Hadžihasanović* Appeal Decision on Jurisdiction, the three Judges in *Orić* Trial Judgement, the three in the *Hadžihasanović* Trial Chamber Decision on Jurisdiction, the three in the *Hadžihasanović and Kubura* Trial Judgement, three in the *Kordić and Čerkez* Trial Judgement and myself in the present case. Former Judge of this International Tribunal, Antonio Cassese has also disagreed with this decision, opining that "[i]t does not matter at all whether the crimes were perpetrated when [a commander] was in control of the troops prior to that date: this circumstance is immaterial to the fulfilment of the obligation": Antonio Cassese, *International Criminal Law*, Oxford University Press, 2nd Ed.,2008, p. 246. All these views indicate that it is indeed a matter of great importance to the jurisprudence of this International Tribunal that should not be avoided.

[10] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 105-118; Orić Response Brief, paras. 402-411.

[11] Prosecution Appeal Brief, paras. 102-119.

[12] *Hadžihasanović and Kubura* Trial Judgement, para. 199.

> the crimes. *Consequently, for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime.* Since the Appeals Chamber, however, has taken a different view [in the *Hadžihasanović* Appeal Decision on Jurisdiction] for reasons which will not be questioned here, the Trial Chamber finds itself bound to require that with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken.[13]

These factors show that this issue is of general significance to the jurisprudence of this International Tribunal and thus falls into the category of those exceptional circumstances in which the Appeals should, in light of the various cogent arguments put forward, step in and correct the law.

8. In addition, the Appeals Chamber as an appellate Court has the obligation to correct its own errors as soon as cogent reasons in the interests of justice are identified. While it is the appeals Chamber which created this highly questionable precedent, judicial integrity requires its revision once material errors in its reasoning have been identified. The Appeals Chamber is the only Chamber with jurisdiction to correct its errors once cogent reasons in the interests of justice are identified. For the International Tribunal to effectively function, the Appeals Chamber must be willing to revisit its own previous decisions and correct them where circumstances so require. Until then, the Trial Chambers, which according to the jurisprudence of this International Tribunal are bound to follow the decisions of the Appeals Chamber, have to apply the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction. To avoid any uncertainty and ensure respect for the correct principles of international law, the Appeals Chamber must intervene to assess whether the limits to command responsibility applied by the *Hadžihasanović* Appeal Decision on Jurisdiction are indeed customary international law.

9. Lastly, the Appeals Chamber should have addressed this question because it concerns a challenge to an existing decision of the Appeals Chamber, the outcome of which does not affect the verdict. In fact, having established the existence of a *nexus* with this case, this is the most favourable situation in which the Appeals Chamber can revisit this issue. My reasoning is twofold: (a) because there has been an error of law by the Appeals Chamber, an accused who is convicted for failing to punish his subordinates for any crimes committed before he assumed command cannot argue that he was prejudiced by the Appeals Chamber's misdirection and that he did not vigorously defend against a conviction at trial as a result; and (b) in these circumstances neither party can claim that he was deprived of his right to appeal since the "correction" was made on appeal.

10. It is for these reasons that I feel obligated to express my views on this legal issue in the present Judgement.

[13] Trial Judgement, para. 335 (emphasis added and internal footnotes omitted).

B. Whether cogent reasons in the interests of justice require a departure from the *Hadžihasanović* Appeal Decision on Jurisdiction

11. I recall that Appeals Chambers are bound, according to the *stare decisis* principle, to follow their previous decisions and that they may only depart from previous decisions of the Appeals Chamber on the basis of cogent reasons in the interests of justice.[14] Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[15] In my examination below, I will give careful consideration to the authorities and the law cited by the majority in the *Hadžihasanović* Appeal Decision on Jurisdiction ("Majority").

12. As a starting point, in reaching the conclusion that a superior can only incur criminal responsibility if the underlying crimes were committed at the time that the accused had assumed command over the direct perpetrators, the Majority held that, "no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate."[16] It added that in fact there are indications that militate against the existence of a customary rule establishing such criminal responsibility.[17]

13. According to the Majority, the facts militating against command responsibility for crimes committed before the assumption of command over the direct perpetrators were: i) the First Protocol Additional to the Geneva Conventions of 12 August 1949 ("Additional Protocol I"), particularly Article 86(2) thereof which does not include within its scope breaches committed before a commander assumed command over the perpetrator;[18] ii) the Report of the International Law Commission on the work of its forty-eighth session and the *Čelebići* Appeal Judgement which indicated that command responsibility is based on Article 86 only (rather than Article 87);[19] iii) Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session ("Draft Code") which clearly excludes crimes committed by a subordinate prior to his superior's assumption of command;[20] and iv) Article

[14] *Aleksovski* Appeal Judgement, paras. 110, 111 and 125.
[15] *Aleksovski* Appeal Judgement, para. 108.
[16] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 45.
[17] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 46.
[18] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 47.
[19] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 48.
[20] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 49. Report of the International Law Commission (6 May-26 July 1996), UNGA, Official Records, Forty-eighth Session, Supplement No. 10 (A/51/10) ("Report of the International Law Commission"). The Majority also cited the *Kuntze* Case before the Nurenberg Military International Tribunals.

28 of the Rome Statute of the International Criminal Court ("ICC Statute") as its language excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate.[21] Because the findings on each of the above-mentioned sources are interlinked, I will address each of these together below.

14. The best starting point for ascertaining the state of customary law in force at the time the crimes were committed is Additional Protocol I. Articles 86 and 87 provide respectively:

> **Article 86. Failure to act**
>
> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal 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.
>
> **Article 87. Duty of commanders**
>
> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

15. In attempting to ascertain the state of customary law in force at the time the crimes were committed, the Majority, citing the Report of the International Law Commission, held that command responsibility is elaborated in Article 86 of Additional Protocol I. Referring to the *Čelebići* Appeal Judgement, it also pointed out that the "criminal offence based on command responsibility is defined in Article 86(2) only", while "Article 87 speaks of obligations of States Parties".[22] Accordingly, it found that Article 86(2) supported its finding that command responsibility "envisions a situation in which a breach was in the process of being committed, or

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Given my position regarding the Partially Dissenting Opinion of Judge Shahabuddeen, 16 July 2003 ("Dissenting Opinion of Judge Shahabuddeen") and Separate and Partial Dissenting Opinion of Judge David Hunt, 16 July 2003 ("Dissenting Opinion of Judge Hunt") on the case law (at paras. 15-19 and 2-7 respectively), I will not address this point.

[21] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 46.

[22] *Hadžihasanović* Appeal Decision on Jurisdiction, paras. 48 and 53.

was going to be committed" and that "breaches committed before the superior assumed command over the perpetrator are not included within its scope".[23]

16. The Majority's interpretation of these articles is inconsistent with a plain reading of Articles 86 and 87 which shows that they are complimentary to one another, and as I will explain in further detail below, should be read in conjunction with one another. Article 87(3) expounds on the obligations provided in Article 86 and clearly provides that commanders who are aware that subordinates or other persons under their control "are going to commit or have committed" a breach shall be required to take steps, thus encompassing crimes already committed by their subordinates.

17. The Majority's conclusion that Article 87 deals instead with the obligations of States is misplaced.[24] First, I note that the Majority fails to explain why it concludes that Article 87 deals with States' obligations while Article 86 does not. Secondly, not only does the heading of Article 87 clearly reflect that it concerns the "Duty of Commanders", but the sub-articles actually specify the duties of the commanders. While I note that the phrase "High Contracting Parties and the Parties to the conflict" may cause some confusion, both Articles 86 and 87 contain this phrase. Even if Article 87 related to the obligations of States, the imperative tone of this article shows that commanders in their respective states would have been required by their States to initiate steps against subordinates who have breached Additional Protocol I, and as such provides evidence in support of state practice.

18. Moreover, the Majority's clear misdirection appears in the Report of the International Law Commission. Although the Report of the International Law Commission was cited by the Majority in support of its ultimate conclusion that "Article 87 speaks of obligations of States Parties", the statement that "[command responsibility] is elaborated in article 86 of [Additional] Protocol I" was taken out of context. In fact, read in full, the rest of the report declared in plain terms that, "[t]he duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of Additional Protocol I".[25]

19. I also note that the Majority in support of its conclusion cited the *Čelebići* Appeal Judgement's holding that the "criminal offence based on command responsibility is defined in Article 86(2) only".[26] This quotation was also taken out of context and does not in actual fact support the Majority's conclusion. The entire sentence in the *Čelebići* Appeal Judgement actually read, "Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior

[23] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 47.
[24] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 53.
[25] Report of the International Law Commission, p. 36.
[26] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 48.

are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only",[27] thus indicating that Article 87 is relevant for the purpose of interpreting command responsibility under Article 86(2).

20. In addition, in the practice of this International Tribunal, Article 87 has been relied upon in interpreting command responsibility, not the obligations of States. In *Blaškić,* Article 87 was relied upon as showing that command responsibility is ascribed to a commander who fails to punish his subordinates who committed crimes, and it was found that "it demonstrates even more clearly and specifically that, according to the Protocol, any failure to punish an offence is grounds for command responsibility."[28] In *Čelebići*, the Trial Chamber held, "[a]s is most clearly evidenced in the case of military commanders by article 87 of Additional Protocol I, international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute."[29]

21. There is also no authority or indication that Article 86 should be read in isolation. To the contrary, the commentary of the International Committee of the Red Cross on the Additional Protocols, clearly provides that, "[t]his provision, which should be read in conjunction with paragraph 1 of Article 87, which lays down the duties of commanders, raises a number of difficult questions."[30] The jurisprudence of this International Tribunal has also frequently read Article 87 in conjunction with Article 86. In *Čelebići*, the Appeals Chamber read Articles 86 and 87 in conjunction to find that the term "'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control."[31] Similarly, in *Blaškić,* the Appeals Chamber recognised that "the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I."[32]

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[27] *Čelebići* Appeal Judgement, para. 237.
[28] *Prosecutor v. Blaškić,* Case No. IT-95-14-PT, Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging "Failure to Punish" Liability, 21 April 1997, para. 12. Similarly, in the *Blagojević and Jokić* Trial Judgement, para. 822, the Trial Chamber said that Article 87 is "the provision upon which Article 7(3) of the Tribunal's Statute is largely modelled."
[29] *Čelebići* Trial Judgement, para. 334.
[30] Yves Sandoz, Christoph Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987 ("ICRC Commentary on the Additional Protocols"), para. 3541.
[31] *Čelebići* Appeal Judgement, para. 195, states: "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature. In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that 'it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control', the Trial Chamber properly considered the issue in finding the applicable law." (Footnote omitted).
[32] *Blaškić* Appeal Judgement, para. 69.

22. Next, whilst I do not dispute the authoritative nature of the Draft Code, the Majority's reliance on it to ascertain the state of customary law in force at the time the crimes were committed was misguided as regards command responsibility. As noted by the Appeals Chamber in the *Krstić* Appeal Judgement, "[t]he Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission […] is not binding as a matter of international law, but is an authoritative instrument, parts of which may constitute evidence of customary international law, clarify customary rules, or, at the very least, 'be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.'"[33] Thus, it is not in every instance that it will evidence customary international law.

23. Furthermore, the Report of the International Law Commission as evidencing customary international law is doubtful and may indeed be "an unfortunate error in drafting".[34] The International Law Commission's Special Rapporteur's Commentary ("Special Rapporteur's Commentary") illustrates this point. The relevant portion of the Special Rapporteur's Commentary states that, "[a]n individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act and the failure to perform this obligation results in a crime. *The duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of [Additional] Protocol I.* This article recognizes that a military commander has a duty to prevent and to suppress violations of international humanitarian law committed by his subordinates."[35] Although the Special Rapporteur's Commentary points out that the duty of commanders is set forth in Article 87 of Additional Protocol I, the text of the Report of the International Law Commission only echoes Article 86, thereby indicating an inconsistency between the source and the actual text.

24. Another indication of an error in drafting can be gleaned from the Report of the International Law Commission itself. It states that the text of Article 6 of the Draft Code is based on Additional Protocol I and the Statutes of the former Yugoslavia and Rwanda International Tribunals.[36] However, all of the afore-mentioned sources specifically make reference to a subordinate who was "about to commit such acts or had done so", while Article 6 of the Draft Code does not make such reference. Having been founded on the above authorities, the unexplained distinction between the text of the Draft Code and that of the sources on which it is allegedly based further demonstrates an error in the Draft Code, rather than evidence of *opinio juris* on this point. Therefore the Majority's reliance on Article 6 of the Draft Code was misplaced.

[33] *Krstić* Appeal Judgement, fn. 20.
[34] Carol T. Fox, Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences, 55 *Case Western Reserve Law Review* 2004, No. 2, p. 468.
[35] Special Rapporteur's Commentary, p. 25 (emphasis added).
[36] Report of the International Law Commission, pp. 25-26.

25. Unfortunately, next, the Majority relied on the text of Article 28 of the ICC Statute which also seems to echo the errors in the Report of the International Law Commission. The relevant part of Article 28 states that a commander exercising effective control and having the requisite knowledge would be held responsible where his subordinates "were committing or about to commit such crimes". The obvious problem with relying on the ICC Statute is that it is different from this International Tribunal's Statute, together with that of the ICTR and Article 87 of Additional Protocol I, and consequently with customary international law, as it seems to only cover "present" and "future crimes", rather than "past crimes".[37] It suggests that the commander's knowledge must be attained at the time the subordinate committed the crime. Therefore, situations where the superior learnt of the subordinate's crime only after its commission and then failed to report the matter to the relevant authorities would seem not to be covered by Article 28 of the ICC Statute, even where a crime was committed by the subordinate after the commander had assumed effective control. This interpretation, is not persuasive in view of the jurisprudence of this International Tribunal according to which the duty to punish arises after the superior acquires knowledge of the commission of the crime.[38] Therefore this text should not have been taken as indicative of customary international law on this subject.

26. Additionally, as previously noted by Judge Shahabuddeen, the texts of the Draft Code and Article 28 of the ICC Statute were adopted subsequent to that of the Statute of this International Tribunal and that of the ICTR. Because customary international law has to be assessed as of the date of commission of the offences, the fact that these texts were adopted subsequent to these dates, further limits their weight and usefulness as sources of customary international law at the time the crimes were committed.[39]

27. Finally, I also note the thorough and exhaustive analysis by Judges Hunt and Shahabuddeen on the case law on command responsibility and need not elaborate further, save to say that I agree with their views that the case law does not support the Majority's view.

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[37] In this regard, I further note that Article 6(3) of the Statute of the Special Court for Sierra Leone similarly provides "[t]he fact that any of the acts referred to in [A]rticles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts *or had done so* and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." (Emphasis added). While the Sierra Leone Tribunal was established after the date of commission of the offences in issue in the *Hadžihasanović* Appeal Decision on Jurisdiction, its Statute is consistent with the proposition that customary international law, unlike the ICC Statute, punishes commanders for "past crimes" of their subordinates.

[38] As Judge Shahabuddeen notes, the wording of Article 28(1)(a) of the ICC Statute would also "seem to exclude crimes of subordinates even if committed after the commencement of the commander's command where the commander knew, or should have known, of the commission of the crimes but only after they were committed": Dissenting Opinion of Judge Shahabuddeen, para. 20.

[39] Dissenting Opinion of Judge Shahabuddeen, para. 21.

28. For the above reasons, the Majority's error in the interpretation of Articles 86 and 87 of Additional Protocol I, and in according too much weight to Article 28 of the ICC Statute and International Law Commission's documents as evidence of customary international law thus represents a cogent reason to depart from the finding in the *Hadžihasanović* Appeal Decision on Jurisdiction. As a result, the Majority placed too little weight on relevant sources such as Article 7(3) of the Statute and Article 87 of Additional Protocol I, and undue weight on immaterial considerations.

C. Whether customary international law supports a finding of responsibility of commanders for crimes committed before they assumed command

29. Finally, there are indeed indications that support the existence of a customary rule establishing criminal responsibility of commanders for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate. As a starting point, a plain reading of the Statute and an analysis of the objects and purpose of Article 7(3) responsibility shows that a commander can be held responsible for failing to punish crimes committed before he assumed command. In this respect, I recall the provisions of Article 7(3) of the ICTY Statute and its corresponding article in the ICTR Statute:

> The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts *or had done so* and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[40]

Therefore the plain and ordinary meaning of this provision shows that Article 7(3) entails two distinct obligations for commanders, who have to take necessary and reasonable measures to (a) prevent such acts and (b) punish the perpetrators thereof. Therefore, according to a plain reading of the Statute, which does not distinguish between crimes committed before and after assumption of duties, a commander exercising effective control with the requisite knowledge can indeed be held liable solely for failing to punish his subordinates for crimes they committed before he assumed office.[41]

30. As recalled by the dissenting opinions in the *Hadžihasanović* Appeal Decision on Jurisdiction, the purpose behind the concept of command responsibility is to ensure compliance

[40] Article 7(3) of the ICTY Statute (emphasis added). The equivalent Article 6(3) in the ICTR Statute, refers in its first sentence to acts referred to in Articles 2 to 4 of its Statute.
[41] This approach is consistent with Article 31 of the Vienna Convention on the Law of Treaties which provides that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

with the laws and customs of war and international humanitarian law generally.[42] The principle of command responsibility may be seen in part to arise from one of the basic principles of international humanitarian law aiming at ensuring protection for protected categories of persons and objects during armed conflicts,[43] and this protection is at the very heart of international humanitarian law.[44] The Majority's restrictive view to a certain extent defeats this objective and may have far-reaching consequences in international humanitarian law. It sends the signal that commanders are allowed to escape their responsibility to punish their subordinates for crimes they committed before they assumed office. Its creation of a new defence does indeed create what Judge Hunt referred to as a "gaping hole" in the protection provided by international humanitarian law.[45] I therefore agree with the dissenting opinions of Judges Shahabuddeen and Hunt on this issue.

31. The jurisprudence of this International Tribunal has consistently recognised that Article 7(3) of the Statute is based upon the duty of superiors to act, which obligation consists of a separate duty to prevent and a duty to punish the criminal acts of their subordinates.[46] Simply put, the elements of command responsibility are derived from the duties comprised in responsible command,[47] and those duties are generally enforced through command responsibility. There is also authority indicating that it is the "failure to act when under a duty to do so" which is the essence of this form of responsibility.[48] When a commander assumes his duties, he does not only take over the rights and privileges of his predecessor, but also his duties or obligations. A commander who possesses effective control over the actions of his subordinates, having the requisite knowledge, is duty bound to ensure that they act within the dictates of international humanitarian law and that the laws and

[42] Dissenting Opinion of Judge Shahabuddeen, para. 39 and Dissenting Opinion of Judge Hunt, para. 40; *Obrenović* Sentencing Judgement, para. 100; and *Prosecutor v. Hadžihasanović et. al.* Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 ("*Hadžihasanović* Trial Decision on Jurisdiction"), para. 66. Command responsibility also avoids situations in which troops may interpret any inaction by a superior as an implicit approval of their conduct: *See* Antonio Cassese, *ibid* footnote 7.

[43] *Halilović* Trial Judgement, para. 55; *Obrenović* Sentencing Judgement, para. 100.

[44] *See also* J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005, Vol. I, Introduction, p. XXV; and F. Kalshoven and L. Zegveld, *Constraints on the Waging of War*, 3rd ed, ICRC 2001, pp. 53-54.

[45] Dissenting Opinion of Judge Hunt, para. 22.

[46] *Halilović* Trial Judgement, para. 38; *See* for example *Čelebići* Trial Judgement, para. 334. This was also acknowledged by the Majority in *Hadžihasanović* Appeal Decision on Jurisdiction when it held at para. 55 that, "[a]lthough the duty to prevent and the duty to punish are separable, each is coterminous with the commander's tenure."

[47] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 22. For many years the responsibility of commanders for the conduct of their troops has been recognised in domestic jurisdictions. The concept of responsible command can be seen in the earliest modern codifications of the laws of war. It was incorporated in the 1899 Hague Convention with Respect to the Laws and Customs of War on Land. It was also reproduced in Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 which states: "[t]he Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention."

[48] Article 86 of Additional Protocol I entitled "Failure to act", in para. 1 imposes responsibility for grave breaches which result from a "failure to act when under a duty to do so". ICRC Commentary on the Additional Protocols, para. 3537, states with regards to Article 86 of Additional Protocol I, that "responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so". Similarly the Trial Chamber in the

customs of war are therefore respected. There is thus no justification for the distinction made before and after assumption of office by a commander.

32. Further, the nature of command responsibility does not support a distinction before and after a commander assumes command. The jurisprudence has recognised that causation is not a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates.[49] I recall that it has been held that, requiring a causal link "would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require the involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3)."[50] Thus, if it is not necessary that the commander's failure to act caused the commission of the crime, and the essence of the commander's responsibility is his failure to punish under the second leg of Article 7(3), there clearly is no basis for the distinction advocated by the *Hadžihasanović* Appeal Decision on Jurisdiction.

33. For the foregoing reasons, because a framework already exists indicating a customary rule allowing a commander to be held responsible for his failure to punish crimes committed before his assumption of command over the subordinates, it is thus not necessary to identify a specific customary rule on this point. It is therefore clear that the Majority in the *Hadžihasanović* Appeal Decision on Jurisdiction committed an error of law in its reasoning.

34. It is for this reason that I append this Partially Dissenting Opinion and Declaration.

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

Judge Liu Daqun

Dated this third day of July 2008
At The Hague, The Netherlands

[Seal of the International Tribunal]

Čelebići case noted "criminal responsibility for omissions is incurred only where there exists a legal obligation to act": *Čelebići* Trial Judgement, para. 334, fn. 345.
[49] *Blaškić* Appeal Judgement, para. 77.
[50] *Halilović* Trial Judgement, para. 78.

IX. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

1. I support the Judgement of the Appeals Chamber, in particular its Disposition. However, I feel compelled to write separately since the Appeals Chamber fails to discuss the validity of the *ratio decidendi* of its decision in *Prosecutor v. Enver Hadžihasanović et al.*,[1] which is challenged by the Prosecution in this appeal. In particular, I dissent from the majority's decision not to address this issue[2] – although it was squarely before the Appeals Chamber – because it conveys the wrong impression that the Appeals Chamber tacitly endorses its decision in *Hadžihasanović*.

2. I note that the question of whether a superior is indeed under an obligation to punish crimes committed by his subordinates before he assumed command is not relevant in the instant case as it does not have an impact on the validity of the Trial Judgement.[3] However, in accordance with its usual systematic approach, the Appeals Chamber was required first to set out the applicable law before subsuming the underlying facts. Indeed, there are exceptional circumstances warranting that this legal issue of great significance to the jurisprudence of the International Tribunal is properly addressed.[4] Furthermore, the *Hadžihasanović* Appeal Decision on Jurisdiction's arbitrary limitation of the concept of superior responsibility to crimes committed by subordinates after the superior assumed control does not reflect customary international law. Consequently, there are cogent reasons for the Appeals Chamber to depart[5] as soon as possible from a jurisprudence that is legally not justifiable and goes directly against the mandate of the International Tribunal and the spirit of its Statute, *i.e.* to implement effectively accountability for crimes forming part of international customary law.

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[1] *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction").
[2] *See* Judgement, para. 167.
[3] *See* Judgement, paras. 7 and 167 and provided that one cannot regard, going even one step further, the knowledge of a crime committed by a person holding subordinate rank in a former hierarchy (but not necessarily under the present superior) as the decisive factor triggering the duty to report, under the Statute of this International Tribunal. *See* further *infra* note 60.
[4] *See* Judgement, para. 7.
[5] *See Aleksovski* Appeal Judgement, paras. 107-109.

B. The Separate Opinion: whether a superior incurs criminal responsibility for failing to initiate action against subordinates for alleged violations of international humanitarian law

1. The obligation of the Appeals Chamber to set out the applicable law

3. In its appeal, the Prosecution has challenged the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction.[6] The Appeals Chamber was thus required – before addressing the factual issues – to ascertain the law on the issue in question, as it usually does. This also conforms to an appeals chamber's function "to clarify legal issues, to provide guidance where appropriate to Trial Chambers […] in the interest of the parties as well as in the interests of justice."[7]

4. Furthermore, even if abandoning such a systematic approach, the Appeals Chamber has the power to *proprio motu* consider any issue of general importance to the International Tribunal's jurisprudence regardless of whether it is addressed or challenged by either party.[8] The question of whether a superior is under an obligation to punish crimes committed by his subordinates before he assumed command, *i.e.* whether the Appeals Chamber should depart from its prior jurisprudence which has answered that question in the negative, is an issue of general importance warranting the renewed scrutiny of the Appeals Chamber.[9] In this context, I note that two different Trial Chambers – including the one in this case – have expressed their strong disagreement with the *Hadžihasanović* Appeal Decision on Jurisdiction.[10] Furthermore, the relevant issue of the *Hadžihasanović* Appeal Decision on Jurisdiction was decided by majority, with two remarkable and erudite Dissents, reversing a unanimous decision of a Trial Chamber.[11] Finally, in contrast to the proceedings in *e.g.* the *Stakić* case,[12] the Prosecution has

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[6] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 105 *et seq.*, referring *inter alia* to CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds, Cambridge, 2005) ("ICRC Study on Customary International Law") as well as to COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds, Geneva, 1987), paras. 3541 and 3543-3545.

[7] *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, Case No. SCSL-04-14-A, Partially Dissenting Opinion of Honourable Justice Renate Winter, para. 2.

[8] *Cf.* Judgement, para. 7. *Cf. Stakić* Appeal Judgement, para. 59.

[9] *See also* Partially Dissenting Opinion and Declaration of Judge Liu, appended to this Judgement, para. 7 with further references in fn. 8.

[10] Trial Judgement, para. 335; *Hadžihasanović and Kubura* Trial Judgement, paras. 198-199. *See also Kordić and Čerkez* Trial Judgement, para. 446: Rendered before the *Hadžihasanović* Appeal Decision on Jurisdiction, the Trial Chamber concluded that "[t]he duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish." *See also* Declaration of Judge Shahabuddeen, appended to this Judgement, para. 22 and fn. 13.

[11] *Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, Separate and Partially Dissenting Opinion of Judge David Hunt; *Prosecutor v. Enver Hadžihasanović et al.,* Case No. IT-01-

explicitly brought the matter before the Appeals Chamber.[13] In these circumstances, the Appeals Chamber was required to fulfill its key obligation of setting out the law, in particular to give guidance to Trial Chambers and the parties in pending cases and cases yet to be heard. Thus, the Appeals Chamber was obliged to address this legal issue on its merits. I therefore dissent from the Judgement insofar as the majority declined to do so.

2. The *Hadžihasanović* Appeal Decision on Jurisdiction

5. In the *Hadžihasanović* Appeal Decision on Jurisdiction, the Appeals Chamber confirmed the Trial Chamber's holding that there exists a duty under customary international law for superiors to prevent their subordinates from committing violations of international humanitarian law in both international and internal armed conflicts and to punish them if they have done so.[14]

6. In deciding upon the issue of whether a superior is responsible for crimes committed by his subordinates before he assumed effective control, the Appeals Chamber in *Hadžihasanović* considered "the state of customary law in force at the time the crimes were committed."[15] The Appeals Chamber held by majority[16] without further convincing reasoning that there was neither state practice nor *opinio iuris* affirming a superior's duty to punish crimes committed by his subordinates before he assumed command.[17] The Appeals Chamber *inter alia* referred to Article 28 of the Statute of the International Criminal Court (ICC)[18] and to Article 86 of Additional Protocol I to the Geneva Conventions[19] as "indications that militate against the existence of a customary rule establishing such criminal responsibility."[20] Furthermore, it made reference to the International Law Commission's Report on the work of its forty-eighth session (6 May-26 July 1996), and to Article 6 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.[21]

47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 ("*Hadžihasanović* Trial Decision on Jurisdiction").
[12] *See Stakić* Appeal Judgement, para. 59. I also note that in that case the *proprio motu* discussion of a fundamental legal issue by the Appeals Chamber did not affect the outcome of the case.
[13] *See supra* note 6.
[14] *Hadžihasanović* Appeal Decision on Jurisdiction, paras. 11 and 31.
[15] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 44.
[16] *See Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, Separate and Partially Dissenting Opinion of Judge David Hunt.
[17] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 45.
[18] Rome Statute of the International Criminal Court of 17 July 1998, 2187 U.N.T.S. 90 ("ICC Statute").
[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 U.N.T.S. 3 ("Additional Protocol I").
[20] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 46.
[21] *Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session*, U.N. Doc. A/51/10 (1996) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, Part Two (1996), p. 25.

3. Whether the Appeals Chamber's prior jurisprudence reflects international customary law

7. The holding in the *Hadžihasanović* Appeal Decision on Jurisdiction, limiting the International Tribunal's jurisdiction under Article 7(3) of the Statute to crimes committed by subordinates after the superior assumed command, is at odds with the object and purpose of international humanitarian law in general and does not reflect the state of customary international law in 1992 in particular.

8. First and foremost, the application of the principle of superior responsibility, enshrined in customary international law, includes the obligation of a commander to impose sanctions on subordinates who commit crimes, whether or not they committed the crimes before he assumes effective control, and assigns individual criminal responsibility for a violation of this obligation. In fact, not obliging commanders to hold subordinates accountable for alleged crimes in such a situation creates a gap not foreseen in international humanitarian law.[22] In this regard, the reasoning of the *Hadžihasanović* Appeal Decision on Jurisdiction is in itself contradictory.

9. Second, in arguing against a superior's criminal responsibility for not punishing crimes committed before he assumed his position, the Appeals Chamber in *Hadžihasanović* merged, without justification in law, the totally distinct and separate duties of a superior to prevent crimes of subordinates and to hold accountable those subordinates who have already committed crimes.

(a) The application of the principle of superior responsibility

10. Article 7(3) of the Statute of the International Tribunal reads as follows:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

11. The International Tribunal has jurisdiction only in relation to modes of liability which existed in customary international law at the time of the alleged crimes.[23] It is the settled jurisprudence of the International Tribunal that at least by the early 1990s command

[22] *See also Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 14, Separate and Partially Dissenting Opinion of Judge David Hunt, para. 22.
[23] *See Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 21. *See also Prosecutor v. Édouard Karemera et al.*, Case Nos. ICTR-08-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 12.

responsibility in the course of an internal armed conflict was part of customary international law.[24] It is also undisputed that the temporal time frame for the responsibility of superiors encompasses any acts committed by their subordinates from the moment when the superior has assumed command if he knew or had reason to know about them.

12. I have two preliminary remarks. First, having had the benefit of reading Judge Shahabuddeen's Declaration, appended to this Judgement, I fully concur with him that "where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control."[25] Second, I note that the words "to punish" in Article 7(3) of the Statute refer to the requirement that the superior must take all feasible measures to make his subordinate effectively accountable for crimes allegedly committed. In particular, I refer to the wording of Article 87(3) of Additional Protocol I, which prescribes the duty of commanders "to *initiate* disciplinary or penal action against violators [of the Geneva Conventions and Additional Protocol I]."[26] Thus, the "duty to punish" is primarily the duty to take the necessary and reasonable measures to trigger the action of another body, ideally the independent judiciary.[27]

13. With regard to the timeframe of superior responsibility, the wording of Article 7(3) of the Statute is clear: the phrasing "was about to commit such acts or had done so" expresses that a superior can be held responsible regardless of when the crimes were committed by his subordinate, *i.e.* before or after the superior assumed command. This reading is further supported by the Report of the Secretary-General,[28] approved by the Security Council when it established the International Tribunal,[29] which specifies the following:

> This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had

[24] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 31. *See also Hadžihasanović* Trial Decision on Jurisdiction, para. 179. I also note that it was never disputed that command responsibility in the course of an *international* armed conflict was part of international customary law, *see Hadžihasanović* Appeal Decision on Jurisdiction, para. 11, *Hadžihasanović* Trial Decision on Jurisdiction, paras. 17, 40, 167.
[25] Declaration of Judge Shahabuddeen, appended to this Judgement, para. 19, referring to *Krnojelac* Appeal Judgement, para. 171.
[26] Emphasis added.
[27] This is in line with the separation of powers in a democratic state. In this context I refer to Montesquieu who stated the following: "Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative & de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur." CHARLES-LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, ŒUVRE DE MONSIEUR DE MONTESQUIEU, TOME PREMIER, L'ESPRIT DES LOIX, LIVRE XI, CHAPITRE VI, p. 208 (Nouvelle Edition, à Londres, chez Nourse, M.DCC.LXVII). I further note that military commanders will usually only have the power to *initiate* an investigation: *see Kordić and Čerkez* Trial Judgement, para. 446, fn. 623.
[28] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (3 May 1993) ("Report of the Secretary-General").
[29] S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993).

> committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.30

However, the Appeals Chamber in *Hadžihasanović* decided by majority that there was no state practice and/or *opinio iuris* that would support this particular part of Article 7(3).[31] It held that the International Tribunal can impose criminal responsibility for crimes committed by a subordinate before the accused assumed command over that subordinate only "if the crime charged was *clearly* established under customary law at the time the events in issue occurred."[32]

14. This line of argument is contradictory to both the reasoning elsewhere in the *Hadžihasanović* Appeal Decision on Jurisdiction and the jurisprudence of the International Tribunal. Indeed, the Appeals Chamber in *Hadžihasanović* held that there is a fundamental principle of superior responsibility under customary international law and that criminal responsibility can arise from the failure to prevent or to punish crimes committed during an internal armed conflict.[33] It also stated that "where a principle can be shown to be […] established [under customary international law], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it *reasonably* falls within the application of the principle."[34] This approach has been followed in the jurisprudence of both the International Tribunal and the ICTR.[35]

15. The International Tribunal cannot expand customary international law.[36] However, given that it is established that there exists a general principle of individual criminal responsibility for superiors who fail a) to prevent or b) to punish crimes of their subordinates, the question to be answered is thus whether – when applying the principle – it is reasonable to assume that such

[30] Report of the Secretary-General, para. 56 (emphasis added).
[31] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 45.
[32] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 51 (emphasis added). I note that the issue at stake in the *Hadžihasanović* Appeal Decision on Jurisdiction and here is not related to a "crime" but to a mode of criminal liability.
[33] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 31.
[34] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 12 (emphasis added).
[35] *See Brdanin* Trial Judgement, para. 715. *See Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, para. 37. *See Prosecutor v. Édouard Karemera et al.*, Case Nos. ICTR-08-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, paras. 15-16. Therefore, there is no need to enter into a renewed detailed analysis of national law, such as military manuals or domestic legislation, as argued by the Prosecution when it referred to the ICRC Study on Customary International Law. *See* in this context the detailed discussion in the *Hadžihasanović* Trial Decision on Jurisdiction as regards the principle of superior responsibility with further references.
[36] *See also* Declaration of Judge Shahabuddeen, appended to this Judgement, paras. 16-17.

responsibility also arises from the failure to punish crimes committed before the superior assumed effective control.[37]

16. From the outset, one must give consideration to the purpose of a superior's obligation to effectively make his subordinates criminally accountable for breaches of the law of armed conflict. The rationale behind this duty is based on the need to promote and ensure compliance with the rules of international humanitarian law, which in turn aim at ensuring protection for certain protected categories of persons and objects during times of armed conflict, in particular the civilian population.[38] Therefore, any superior must do his utmost to ensure that his subordinates observe the rules of armed conflict. As regards an army, this can be effectively done in principle only by taking the necessary and reasonable measures to ensure the accountability of those individuals who allegedly have violated norms of international humanitarian law. Indeed, subordinates could perceive a superior's failure to take the necessary and reasonable measures to effectively punish violations as an approval of their actions.

17. Considering thus the purpose of superior responsibility, it is arbitrary – and contrary to the spirit of international humanitarian law – to require for a superior's individual criminal responsibility that the subordinate's conduct took place only when he was placed under the superior's effective control. Given the rapid succession of military commanders in armed conflicts, the result of such an interpretation would be to grant impunity to those who committed war crimes under a predecessor.[39] What is required of superiors is that they have to take the necessary and reasonable measures to initiate investigations and report any alleged violation of international humanitarian law which comes to their knowledge, regardless of when it occurred.

18. This analysis is also supported by the relevant norms of international humanitarian law. I note that one of the main arguments put forward by the Appeals Chamber in *Hadžihasanović* was that the language of Article 86(2) of Additional Protocol I does not support the existence of a commander's duty to punish crimes committed before the assumption of command.[40] Article 86(2) reads:

> 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

[37] *See also* in support of this approach: *Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 10, Separate and Partially Dissenting Opinion of Judge David Hunt, para. 10. *See also* Declaration of Judge Shahabuddeen, appended to this Judgement, para. 17.
[38] *See Blagojević and Jokić* Appeal Judgement, para. 281; *see Halilović* Trial Judgement, para. 39. *See also Hadžihasanović* Trial Decision on Jurisdiction, para. 66. *See* Article 43(1) of Additional Protocol I.
[39] *See Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 14.
[40] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 47.

> 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.

In furtherance of its reasoning, the Appeals Chamber in *Hadžihasanović* put emphasis on the phrase "in the circumstances at the time" in order to point out that an essential condition for triggering the "duty to punish" is the contemporaneousness of an existing superior-subordinate relationship and the actual commission of an offence.[41] Additionally, it referred to Article 28 of the ICC Statute and Article 6 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind because both norms also contain the phrase "in the circumstances at the time."[42]

19. However, in order to properly interpret the application of the principle of superior responsibility, Article 86(2) of Additional Protocol I has to be read in conjunction with Article 87(3) of Additional Protocol I.[43] While Article 86(2) of Additional Protocol I establishes the duty "to prevent or repress" the commission of an offence, no explicit reference is made to an obligation to enact sanctions.[44] The latter duty, however, is specifically set up in Article 87(3) of Additional Protocol I, which reads as follows:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.45

I recall that in relation to the interpretation of Articles 86 and 87 of Additional Protocol I, the Appeals Chamber has previously taken recourse[46] to Article 31(1) of the Vienna Convention on the Law of Treaties,[47] itself a codification of customary international law,[48] which prescribes that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In line with this teleological approach, the reference of Article 87(3) of Additional Protocol I to

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[41] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 47.
[42] *Hadžihasanović* Appeal Decision on Jurisdiction, paras. 46 and 49.
[43] *Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, paras. 22 and 25; Separate and Partially Dissenting Opinion of Judge David Hunt, para. 21. *See also* Partially Dissenting Opinion and Declaration of Judge Liu, appended to this Judgement, paras. 16 *et seq.*, with which I fully concur.
[44] *See Hadžihasanović* Appeal Decision on Jurisdiction, Separate and Partially Dissenting Opinion of Judge David Hunt, para. 21.
[45] Emphasis added.
[46] *See Blagojević and Jokić* Appeal Judgement, para. 281. *See also Galić* Appeal Judgement, para. 103 in relation to Article 51 of Additional Protocol I.
[47] Vienna Convention on the Law of Treaties of 23 May 1969, 1155 U.N.T.S. 331.
[48] *See* Case Concerning Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 812 (12 December 1996); *see* Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 19-20 (3 February 1994). This was most recently reiterated by the International Court of Justice in: Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), para. 112 (4 June 2008), available at http://www.icj-cij.org/.

"subordinates [who] have committed a breach" must be understood in the context of the purpose of Additional Protocol I and international humanitarian law in general. As was discussed above, international humanitarian law strives for the greatest possible protection of those who do not or are no longer taking part in hostilities. Indeed, the Preamble to Additional Protocol I confirms that its object is to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application." A contextual reading of Articles 86 and 87 of Additional Protocol I thus inevitably leads to the conclusion that there is indeed a duty of superiors to initiate the prosecution of offences allegedly committed by their subordinates before the superior's assumption of command. This obligation is also aimed at discouraging the commission of further crimes.[49]

20. In this context, I regard neither the Draft Code of Crimes against the Peace and Security of Mankind appended to the above-mentioned Report of the International Law Commission nor the Statute of the ICC as helpful. None of them can be perceived as reflecting customary international law, since the aforementioned Draft Code was never implemented[50] and the respective article of the ICC Statute was the subject of difficult negotiations, which resulted in "delicate compromises".[51] Moreover, the ICC Statute is specific to the jurisdiction of the ICC and "was not intended to codify existing customary rules."[52] I would also refer to Article 10 of the ICC Statute which states that "[n]othing in this Part [Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[53] Finally, I cannot but stress that the Appeals Chamber is seized of a case dating back to 1992, while the Statute of the ICC was negotiated in 1998.

21. Furthermore, the reliance of the Appeals Chamber in *Hadžihasanović* on the words "in the circumstances of the time" and "was committing" contained in Article 86(2) of Additional Protocol I and similar language in the ICC Statute is misguided as it is in contradiction with the

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[49] *See Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 25, Separate and Partially Dissenting Opinion of Judge David Hunt, para. 21. *See also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, p. 246-247 (Oxford, 2nd ed. 2008), and BORIS BURGHARDT, DIE VORGESETZTENVERANTWORTLICHKEIT IM VÖLKERRECHTLICHEN STRAFSYSTEM, p. 222 et seq. (Berlin, 2008), both supporting the view of the Dissenting Opinions.

[50] *See* for further discussion Partially Dissenting Opinion and Declaration of Judge Liu, appended to this Judgement, paras. 22-24.

[51] *See* U.N. Doc. A/Conf.183/C.1/WGGP/L.4/Add.1, 29 June 1998, p. 3. *See also Hadžihasanović* Appeal Decision on Jurisdiction, Separate and Partially Dissenting Opinion of Judge David Hunt, paras. 26 and 31.

[52] CASSESE, *supra* note 49, p. 172.

[53] While Article 28 is contained in a different part of the ICC Statute (General Principles of International Criminal Law) it is nevertheless "directly related to [Part II] of the Statute" and should therefore be distinguished. Mohamed

Appeals Chamber's own undisputed finding that a superior's "duty to punish" crimes committed by his subordinates includes at least all those crimes committed after the superior has assumed his position.[54] In fact, if the interpretation of these texts by the Appeals Chamber in *Hadžihasanović* were to be applied with all its consequences, then superior responsibility would not even arise for crimes committed after the assumption of command.[55] The words "in the circumstances of the time" are nothing but a reminder that it is prohibited to establish criminal responsibility retroactively, a fundamental principle of criminal law.[56]

(b) The distinct duties to prevent crimes by subordinates and to initiate measures to punish them for crimes already committed

22. The Appeals Chamber in *Hadžihasanović* also failed to take into account that Article 7(3) of the Statute distinguishes between two different duties. On the one hand, there is the duty to prevent future crimes by subordinates. On the other hand, there is the "duty to punish" past crimes committed by subordinates. As the Appeals Chamber held in the *Blaškić* case:

> The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.[57]

However, the above-mentioned reliance of the Appeals Chamber in *Hadžihasanović* on the language of Article 86(2) of Additional Protocol I read in isolation and Article 28 of the ICC Statute renders this distinction obsolete. If it were required for the "duty to punish" that the superior knew or had reason to know about the subordinate's crimes at the time of their commission, then the scope of this duty would be severely limited solely to the new superior's duty to prevent future crimes.

23. It is a simple as this: when assuming a superior position, the new superior has all of the functions, rights and duties of his predecessor(s). As a matter of common sense, it would be futile to relieve arbitrarily the new superior precisely from one of his – in this context – most important obligations, *i.e.* his duty to punish crimes allegedly committed by his subordinates before he assumed his superior position.

Bennouna, *The Statute's Rules on Crimes and Existing or Developing International Law, in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, p. 1101 (Antonio Cassese et al. eds, Oxford, 2002).

[54] *Hadžihasanović* Appeal Decision on Jurisdiction, paras. 40, 46, 49, 51. *Cf. Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 20.

[55] *Cf. Hadžihasanović* Appeal Decision on Jurisdiction, Partial Dissenting Opinion of Judge Shahabuddeen, para. 20. *See also* BURGHARDT, *supra* note 49, p. 222.

[56] This principle is enshrined in Article 15(1)(1) of the International Covenant on Civil and Political Rights of 19 December 1966 (999 U.N.T.S. 171), read together with Article 15(2).

[57] *Blaškić* Appeal Judgement, para. 83.

24. Accordingly, I join with approval the reasoning of the Trial Chamber in the Judgement before us, which held the following:

> The duty to prevent calls for action by the superior prior to the commission of the crime, and thus presupposes his power to control the conduct of his subordinates. The duty to punish, by contrast, follows the commission of a crime of which the superior need not have been aware, and thus at the moment of commission was in fact out of his or her control to prevent. Since a superior in such circumstances is obliged to take punitive measures notwithstanding his or her inability to prevent the crime due to his or her lack of awareness and control, it seems only logical that such an obligation would also extend to the situation wherein there has been a change of command following the commission of a crime by a subordinate. The new commander in such a case, now exercising power over his or her subordinates and being made aware of their crimes committed prior to the change of command, for the sake of coherent prevention and control, should not let them go unpunished. This is best understood by realising that a superior's duty to punish is not derived from a failure to prevent the crime, but rather is a subsidiary duty of its own.[58]

25. In sum, the conclusion of the Appeals Chamber in *Hadžihasanović* is not reflective of customary international law in 1992, which provided for the principle of individual criminal responsibility of superiors for failing to prevent or punish criminal acts of their subordinates. To include responsibility for failing to punish crimes committed before the superior assumed command is not "to stretch an existing customary principle to establish criminal responsibility for conduct falling beyond the established principle."[59] On the contrary, the failure of a superior to initiate the punishment of crimes committed by his subordinates before and after his assumption of command falls squarely within the ambit of the principle of superior responsibility.

26. Consequently, if a superior knows or has reason to know about crimes allegedly committed earlier by a person who is now a subordinate,[60] the obligation automatically follows

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[58] Trial Judgement, para. 335. *See also Hadžihasanović* Appeal Decision on Jurisdiction, Separate and Partially Dissenting Opinion of Judge David Hunt, para. 23.

[59] *Hadžihasanović* Appeal Decision on Jurisdiction, para. 52.

[60] I note moreover that the rationale of Article 7(3) of the Statute and its teleological interpretation could also support the inclusion of a former subordinate of whose alleged crime his present superior knows. The establishment and the mandate of the International Tribunal primarily aim at the fair prosecution of crimes committed in war times. Thus, in principle, the knowledge of the commission of a crime could be seen as the decisive factor triggering the duty to initiate proceedings on the part of a superior, knowing of a crime, immaterial of whether at the commission of the crime a superior-subordinate relationship existed *ad personam*. Indeed, one could see a superior position as a continuum independent from its exercise by a certain person. According to the finding of the Trial Chamber, Orić apparently knew that a crime had been committed by a person who was subordinate in rank, namely, Mirzet Halilović, who had been replaced as the commander of the Military Police for exactly these reasons. Unfortunately, the Trial Chamber remained silent in which capacity Orić participated in this meeting of 22 November 1992 in which Mirzet Halilović was replaced (*see* Trial Judgement, para. 506 read together with fn. 1403). Notwithstanding that consequently Orić was never found to be Halilović's superior, he did assume a superior position in relation to the Military Police's subsequent commander, Atif Krdžić, the immediate successor of Mirzet Halilović. I note that in a number of jurisdictions, if a superior knows – in his official capacity – of the commission of a serious crime, he has a duty to report the crime, even if the alleged perpetrator is not now a subordinate. An omission to do so would be sanctionable as such. However, such a broad understanding of Article 7(3) of the Statute is not possible as each interpretation of a statutory norm is limited by its clear wording, in this case the existence of a superior-subordinate relationship between two persons being at least at one point in time superior and subordinate.

to take the necessary and reasonable measures to punish this individual. If he did not act in accordance with this duty, he has to be punished for failing to fulfil this obligation.

4. Whether there are cogent reasons to depart from the Appeals Chamber's jurisprudence

27. The Appeals Chamber "should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[61] In the instant case, it is in the interests of justice to clarify the interpretation of Article 7(3) of the Statute to align it with international customary law existing in 1992. Moreover, the *Hadžihasanović* Appeal Decision on Jurisdiction was decided by majority and its interpretation of the law was and is strongly disputed.[62] This serves as an indicia that the threshold for overcoming the principle of *stare decisis* in the instant case is not as high as it would be vis-à-vis a unanimously adopted interpretation of the law. As a matter of principle, however, if the change in the jurisprudence were to have a negative impact on the case of an accused, it needs to be assessed whether the implementation of the jurisprudence in the specific case would render the proceedings unfair, in particular if the accused was not able to present a proper defence.[63] In the instant case, the warranted correction of the jurisprudence would have had no impact on the proceedings and their outcome.[64] Thus, there would not have been any appearance of unfairness to the Accused.

28. Accordingly, the Appeals Chamber should have departed from its holding in *Hadžihasanović*, which incorrectly limited superior responsibility for failing to initiate the punishment of alleged crimes of subordinates to those crimes that were committed by the subordinate after the superior assumed command. Indeed, superior responsibility for such crimes arises regardless of when the superior assumed command, whenever the superior knew or had reason to know about a subordinate's criminal conduct but nevertheless failed to take the reasonable and necessary measures to initiate any action against him.

29. In sum, the Appeals Chamber has missed the unique chance to depart from its wrong holding in *Hadžihasanović*.

[61] *Aleksovski* Appeal Judgement, para. 107.
[62] *See supra* para. 3.
[63] *Cf. Brdanin* Appeal Judgement, para. 361.
[64] Opposed to this, in the *Kordić and Čerkez* Appeal Judgement, para. 1040, the Appeals Chamber simply held that cogent reasons justified the departure from previous jurisprudence, without elaborating on the justification for doing so, even though this was to the detriment of the accused. *See also supra* notes 3 and 60.

C. The Dissent

30. I fully support the conclusion of the Appeals Chamber to dismiss the Prosecution's Sub-ground of Appeal 1(2) for factual reasons, because Mirzet Halilović was never found to be Orić's subordinate.[65] However, it is highly unsatisfactory that the Appeals Chamber did not seize the opportunity to exercise its discretion to correct its jurisprudence as regards the scope of superior responsibility.

31. My learned colleagues Judge Shahabuddeen and Judge Liu have appended a Declaration and a Partially Dissenting Opinion, respectively, in which they state that as a matter of law they also disagree with the holding of the Appeals Chamber in the *Hadžihasanović* Appeal Decision on Jurisdiction. I deeply regret that the view of the majority on such an important legal issue, which is expressed in our three opinions, is not reflected in the Judgement itself. On the contrary, it will appear as if the Appeals Chamber endorses its prior decision in the *Hadžihasanović* case: *qui tacet, consentire videtur ubi loqui potuit et debuit*.[66] Considering that the majority of judges in this case are of the opinion that the *Hadžihasanović* Appeal Decision on Jurisdiction was decided erroneously in its part being relevant here, I do not see any reason why a Judge is entitled to refrain from expressing in the Judgement as such what he believes is the right conclusion in this matter.[67] As was stated by Justice Sir Isaac Isaacs in a case before the High Court of Australia: "If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right."[68]

32. Again, I recall that it is one of the key obligations of the Appeals Chamber to set out the law, in particular on a point as important as the one in this case. The Appeals Chamber by majority ignores its own established standard of appellate review as laid down again in paragraph 7 of the Judgement, namely, that "the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence."[69] I would refer to the

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[65] *See* Judgement, para. 166.
[66] Someone who remains silent appears to consent, in particular when he could and should have spoken. *See* DETLEF LIEBS, LATEINISCHE RECHTSREGELN UND RECHTSSPRICHWÖRTER, (Munich, 6th ed. 1998), p. 193.
[67] *Cf. Queensland v. The Commonwealth* (1977), 139 C.L.R. 585 at 594 (Barwick CJ).
[68] *Australian Agricultural Co v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913), 17 C.L.R. 261 at 278 (Isaacs J).
[69] Judgement, para. 7.

Appeals Chamber's holding in *Brdanin* that "such determinations do not constitute impermissible 'advisory opinions,' but are instead necessary means of moving forward this *ad hoc* International Tribunal's jurisprudence within the limited time in which it operates and contributing meaningfully to the overall development of international criminal law."[70] Moreover, "where in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice."[71]

D. Conclusion

33. In the case before us, the Appeals Chamber has come to a result I agree with. However, in doing so it has not only missed the unique opportunity to spell out the correct interpretation of command responsibility as laid down in Article 7(3) of the Statute of this International Tribunal, it failed to fully carry out its mandate.

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

Judge Wolfgang Schomburg

Dated this third day of July 2008
At The Hague, The Netherlands

[Seal of the International Tribunal]

[70] *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3 (footnotes omitted). *See also Akayesu* Appeal Judgement, paras. 21-23.
[71] *Aleksovski* Appeal Judgement, para. 111.

X. ANNEX A: PROCEDURAL BACKGROUND

A. Pre-Trial and Trial proceedings

1. Naser Orić was indicted on 28 March 2003.[1] The indictment was subsequently amended on 16 July 2003,[2] 1 October 2004[3] and 30 June 2005.[4] He was arrested by SFOR on 10 April 2003 in Tuzla and was transferred to the United Nations Detention Unit on 11 April 2003.[5] At his initial appearance on 15 April 2003, he pleaded not guilty to all counts and was ordered detained on remand.[6] His case was initially assigned to Trial Chamber III.[7] On 21 September 2004, the President of the Tribunal ordered the transfer of the case from Trial Chamber III to Trial Chamber II. [8]

2. The trial commenced on 6 October 2004 with the Prosecution's case. On 8 June 2005, the Trial Chamber rendered an oral judgement pursuant to Rule 98*bis*.[9] The Trial Chamber found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the crime of plunder of public or private property, and thus acquitted Orić of Counts 4 and 6.[10] The Trial Chamber also found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the murder of Bogdan Živanović, the cruel treatment of Miloje Obradović and the wanton destruction of cities, towns or villages, not justified by military necessity, with respect to the hamlets of Božići and Radijevići.[11] The Defence began the presentation of its case on 4 July 2005 and rested on 1 February 2006. Closing arguments were heard from 3 April to 10 April 2006. The Trial Chamber delivered its Judgement on 30 June 2006.

B. Appeal proceedings

3. Both Orić and the Prosecution lodged an appeal against the Trial Judgement.

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[1] *Prosecutor v. Naser Orić,* Case No. IT-03-68-I, Indictment, signed 13 March 2003, filed 17 March 2003 ("Initial Indictment"); *See also Prosecution v. Naser Orić*, Case No. IT-03-68-I, Confirmation of Indictment and Order for Non-disclosure, *ex parte* and *under seal*, 28 March 2003. This Initial Indictment was kept under seal until 11 April 2003.
[2] *Prosecutor v. Naser Orić,* Case No. IT-03-68-PT, Amended Indictment, 16 July 2003.
[3] *Prosecutor v. Naser Orić,* Case No. IT-03-68-PT, Second Amended Indictment, 1 October 2004.
[4] *Prosecutor v. Naser Orić,* Case No. IT-03-68-T, Third Amended Indictment, 30 June 2005.
[5] *Prosecution v. Naser Orić*, Case No. IT-03-68-I, Order Assigning a Case to a Trial Chamber, 11 April 2003.
[6] Initial Appearance, T. 15 April 2003, p. 6; *Prosecution v. Naser Orić*, Case No. IT-03-68-I, Order for Detention on Remand, 14 April 2003.
[7] *Prosecution v. Naser Orić*, Case No. IT-03-68-PT, Order Assigning a Case to a Trial Chamber, 11 April 2003.
[8] *Prosecution v. Naser Orić*, Case No. IT-03-68-PT, Order Assigning Judges and Transferring a Case to a New Trial Chamber, 21 September 2004.
[9] Rule 98*bis* Ruling, T. 8 June 2005, pp. 8981-9037.
[10] Rule 98*bis* Ruling, T. 8 June 2005, p. 9032.
[11] Rule 98*bis* Ruling, T. 8 June 2005, pp. 9032-9033.

1. Notices of Appeal

4. The Prosecution and Orić both filed their notices of appeal on 31 July 2006.[12] Pursuant to the Appeals Chamber's direction,[13] Orić filed an amended version of his notice of appeal on 5 October 2006.[14]

2. Appeal briefs

(a) The Prosecution's appeal

5. The Prosecution filed its Appellant's brief on 16 October 2006, in which it withdrew one the four sub-grounds composing its first ground of appeal.[15] On 18 October 2006, the Prosecution filed a Corrigendum to its Appellant's brief, attaching a revised version of the brief.[16]

6. On 27 November 2006, Orić filed his Respondent's brief.[17] On 29 January 2007, seized of the Prosecution's Motion to Strike Defence Response Brief Annex,[18] the Appeals Chamber declared the annexes attached to Orić Response Brief to be null and void and ordered Orić, if he so wished, to re-file annexes to his Response Brief in compliance with the Practice Direction on the Length of Brief and Motions within five days.[19] Orić chose not to re-file any annex.

7. On 12 December 2006, the Prosecution filed its brief in reply.[20] The Prosecution additionally filed a notice of supplemental authority referring to an appeal judgement issued after the filing of its written submissions which was pertinent to the Prosecution's appeal.[21] The notice was considered as validly filed by the Appeals Chamber. [22]

8. On 7 March 2008, the Prosecution filed a notice of withdrawal of its third ground of appeal.[23]

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[12] Prosecution's Notice of Appeal, 31 July 2006; Notice of Appeal on Behalf of Naser Orić Pursuant to Rule 108, 31 July 2006.
[13] Decision on Prosecution's Motion for an Order Striking Defence Notice of Appeal and Requiring Refiling, 03 October 2006.
[14] Defence Notice of Appeal, 5 October 2006, in which Orić indicated withdrawing his twelfth ground of appeal (para. 106).
[15] Prosecution's Appeal Brief, 16 October 2006, para. 101.
[16] Prosecution's Corrigendum to Appeal Brief, 18 October 2006, attaching an amended version of the Prosecution's Appeal Brief, filed on 16 October 2006. On 3 May 2007, the Appeals Chamber accepted the amended version as the valid Appellant's brief: Decision on The Prosecution's Motion for Variance Concerning Order and Numbering of the Arguments on Appeal and on The Prosecution's Corrigendum to Appeal Brief, 3 May 2007, p. 3.
[17] Defence Respondent's Brief, 27 November 2006 ("Orić Response Brief").
[18] Prosecution's Motion to Strike Defence Response Brief Annex, 4 December 2006.
[19] Decision on the Prosecution's Motion to Strike Defence Response Brief Annex, 29 January 2007, p. 3.
[20] The Prosecution's Reply Brief, 12 December 2006.
[21] Notice of Supplemental Authority, 25 April 2007.
[22] Decision on Prosecution's "Notice of Supplemental Authority", 14 May 2007.
[23] Prosecution's Notice of Withdrawal of its Third Ground of Appeal, 7 March 2008.

(b) Orić's appeal

9. Orić filed his Appellant's brief on 16 October 2006,[24] in which he indicated that he withdrew his ninth and sixteenth grounds of appeal.[25]

10. On 27 November 2006, the Prosecution filed its Respondent's brief.[26]

11. On 12 December 2006, Naser Orić filed his brief in reply.[27] On 22 December 2006, he filed a revised brief in reply.[28]

3. Additional written submissions

12. Following the Appeals Chamber's invitation to submit their answers to the questions identified by the Appeals Chamber in the *Addendum* to Order Scheduling Appeal Hearing in writing,[29] both Parties filed additional written submissions on 25 March 2008.[30]

4. Appeal Hearing

13. Pursuant to the Order Scheduling Appeal Hearing of 23 November 2007, as complemented by the *Addendum* to Order Scheduling Appeal Hearing signed on 10 March 2008, the Appeal Hearing took place on 1 and 2 April 2008.

[24] Defence Appellant's Brief, confidential, 16 October 2006 ("Orić Confidential Appeal Brief"). The public version was filed on 11 May 2007 pursuant to the order of the Appeals Chamber: Decision on Prosecution's Motion to Seal Defence Appeal Brief, 10 May 2007.
[25] Orić Confidential Appeal Brief, paras. 477 and 611.
[26] The Prosecution's Response Brief, confidential, 27 November 2006; *See also* The Prosecution's Response Brief, public version, 29 November 2006. Upon leave of the Appeals Chamber, the Prosecution filed a second notice of supplemental authority referring to an appeal judgement issued after the filing of its written submissions, which was pertinent to Orić's appeal and the Prosecution's response thereto: Prosecution's Request for Leave to File a Second Notice of Supplementary Authority, 5 June 2007; Decision on Prosecution's Request for Leave to File a Second Notice of Supplementary Authority, 10 July 2007.
[27] Defence Reply Brief, 12 December 2006.
[28] Orić's revised Brief in reply was filed as annex to his response to the Prosecution's Motion to Strike Defence Reply Brief and Annex A-D filed on 15 December 2006: Defence Response to the Prosecution's Motion to Strike Defence Reply Brief and Annexes A-D, 22 December 2006, attaching a revised Brief in reply entitled "Corrigendum to Defence Reply Brief". On 7 June 2007, the Appeals Chamber recognised the revised Brief in reply as the valid brief and declared Annexes A-D attached to the initial Brief in reply filed on 12 December 2006 to be null and void: Decision on the Motion to Strike Defence Reply Brief and Annexes A-D, 7 June 2007.
[29] *Addendum* to Order Scheduling Appeal Hearing, 10 March 2008, p. 2.
[30] Defence Submissions in Relation to Issues Identified by the Appeals Chamber, 25 March 2008; Prosecution's Written Submissions Pursuant to Order of 10 March 2008, 25 March 2008.

XI. 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").

BLAGOJEVIĆ Vidoje and JOKIĆ Dragan

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

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

BLAŠKIĆ Tihomir

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

BRĐANIN Radoslav

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

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

"ČELEBIĆI"

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

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

GALIĆ Stanislav

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

HADŽIHASANOVIĆ Enver and KUBURA Amir

Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction").

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, Judgement, 15 March 2006 ("*Hadžihasanović and Kubura* Trial Judgement").

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

HALILOVIĆ Sefer

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

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

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").

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").

KRSTIĆ 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-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 Santić, 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-A, Judgement, 28 Feburary 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").

NALETILIĆ Mladen and MARTINOVIĆ Vinko

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

OBRENOVIĆ Dragan

Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement").

SIMIĆ Blagoje

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

STAKIĆ Milomir

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

VASILJEVIĆ Mitar

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

2. International Criminal Tribunal for Rwanda

AKAYESU Jean-Paul

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

BAGILISHEMA Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 ("*Bagilishema* Appeal Judgement").

KAYISHEMA Clément and RUZINDANA Obed

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

NAHIMANA et al. ("MEDIA")

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement").

NTAGERURA et al. ("CYANGUGU")

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

SEROMBA Athanase

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

B. List of Designated Terms and Abbreviations

According to Rule 2 (B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

ABiH	Army of the Republic of Bosnia and Herzegovina
AT.	Transcript page from the Appeal Hearing in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited
BiH	Republic of Bosnia and Herzegovina
Building	The building behind the municipal building referred to in paragraph 22 of the Indictment
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
Initial Indictment	*Prosecutor v. Naser Orić,* Case No. IT-03-68-I, Indictment, 13 March 2003
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
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indictment (or Third Amended Indictment)	*Prosecutor v. Naser Orić,* Case No. IT-03-68-T, Third Amended Indictment, 30 June 2005
Military Police	Military police of the municipality of Srebrenica

Orić Appeal Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Defence Appellant's Brief, public redacted version, 11 May 2007
Orić Closing Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-T, Defence Closing Brief, 17 March 2006
Orić Notice of Appeal	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Defence Notice of Appeal, 5 October 2006
Orić Reply Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Corrigendum to Defence Reply Brief, attached to the "Defence Response to the Prosecution's Motion to Strike Defence Reply Brief and Annexes A-D" filed 22 December 2006 and recognized as the valid Reply Brief by the Appeals Chamber in the "Decision on the Motion to Strike Defence Reply Brief and Annexes A-D", filed 7 June 2007
Orić Response Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Defence Respondent's Brief, 27 November 2006
Orić Written Submissions of 25 March 2008	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Defence Submissions in Relation to Issues Identified by the Appeals Chamber, 25 March 2008
Practice Direction on Formal Requirements for Appeals for Judgement	Practice Direction on Formal Requirements for Appeals for Judgement, IT/201, 7 March 2002, accessible at http://www.un.org/icty/legaldoc-e/index.htm
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Prosecution's Corrigendum to Appeal, 18 October 2006, attaching an amended version of The Prosecution's Appeal Brief, filed on 16 October 2006
Prosecution Notice of Appeal	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Prosecution's Notice of Appeal, 31 July 2006
Prosecution Pre-Trial Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-PT, Pre-Trial Brief of the Prosecution pursuant to Rule 65*ter*(E)(i), 5 December 2003
Prosecution Reply Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, The Prosecution's Reply Brief, 12 December 2006

Prosecution Response Brief	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, The Prosecution's Response Brief, public redacted version, 29 November 2006
Prosecution Written Submissions of 25 March 2008	*Prosecutor v. Naser Orić,* Case No. IT-03-68-A, Prosecution's Written Submissions Pursuant to Order of 10 March 2008, 25 March 2008
Rules	Rules of Procedure and Evidence of the International Tribunal, IT/32/Rev. 40, 12 July 2007
Srebrenica Armed Forces Staff	Successor of the Srebrenica TO Staff as of 3 September 1992
Srebrenica TO Staff	Group of local leaders from the Srebrenica area, established in Bajramovići on 20 May 1992
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited
TO	Territorial Defence
Trial Chamber	Trial Chamber II of the International Tribunal