UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-48-A
		Date:	16 October 2007
		Original:	English

IN THE APPEALS CHAMBER

Before:	**Judge Mehmet Güney, Presiding** **Judge Mohamed Shahabuddeen** **Judge Andrésia Vaz** **Judge Theodor Meron** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Hans Holthuis**
Judgement of:	**16 October 2007**

PROSECUTOR

v.

SEFER HALILOVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Mr. Arthur Buck
Ms. Laurel Baig
Mr. Xavier Tracol
Mr. Matteo Costi

Counsel for Sefer Halilović:

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Mr. Guénaël Mettraux

CONTENTS

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 ("International Tribunal") is seized of an appeal from the judgement rendered by Trial Chamber I ("Trial Chamber") on 16 November 2005 in the case of *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T ("Trial Judgement").

A. Background

2. Sefer Halilović was born in Prijepolje (Serbia) in 1952. He had attained the rank of Major by the time he left the Yugoslav Peoples' Army ("JNA") in 1991 to join the Patriotic League in Bosnia and Herzegovina. On 25 May 1992, he was appointed Commander of the Territorial Defence ("TO") by the Presidency of Bosnia and Herzegovina ("BiH"). Halilović was Supreme Commander, with the title of "Chief" of the Main Staff of the Army of the Republic of Bosnia and Herzegovina ("ABiH") until 8 June 1993, when the new position of ABiH "Commander of the Main Staff" was established. On 8 June 1993, the President of BiH, Alija Izetbegović, appointed Rasim Delić to the position of ABiH Commander and provided that Halilović would retain the position of ABiH "Chief of the Main Staff". By order of 1 November 1993, Alija Izetbegović then relieved Halilović from his duties as "Chief of the Main Staff". At the time of his voluntary surrender to the International Tribunal, on 25 September 2001, Halilović was Minister for Refugees, Social Affairs and Displaced People in the Government of BiH.[1]

3. The events underlying the Trial Judgement took place in 1993 in BiH, specifically in the Bosnian Croat village of Grabovica,[2] part of the Drežnica commune, and in the Bosnian Croat village of Uzdol, in Prozor municipality (Herzegovina).[3] The Trial Chamber found that seven persons taking no active part in hostilities were killed in Grabovica by members of the 9th Brigade on 8 or 9 September 1993 and that six persons taking no active part in the hostilities were killed in Grabovica by unidentified members of the ABiH between 8 and 9 September 1993.[4] The Trial Chamber further found that 25 persons taking no active part in the hostilities were killed in Uzdol by members of units under ABiH command on 14 September 1993.[5] The Trial Chamber also found that these killings amounted to murder as a violation of the laws or customs of war.[6] Having established the commission of the crimes and the nexus between the existing armed conflict and the

[1] Trial Judgement, para. 1.
[2] Trial Judgement, paras 373-377.
[3] Trial Judgement, paras 526-527.
[4] Trial Judgement, para. 728.
[5] Trial Judgement, paras 730 and 734.

crimes,[7] the Trial Chamber went on to determine whether Halilović bore responsibility for these crimes. The Prosecution alleged that senior commanders of the ABiH, including its Commander Rasim Delić, attended a meeting held in Zenica from 21 to 22 August 1993 and decided to conduct a military operation called "Neretva-93" in order to end the blockade of Mostar (Herzegovina) by the Croatian Defence Council ("HVO"). According to the Prosecution, Halilović was the commander of this operation and, therefore, the troops involved in the operation were under his command and control.[8] The Trial Chamber however found that the Prosecution failed to prove beyond reasonable doubt that Halilović was either *de jure* or *de facto* commander of "Operation Neretva-93".[9] The Trial Chamber further found that the Prosecution failed to prove beyond reasonable doubt that Halilović had effective control over the troops who committed the crimes in Grabovica and Uzdol.[10]

4. As a result of its findings, on 16 November 2005, the Trial Chamber acquitted Halilović of the sole count charged against him: murder as a violation of the laws or customs of war, punishable under Article 3 and Article 7(3) of the Statute of the International Tribunal ("Statute").[11]

B. The Appeal

5. On 16 December 2005, the Prosecution filed a notice of appeal against the Trial Judgement, seeking the reversal of the acquittal for the charge of murder with respect to the killings perpetrated in Grabovica, the entering of a conviction pursuant to Articles 3 and 7(3) of the Statute for murder as a violation of the laws or customs of war, and the imposition of an appropriate sentence.[12] More specifically, the Prosecution's appeal consists of four grounds. At the heart of the first ground of appeal, which comprises six sub-grounds, lies the issue of effective control.[13] Since all grounds of appeal are intertwined, the other grounds hinge upon the outcome of the first ground of appeal: the second and third grounds concern the other two requirements of superior responsibility under Article 7(3) of the Statute: *mens rea* of Halilović and failure to prevent or punish, respectively.[14]

[6] Trial Judgement, paras 728 and 734.
[7] Trial Judgement, paras 722 and 727.
[8] Trial Judgement, para. 2, citing *Prosecutor v. Sefer Halilović,* IT-01-48-I, Indictment, 10 September 2001 ("Indictment"), para. 4. *See* also Trial Judgement, para. 9.
[9] Trial Judgement, para. 752. While the Trial Chamber was not convinced that the combat operations conducted in Herzegovina to lift the HVO blockade of Mostar were called "Operation Neretva" (or "Operation Neretva-93"), it stated that it would use the term "Operation Neretva" to refer to the combat operations which took place in Herzegovina at the relevant time, since this was the description used in the Indictment and the Prosecution had charged Halilović as commander of "Operation Neretva" (Trial Judgement, para. 175). The parties on appeal often referred to this operation simply as "the Operation". The Appeals Chamber will use both the expressions "Operation Neretva" and "Operation Neretva-93" to refer to these military activities.
[10] Trial Judgement, paras 747 and 751-752.
[11] Trial Judgement, para. 753.
[12] Prosecution's Notice of Appeal, 16 December 2005 ("Prosecution Notice of Appeal"), para. 12.
[13] Prosecution Notice of Appeal, paras 4(i)-4(vi).
[14] Prosecution Notice of Appeal, paras 5-8.

The fourth ground of appeal concerns the admission into evidence of the report and proposed testimony of an expert witness relating to Halilović's alleged failure to prevent or punish.[15] The Prosecution has not appealed Halilović's acquittal for the murders committed in Uzdol.[16]

[15] Prosecution Notice of Appeal, para. 9.
[16] Prosecution Appellant's Brief, 1 March 2006 ("Prosecution Appeal Brief"), fn. 1.

II. STANDARD FOR APPELLATE REVIEW

6. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established by the Appeals Chambers of the International Tribunal and the ICTR.[17] In exceptional circumstances, 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 nevertheless of general significance to the jurisprudence of the International Tribunal.[18] Article 25 of the Statute also states that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

7. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law, which has no chance of changing the outcome of a decision, may be rejected on that ground. Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[19] It is necessary for any appellant claiming an error of law based on the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments, which the appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[20]

8. The Appeals Chamber reviews the Trial Chamber's impugned findings of law to determine whether or not they are correct.[21] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[22] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines

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[17] *Blagojević and Jokić* Appeal Judgement, para. 6; *Brdanin* Appeal Judgement para. 8; *Galić* Appeal Judgement, para. 6; *Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, para. 5; *see* also *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, paras 21-41; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40. For jurisprudence under Article 24 of the ICTR Statute, *see Ndindabahizi* Appeal Judgement, paras 8-10; *Ntagerura et al.* Appeal Judgement, paras 11-12; *Gacumbitsi* Appeal Judgement, paras 6-9; *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, paras 7-8; *Musema* Appeal Judgement, para. 15; *Kayishema and Ruzindana* Appeal Judgement, para. 177; *Akayesu* Appeal Judgement, paras 178-179.

[18] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 6; *Brdanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6. *See* also *Akayesu* Appeal Judgement, para. 24; *see* also *Krnojelac* Appeal Judgement, para. 8.

[19] *See*, for example, *Limaj et al.* Appeal Judgement, para. 9, *Blagojević and Jokić* Appeal Judgement, para. 7*; Brdanin* Appeal Judgement, para. 9. *See* also *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7.

[20] *Brdanin* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 25.

[21] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Simić* Appeal Judgement, para. 9.

[22] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Simić* Appeal Judgement, para. 9.

whether it is itself convinced beyond reasonable doubt as to the factual findings challenged by the appellant before that finding may be confirmed on appeal.[23]

9. 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.[24] 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.[25]

10. 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".[26] The Appeals Chamber reiterates that an appeal is not a trial *de novo*[27] 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.[28]

11. 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.[29] However, since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.[30] In this context, the Appeals Chamber has endorsed the following holding by the ICTR Appeals Chamber:

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[23] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 8; *Brdanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement para. 8; *Simić* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 15; *see* also *Ntagerura et al.* Appeal Judgement, para. 136.
[24] *See*, for example, *Simić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Vasiljević* Appeal Judgement, para. 8.
[25] *See Kvočka et al.* Appeal Judgement, para. 18. *See* also *Vasiljević* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 10; *Bagilishema* Appeal Judgement, para. 13.
[26] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.
[27] *Brdanin* Appeal Judgement, para. 15; *Blaškić* Appeal Judgement, para. 13; *Bagilishema* Appeal Judgement, para. 11.
[28] *Kupreškić et al.* Appeal Judgement, para. 30. *See* also *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 10.
[29] *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14; *Bagilishema* Appeal Judgement, para. 13.
[30] *Krnojelac* Appeal Judgement, para. 14.

> [b]ecause the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It 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.[31]

12. 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 evidently unfounded without providing detailed reasoning.[32] A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[33] 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;[34] the appealing party's argument unacceptably seeks to substitute its own evaluation of the evidence for that of the Trial Chamber; or where it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appealing party.[35]

13. The Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively.[36] 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.[37] Further, submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies will not be considered by the Appeals Chamber in detail.[38]

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[31] *Bagilishema* Appeal Judgement, para. 14, cited with approval in *Limaj et al.* Appeal Judgement, para. 13.
[32] *See*, for example, *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Simić* Appeal Judgement, para. 14; *Stakić* Appeal Judgement, para. 13; *Gacumbitsi* Appeal Judgement, para. 10; *Kamuhanda* Appeal Judgement, para. 10.
[33] *See*, for example, *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Chamber, para. 10; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[34] *See Blagojević and Jokić* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 10; *Simić* Appeal Judgement, para. 12; *Stakić* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura* Appeal Judgement para. 13.
[35] *See Kunarac et al.* Appeal Judgement, para. 48. *See* also *Blagojević and Jokić* Appeal Judgement para. 11; *Brdanin* Appeal Judgement, paras 17-31.
[36] *See Kunarac et al.* Appeal Judgement, para. 43.
[37] *See* Practice Direction on Formal Requirements for Appeals from Judgement, paras 1(c)(iii), 1(c)(iv), and 4(b)(ii). *See* also *Blagojević and Jokić* Appeal Judgement, para. 11; *Brdanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.
[38] *Blagojević and Jokić* Appeal Judgement, para. 11; *Simić* Appeal Judgement para. 13; *Naletilić and Martinović* Appeal Judgement, para. 14; *Gacumbitsi* Appeal Judgement para. 10.

III. REQUEST FOR SUMMARY DISMISSAL OF THE ENTIRE APPEAL

14. Halilović generally submits that the Prosecution's appeal should be summarily dismissed because it fails to meet the requisite standard of appellate review, it suffers from "grave, widespread and systematic procedural/formal shortcomings", or it raises matters that had previously been waived.[39] These arguments are then developed by Halilović in relation to each ground or sub-ground of appeal. With respect to those instances where a brief discussion is warranted, the Appeals Chamber will address the requests in more detail in the corresponding section of this judgement. However, when it is clear that a request for summary dismissal cannot possibly prosper, it will be rejected without addressing the arguments advanced in detail.

15. Halilović also urges the Appeals Chamber to recognise the Prosecution's "exceptional statutory entitlement" to appeal an acquittal, which should only be exercised "with the greatest of diligence, in compliance with the fundamental rights of the accused and only where such an appeal would serve one of the purposes for which th[e] [International] Tribunal has been created".[40] This, in his view, is all the more appropriate at a time when the International Tribunal is scaling down its operations and resources "must be allocated only where they are absolutely needed and justified".[41] He submits that "this appeal falls far short of a situation where the Prosecutor could legitimately claim to have been exercising her statutory entitlement to appeal within the limits mentioned above".[42] Halilović concludes that, in this case, the Prosecution's appeal should be dismissed *in toto* without further consideration.[43]

16. The Appeals Chamber notes that Halilović does not identify any authority for his assertion that the Prosecution's right to appeal against acquittals should be exercised only exceptionally, nor does he provide support for his claim that such an appeal would have to reach a higher threshold of "diligence" to be exercised by the appellant in such a case.[44] Similarly, Halilović fails to specify on what ground he bases his assertion that an appeal against acquittal by the Prosecution would have, as a pre-condition, to serve the "purposes for which th[e] [International] Tribunal has been created",[45] in a manner different from all other appeals against judgements rendered by the International Tribunal. The Appeals Chamber also stresses that it is not its task, as suggested by

[39] Respondent's Brief, paras 1-5.
[40] Respondent's Brief, para. 6.
[41] Respondent's Brief, para. 6 (emphasis omitted).
[42] Respondent's Brief, para. 7.
[43] Respondent's Brief, para. 8.
[44] In this context, the Appeals Chamber recalls (*see supra*, para. 11) that the Prosecution's task in the case of appealing an acquittal is "more difficult", in as much as it has "to 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" (*Bagilishema* Appeal Judgement, para. 14).
[45] Respondent's Brief, para. 6.

Halilović, to ascertain whether the Prosecutor has fulfilled her responsibilities in accordance with the Completion Strategy laid out in Security Council Resolution 1503 (2003).[46] The Appeals Chamber further considers that Halilović has failed to point to any element suggesting that the Prosecution abused its discretion in appealing his acquittal. It should also be recalled that the Appeals Chamber has already dismissed Halilović's request to dismiss the appeal without hearing the parties' arguments.[47] Thus, Halilović's request for summary dismissal of the entire appeal is denied.

[46] *See*, in particular, Security Council Resolution 1503, S/RES/1503 (2003), adopted on 28 August 2003, para. 6, as well as Security Council Resolution 1534, S/RES/1534 (2004), adopted on 26 March 2004, paras 4 and 6, requesting the Prosecutor to review the case load of the International Tribunal and to explain, in its progress reports *submitted to the Security Council* every six months, "what measures have been taken to implement the Completion Strategy and what measures remain to be taken".

[47] *See* Decision on Defence Motion for Prompt Scheduling of Appeals Hearing, 27 October 2006, paras 8-9, where the Appeals Chamber found that, since the Prosecution opposed the request for summary disposition of the appeal, the question of whether or not it was open to the parties to waive their entitlement to an oral hearing did not arise.

IV. FIRST GROUND OF APPEAL: WHETHER HALILOVIĆ WAS THE SUPERIOR OF THE PERPETRATORS OF THE CRIMES COMMITTED IN GRABOVICA

A. Overview of the first ground of appeal

17. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that the Prosecution had not proven beyond reasonable doubt that Halilović was the superior of subordinates who committed crimes in Grabovica and in consequently entering an acquittal.[48] The Prosecution alleges six "sub-errors" ("sub-grounds") under this ground of appeal: (i) the Trial Chamber erred in law in applying the legal standard required to demonstrate effective control;[49] (ii) the Trial Chamber erred in law in requiring the Prosecution to prove not only that a military operation existed, but also its name, and it erred in fact in finding that the Prosecution had not established that the operation was called "Neretva";[50] (iii) the Trial Chamber erred in law in requiring the Prosecution to prove that the location where the Inspection Team was accommodated was a forward command post ("IKM") from which the operation in Herzegovina was commanded;[51] (iv) the Trial Chamber erred in using evidence that Halilović had not taken necessary and reasonable measures to punish the perpetrators of the crimes committed in Grabovica to support its finding that he did not have the material ability to punish these perpetrators;[52] (v) the Trial Chamber erred in its application of the standard of proof beyond reasonable doubt;[53] and (vi) the Trial Chamber erred in refusing to admit a statement by Halilović given to the Prosecution in 1996 ("1996 Statement" or "Statement").[54] The Prosecution asks the Appeals Chamber to apply the correct legal standards, admit evidence erroneously excluded and to proceed by making its own findings of fact regarding the existence of a superior-subordinate relationship between Halilović and the perpetrators of the crimes committed in Grabovica.[55]

[48] Prosecution Notice of Appeal, para. 3.
[49] Prosecution Notice of Appeal, para. 4(i); Prosecution Appeal Brief, paras 2.6-2.40; Prosecution Reply Brief, paras 3.1-3.7.
[50] Prosecution Notice of Appeal, para. 4(ii); Prosecution Appeal Brief, paras 2.41-2.82; Prosecution Reply Brief, paras 3.8-3.14. The Prosecution refers to the operation as "Neretva" in the Notice of Appeal, but uses both "Neretva" and "Neretva-93" in the Prosecution Appeal Brief.
[51] Prosecution Notice of Appeal, para. 4(iii); Prosecution Appeal Brief, paras 2.83-2.106; Prosecution Reply Brief, paras 3.15-3.18.
[52] Prosecution Notice of Appeal, para. 4(iv); Prosecution Appeal Brief, paras 2.107-2.120; Prosecution Reply Brief, paras 3.19-3.25.
[53] Prosecution Notice of Appeal, para. 4(v); Prosecution Appeal Brief, paras 2.121-2.136; Prosecution Reply Brief, paras 3.26-3.30.
[54] Prosecution Notice of Appeal, para. 4(vi); Prosecution Appeal Brief, paras 2.137-2.155; Prosecution Reply Brief, paras 3.31-3.35.
[55] Prosecution Notice of Appeal, para. 11; Prosecution Appeal Brief, para. 6.1.

18. The six sub-grounds of appeal advanced under the Prosecution's first ground of appeal are deeply intertwined, in that they all go to the issue of whether Halilović was the superior of the troops that committed the crimes in Grabovica. The discussion on the arguments raised under the first ground of appeal, however, will not conform to the order followed by the Prosecution in the presentation of these sub-grounds of appeal. The Appeals Chamber will first address sub-ground 6, since a reversal of the Trial Chamber's decision on this matter could have an impact upon the evidence to be considered. The Appeals Chamber will then turn to address sub-ground 1, for its resolution will delimit the scope of the Prosecution's appeal, and then sub-grounds 5, 2 and 3 related to the standard of proof applied by the Trial Chamber. Finally, the Appeals Chamber will conclude its analysis of the first ground of appeal by addressing sub-ground 4, which concerns the material ability to punish in order to establish effective control.

B. Sub-Ground 6: Denial of Admission of 1996 Statement

1. Introduction

19. On 8 July 2005, pursuant to a motion filed by Halilović,[56] the Trial Chamber issued its "Decision on Motion for Exclusion of Statement of Accused" ("Decision of 8 July 2005") effectively denying admission of the 1996 Statement, a 25-page statement tendered by the Prosecution from the bar table. The Statement had been given voluntarily by Halilović to the Prosecution during the course of various interviews between February and May 1996, about five years before the Indictment in this case was confirmed.[57] On 25 July 2005, the Trial Chamber denied certification when the Prosecution sought to appeal the Decision of 8 July 2005.[58]

20. Rule 42 of the Rules ("Rights of Suspects During Investigations") reads:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:
>
> (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
>
> (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and
>
> (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
>
> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

21. Rule 43 of the Rules ("Recording Questioning of Suspects") reads:

> Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:
>
> (i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;
>
> (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
>
> (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
>
> (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;

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[56] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Defence Motion for Exclusion of Statement of Accused, 6 June 2005 ("Motion for Exclusion of Statement").

[57] Decision of 8 July 2005, para. 2. *See* also Trial Judgement, Part VII (Procedural History), paras 29-30. A different interview by Halilović had been originally admitted by the Trial Chamber on 20 June 2005 (*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Admission into Evidence of Interview of the Accused), but later rendered inadmissible by an interlocutory decision of the Appeals Chamber (*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 ("Decision on Appeal Concerning Admission of Record of Interview")).

[58] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Motion for Exclusion of Statement of Accused', 25 July 2005 ("Certification Decision of 25 July 2005"), p. 4.

(v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and

(vi) the tape shall be transcribed if the suspect becomes an accused.

22. There is no disagreement among the parties that the procedure for questioning suspects provided for in Rules 42 and 43 of the Rules was not followed in the case of Halilović's interviews because the Prosecution did not consider him a suspect at the time.[59] However, the Prosecution did inform Halilović of his rights to counsel and to remain silent.[60]

23. After having been made aware by the Prosecution of its intention to tender this Statement at trial, once the proceedings against him had started, Halilović asked the Prosecution on six separate occasions (between the months of February and April 2005) to indicate how and through which witness the Prosecution intended to tender the 1996 Statement.[61] In the course of a meeting with Defence Counsel, the Prosecution indicated that it intended to tender the 1996 Statement from the bar table. During a status conference held on 28 April 2005, the Prosecution formally offered to tender the 1996 Statement.[62] Upon objection by the Defence, the Presiding Judge invited Halilović to file submissions in writing.[63] On 30 May 2005, Halilović requested details on the modalities of the interviews and enquired whether records of these interviews existed.[64] On 1 June 2005, the Prosecution submitted that there were no records of the interviews other than the Statement itself.[65] On 6 June 2005, four days after the Prosecution had rested its case,[66] Halilović filed the Motion for Exclusion of Statement.[67] On 8 July 2005, the Trial Chamber decided that the 1996 Statement was inadmissible. It stated, *inter alia*:

> [T]he Trial Chamber is not satisfied that the Statement represents a full and complete record of what Sefer Halilović said. It is more probable than not that not every detail or nuance of the interview was included in the Statement, which affects its reliability. Because the Statement was not audio or video recorded, the Defence at present is incapable to verify the accuracy of the Statement. The only effective way to challenge the content of the statement at this moment in time would be for Sefer Halilović to waive his right to remain silent and testify before this Tribunal.[68]

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[59] *See*, for example, Prosecution Appeal Brief, paras 2.139 and 2.145 (referring to the declarations of two investigators, Gamini Wijeyesinghe and Robert William Reid). *See* also Motion for Exclusion of Statement, para. 29.
[60] Prosecution Appeal Brief, para. 2.146; *see* also Prosecution Reply Brief, para. 3.32, citing Decision of 8 July 2005, paras 22-23.
[61] Motion for Exclusion of Statement, para. 5, cited in Respondent's Brief, para. 218.
[62] Motion for Exclusion of Statement, para. 7, cited in Respondent's Brief, para. 218.
[63] Prosecution Appeal Brief, para. 2.140. *See* also T. 26-27 (28 April 2005): "I believe that the ball is in the court of the Defence and the Defence will file its submission to express [its] views on that. And after that, the Prosecution [will] also have an opportunity to make a reply".
[64] Motion for Exclusion of Statement, para. 8, cited in Respondent's Brief, para. 218.
[65] Motion for Exclusion of Statement, para. 9, cited in Respondent's Brief, para. 218.
[66] Prosecution Appeal Brief, para. 2.140.
[67] *See* Respondent's Brief, para. 218 (referring to the "Motion for Exclusion of Statement" for the relevant procedural background).
[68] Decision of 8 July 2005, para. 25.

On 13 July 2005, the Prosecution requested certification to appeal the Decision of 8 July 2005, a request denied by the Trial Chamber on 25 July 2005 on the ground that "a resolution by the Appeals Chamber at this moment in time would not materially advance the proceedings".[69] In the meantime, on 14 July 2005, the Defence had also rested its case.[70]

24. Under this sub-ground, the Prosecution submits that the Trial Chamber abused its discretion by not admitting the 1996 Statement into evidence.[71]

2. Halilović's request for summary dismissal

25. As part of his response, Halilović requests the summary dismissal of this sub-ground of appeal on the grounds that it was impermissibly varied and that the Prosecution failed to meet the required burden of argument or persuasion, in particular with respect to the alleged effect of the error on the verdict.[72] This request is mainly premised on the alleged abandonment of the Prosecution's allegation of abuse of discretion by the Trial Chamber. According to Halilović, there has been an impermissible variation of the sub-ground between the Notice of Appeal (where "abuse of discretion" is mentioned) and the Appeal Brief (where reference to misinterpretation of Rule 43 of the Rules is made).[73] Although it would have been preferable for the Prosecution to cite in its Notice of Appeal the Rule that was pivotal to this aspect of the appeal, the fact that the Prosecution did not explicitly refer to Rule 43 of the Rules does not amount to an impermissible variation or abandonment of this sub-ground of appeal. The Notice of Appeal states that the Trial Chamber abused its discretion when refusing to admit the Statement and that this amounts to an error of law.[74] This allegation of error is developed and explained in the Appeal Brief as the wrong interpretation of the law (specifically, of Rule 43 of the Rules), which the Trial Chamber identified as applicable to the exercise of its discretion.[75] Thus, the Appeals Chamber dismisses Halilović's arguments in this respect.

26. The Appeals Chamber finds that the issue of whether the Prosecution has failed to meet its burden of argument or persuasion regarding the impact of the admission of the Statement on the verdict[76] is best addressed in the analysis on the merits of the Prosecution's appeal. As to the effect of the alleged error, should the Prosecution establish that the Trial Chamber erred in law in refusing to admit the 1996 Statement into evidence, the verdict might indeed be affected.

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[69] Prosecution Appeal Brief, para. 2.141, citing Certification Decision of 25 July 2005, p. 4.
[70] T. 4 (14 July 2005).
[71] Prosecution Notice of Appeal, para. 4(vi).
[72] Respondent's Brief, paras 215-217.
[73] Respondent's Brief, paras 215-216. The Prosecution replied to these claims in Prosecution Reply Brief, para. 3.31.
[74] Prosecution Notice of Appeal, para. 4(vi).
[75] Prosecution Appeal Brief, 2.137-2.139.
[76] Respondent's Brief, heading (B) after para. 217, p. 70.

27. For the foregoing reasons, Halilović's request for summary dismissal of sub-ground 6 is dismissed.

3. Whether the Trial Chamber abused its discretion in denying admission of the 1996 Statement

28. The Appeals Chamber recalls that, when seized of the interlocutory appeal concerning the admission into evidence of the record of another interview by Halilović to the Prosecution, it acknowledged that "[a]n accused has the right to refuse to give statements incriminating himself prior to trial, and he ha[s] the right to refuse to testify at trial".[77] However, the Appeals Chamber qualified this statement by holding that "where the accused has freely and voluntarily made statements prior to trial, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements from being introduced, provided he was informed about his right to remain silent before giving his statement".[78]

29. In the instant case, Halilović voluntarily consented to be interviewed by the Prosecution and waived his right to be assisted by counsel. However, Halilović argues that he should not be considered an accused who "freely and voluntarily made statements prior to trial" if, in 1995, his status was that of a witness. Thus, according to him, the admission of a statement into evidence under these circumstances would be unfair.[79] The Prosecution submits that, since Halilović was not a suspect at the time of the interview, its investigators were not obliged to follow all of the procedures set out in Rules 42 and 43 of the Rules.[80] In its view, the fact that Halilović later became a suspect and an accused does not retroactively turn the 1996 Statement into a "suspect interview" nor can it affect the waiver of his procedural rights.[81]

30. The Prosecution submits that the Trial Chamber erred in law in refusing to admit into evidence the 1996 Statement on the grounds that it was not audio- or video-recorded in accordance with Rule 43 of the Rules,[82] since the Trial Chamber found that all safeguards in Rule 43 of the Rules, meant to protect rights of a suspect, were met,[83] and since the accuracy of the Statement is confirmed by Halilović's own signature and by the interpreter's certification.[84] Any concern that

[77] Decision on Appeal Concerning Admission of Record of Interview, para. 15.
[78] Decision on Appeal Concerning Admission of Record of Interview, para. 15 (footnote omitted); *see* also *Niyitegeka* Appeal Judgement, paras 30-36.
[79] Halilović's Respondent Brief, paras 231-235.
[80] Prosecution Appeal Brief, paras 2.142-2.148 and 2.154.
[81] Prosecution Appeal Brief, paras 2.151 and 2.154.
[82] Prosecution Appeal Brief, paras 2.137-2.139 and 2.142-2.144.
[83] Prosecution Appeal Brief, paras 2.138 and 2.154-2.155.
[84] Prosecution Appeal Brief, paras 2.147-2.148 and 2.152. *See* also Prosecution Reply Brief, paras 3.32-3.33.

Halilović might have harboured at trial should have been addressed through a *voir dire* at that stage.[85]

31. The Prosecution further submits that, in the 1996 Statement, Halilović makes a number of admissions that would have affected the Trial Chamber's ultimate findings regarding his effective control over the soldiers responsible for the killings in Grabovica, his knowledge of the crimes in Grabovica and his failure to prevent or punish the perpetrators.[86] The Prosecution maintains that the admission of the 1996 Statement would not require a retrial, since the Appeals Chamber is entitled to review and consider it in the context of all the evidence on the record.[87]

32. Halilović observes that the purpose of Rule 43 of the Rules is not limited to ensuring the voluntary nature of a suspect's interview, but also the reliability of the statements derived from such an interview.[88] When a Trial Chamber assesses the admissibility of statements of an accused, it is required to consider whether the evidence was obtained in a manner which casts doubts on its reliability or whether no proper record of the interview exists.[89]

33. Halilović submits that it is not necessary to show that the evidence "was or may" actually be unreliable, but only that the circumstances surrounding the taking of the Statement made it likely to be unreliable.[90] Halilović argues that the 1996 Statement is clearly unreliable on the basis of twelve specific grounds, ranging from language issues to the fact that Halilović was not represented by counsel at the time and, additionally, that the Statement was compiled from undisclosed notes taken by an investigator during seven meetings over a ten-week period.[91]

34. Moreover, Halilović argues that an individual is not entitled to the protection granted under Rules 42 and 43 of the Rules because the Prosecution regards him as a suspect.[92] Rather, this protection applies to this individual "because, *as a suspect* [a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the International Tribunal has jurisdiction][93] these guarantees will apply to him automatically so as to ensure that his rights are being preserved".[94] Halilović submits that the issue

[85] Prosecution Reply Brief, para. 3.32, citing Respondent's Brief, paras 225-230.
[86] Prosecution Notice of Appeal, para. 4(vi); Prosecution Appeal Brief, paras 2.138 and 2.149-2.150; Prosecution Reply Brief, para. 3.34.
[87] Prosecution Reply Brief, para. 3.35.
[88] Respondent's Brief, para. 236, citing Prosecution Appeal Brief, paras 2.143-2.144 and 2.148.
[89] Respondent's Brief, paras 225 and 236.
[90] Respondent's Brief, para. 225.
[91] Respondent's Brief, para. 226. *See* also Respondent's Brief, paras 227-229 (detailing examples of complaints by witnesses on how some of these statements were taken, and of inaccuracies in translations by the Prosecution during the trial).
[92] Respondent's Brief, para. 238.
[93] Rule 2 of the Rules.
[94] Respondent's Brief, para. 238.

of whether he was a suspect at the time of the interview is irrelevant,[95] since "treating the accused as a witness at any stage of the investigation compromises the right of the accused not to be forced to testify against himself or to confess guilt".[96] He considers that, in application of this principle, the guarantees provided for in the Rules must be applied retroactively, at least where the Prosecution seeks to tender evidence obtained from an accused.[97]

35. Finally, Halilović recalls that the Trial Chamber did not deny admission of the 1996 Statement pursuant to Rule 43 of the Rules, but rather pursuant to Rule 89(D) of the Rules.[98] It is not the usefulness or significance of the evidence that should be weighed against the requirement for a fair trial, but rather the "probative value" of that evidence.[99] The Statement was excluded because, in the absence of records of the interview proper, it was impossible to verify the Statement's accuracy and to challenge its content without sacrificing Halilović's rights to remain silent and to a fair trial.[100] Halilović submits that the non-admission of the 1996 Statement fell within the Trial Chamber's discretionary powers under Rule 89(D) of the Rules. He asserts that the Trial Chamber's discretion to exclude evidence should be applied with particular "vigour" where the fundamental right of the accused to remain silent is at stake. It need not be shown that the defendant was in fact treated unfairly.[101]

36. The Trial Chamber found that:

> in order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of *any* former statement of an accused irrespective of the status of the accused at the time of taking the statement.[102]

The Trial Chamber's understanding of the protections afforded by the Statute and the Rules is consistent with the principles expressed in the case law of the International Tribunal and the ICTR[103] as well as the law of other jurisdictions.[104]

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[95] Respondent's Brief, para. 240.
[96] Respondent's Brief, para. 240. *See* also Respondent's Brief, paras 225 and 243.
[97] Respondent's Brief, para. 245.
[98] Respondent's Brief, para. 246.
[99] Respondent's Brief, para. 221. *See* also Respondent's Brief, paras 249 and 251-252.
[100] Respondent's Brief, para. 222. *See* also Respondent's Brief, paras 231-232.
[101] Respondent's Brief, para. 233 and fn. 424. *See* also Respondent's Brief, para. 232.
[102] Decision of 8 July 2005, para. 21.
[103] *See*, for example, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on Defendant's Motion for Summonses and Protection of Witnesses called by the Defence, 17 February 1998; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997.
[104] The European Court of Human Rights ("ECtHR") has dealt with this issue mostly in the context of punishment (in a broad sense) of accused persons relying on their right to remain silent. However, the Appeals Chamber finds the ECtHR case law to be informative of the principles that "[t]he right not to incriminate oneself is primarily concerned … with respecting the will of an accused person to remain silent" (*Heaney and McGuinness v. Ireland*, Reports of Judgments and Decisions 2000-XII, para. 40) and that the status of a person (not yet formally charged) is modified when that individual's situation has been "substantially affected" therefore anticipating the right to remain silent, the right against

37. The Decision of 8 July 2005 dealt with the issue of whether the Statement had been taken in accordance with Rules 42, 43, 63, 89 and 95 of the Rules.[105] The Trial Chamber reasoned that the main question at issue was "what safeguards should have been applied by the Prosecution in order for a former statement of a now accused person to be admissible into evidence".[106] The Trial Chamber concluded that:

> …the Statement was read out to Sefer Halilović in his own language before he signed each page of the document. The Trial Chamber finds that the content of the Statement is a general reflection of what Sefer Halilović said during the interview. However, the fact is that the Statement is but a summary of seven days of interviews, taken over a period of four months. Considering that according to the interpreter Sefer Halilović gave 'very detailed answers to the questions,' the Trial Chamber is not satisfied that the Statement represents a full and complete record of what Sefer Halilović said. It is more probable than not that not every detail or nuance of the interview was included in the Statement, which affects its reliability. Because the Statement was not audio or video recorded, the Defence at present is incapable to verify the accuracy of the Statement. The only effective way to challenge the content of the statement at this moment in time would be for Sefer Halilović to waive his right to remain silent and testify before this Tribunal.[107]
>
> In the present case, Rule 43 [of the Rules] was not applied at the time of taking the Statement. Sefer Halilović has not chosen to waive his right to remain silent during trial. Thus, the Trial Chamber finds that the admission of the Statement would infringe upon the Accused's right to a fair trial.[108]

38. Whether the statement would also be inadmissible due to a retroactive reading of Rule 43 of the Rules was not a decisive consideration in the Trial Chamber's reasoning.[109] It is clear that the Trial Chamber instead excluded the Statement because, in accordance with Rule 89(D) of the Rules, it did not deem the statement reliable enough, so that it could have threatened the fairness of the proceedings.[110] The Appeals Chamber is only called to decide on whether this specific decision was unreasonable.

39. The language used by the Trial Chamber throughout its decision shows that, with no way to test the accuracy of the Statement or its interpretation, its reliability was in doubt.[111] The circumstances of the case, which included the fact that the Statement was being tendered from the bar table, the summary format of the document and the fact that no record of any kind was offered to show its reliability, had an impact upon Halilović's ability to challenge the content of the Statement and prepare an effective defence without forfeiting his right to remain silent. In this respect, the Appeals Chamber emphasizes the large measure of discretion afforded under the Rules

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self-incrimination and the related warnings (*Id.*, 41-42, 45). *See* also *Serves v. France*, Reports 1997-VI, para. 42; *Saunders v. the United Kingdom*, Reports 1996-VI, para. 74; *Shannon v. United Kingdom*, no. 6563/03, judgement of 4 October 2005 (consulted in the Internet).

[105] Decision of 8 July 2005, paras 21 and 24.

[106] Decision of 8 July 2005, para. 19.

[107] Decision of 8 July 2005, para. 25 (footnote omitted).

[108] Decision of 8 July 2005, para. 26.

[109] *See*, in this respect, *Čelebići* Appeal Judgement, para. 533 and *Kvočka* Appeal Judgement, para. 128.

[110] Decision of 8 July, in particular paras 17 and 27, referring to Rule 89(D) of the Rules.

[111] Decision of 8 July 2005, para. 25.

to Trial Chambers in establishing the authenticity of a document.[112] Considering that Trial Chambers' decisions on issues of evaluation of evidence must generally be given a margin of deference,[113] it is only where an abuse of such discretion can be established that the Appeals Chamber should reverse such decisions.[114]

40. The Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber in this instance abused its discretion.[115] The issue of whether the Statement contained relevant and probative evidence, in the sense of Rule 89(C) of the Rules, is therefore moot.

41. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 6.

[112] *See* Decision on Appeal Concerning Admission of Record of Interview, para. 19.
[113] *Čelebići* Appeal Judgement, para. 533, where the Appeals Chamber stated that "a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence" and that, as a result, "a Trial Chamber should be afforded […] deference in making decisions based on the circumstances of the case before it".
[114] *See*, for example, *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000; *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000.
[115] *Cf. Naletilić and Martinović* Appeal Judgement, paras 530 and 544; *Čelebići* Appeal Judgement, para. 533 (concerning the Appeals Chamber's power to intervene to exclude evidence when it finds that a Trial Chamber committed a discernible error in the exercise of its discretion to admit evidence and that this error resulted in unfair prejudice to the appellant, thereby rendering his trial unfair). *See* also *Gacumbitsi* Appeal Judgement, para. 19 (concerning a Trial Chamber's abuse of discretion in relation to a scheduling decision).

C. Sub-ground 1: Requirement of effective control

1. Introduction

42. The Prosecution avers that the Trial Chamber erred in law in paragraphs 38 to 54, 363 to 372, 736 to 747 and 752 of the Trial Judgement in applying the legal standard required to demonstrate effective control.[116] It submits that the Trial Chamber committed three errors in finding that Halilović was not the superior of subordinates who committed the crimes in Grabovica. First, it argues that the Trial Chamber erred in law by requiring the Prosecution to prove that Halilović had "command" and "overall control of combat operations in Herzegovina" rather than effective control over the perpetrators of the crimes committed in Grabovica.[117] Second, the Trial Chamber erred in law in failing to consider whether Halilović had effective control over the perpetrators of the crimes because he was the Team Leader of the Inspection Team, or because he was the most senior ranking ABiH officer in Herzegovina at the time.[118] Third, the Prosecution submits that the Trial Chamber erred in fact in finding that Halilović was not the superior of those perpetrators, notwithstanding the factual findings that establish his material ability to prevent, punish and initiate measures leading to proceedings against the perpetrators.[119]

2. Halilović's request for summary dismissal

43. As part of his response to the Prosecution's arguments, Halilović requests the summary dismissal of this sub-ground of appeal on the grounds that the Prosecution has abandoned or impermissibly varied many of its arguments within this sub-ground of appeal,[120] and that it has failed to meet the burden of argument or persuasion.[121]

44. The Appeals Chamber recalls that in addition to identifying the order, decision or ruling challenged, the Notice of Appeal must set forth the grounds of appeal and "indicate the substance of the alleged errors and the relief sought".[122] An Appellant's brief will thereafter be filed, containing

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[116] Prosecution Notice of Appeal, para. 4(i). *See* also AT. 8-9.
[117] Prosecution Appeal Brief, paras 2.6-2.15. *See* also AT. 9-10 and 12. The Appeals Chamber notes that, during the Appeal Hearing, the Prosecution submitted, on the one hand, that the Trial Chamber examined whether Halilović was commanding and controlling combat activities and whether "Halilović [was] either *de jure* or *de facto* commander of the alleged Operation Neretva […] Again, *with emphasis on de facto commander"* (AT. 10 (emphasis added)). On the other hand, it argued that "the Trial Chamber looked again and again for combat -- command responsibility *in a formal military sense*. It looked for *formal appointment, it looked for formal military title,* and it looked for defined military command roles" (AT. 13 (emphasis added)).
[118] Prosecution Appeal Brief, paras 2.6-2.7 and 2.16-2.27. *See* also AT. 14: "The Trial Chamber overlooked that the case pleaded in the [I]ndictment rested on the authority and power vested in Halilović through his role and function as *de facto* superior, as senior officer in Herzegovina for the operation, and as a team leader of the inspection team".
[119] Prosecution Appeal Brief, para. 2.7. *See* also Prosecution Appeal Brief, paras 2.28-2.40.
[120] Respondent's Brief, paras 10-18, 45, 53, 60, 90-91 and 96.
[121] Respondent's Brief, paras 19-23.
[122] Rule 108 of the Rules. *See* also Practice Direction on Formal Requirements for Appeals from Judgement, para. 1.

all the arguments and authorities in support of the grounds outlined in the notice of appeal.[123] Accordingly, the mere fact that an Appellant's brief contains more arguments which elaborate upon an allegation of error raised in a notice of appeal does not necessarily imply that the grounds of appeal were impermissibly varied. With these principles in mind, and as noted in section III of the present judgement,[124] the Appeals Chamber will address in detail only those arguments advanced in support of Halilović's requests for summary dismissal that warrant discussion.

(a) Failure to find that Halilović was *de facto* commander of the operation

45. In its Notice of Appeal, the Prosecution alleges that "the Trial Chamber erred in law at paragraphs 372 and 752 [of the Trial Judgement] in finding that the Prosecution had failed to prove beyond reasonable doubt that Sefer Halilović was *de facto* commander of an operation called 'Operation Neretva'".[125] Halilović argues that since this allegation was not reiterated in the Prosecution Appeal Brief, it has been abandoned and does not form part of the appeal.[126]

46. In the introduction to its first ground of appeal, the Prosecution states that:

> [t]hus, according to Halilović's superior, to Halilović's subordinate, to Halilović's "Inspection Team", and to Halilović himself, Halilović was the *de jure or de facto commander* of an operation called "Neretva" carried out from an IKM in Jablanica. At the very least, Halilović had "effective control" over the troops that committed the crimes in Grabovica.[127]

However, the specific allegation that the Trial Chamber erred in failing to find that Halilović was the *de facto* commander of Operation Neretva was not reiterated or elaborated upon in the Prosecution Appeal Brief. The allegation of errors of law concerns paragraphs 372 and 752 of the Trial Judgement. The only other instance where the Prosecution makes express reference to paragraph 372 of the Trial Judgement within the context of sub-ground 1, however, is in an introductory line before quoting the paragraph in question:

> The Trial Chamber's legally incomplete findings on effective control end with the conclusion that: [t]he Prosecution has failed to prove beyond reasonable doubt that Sefer Halilović was either *de jure* or *de facto* commander of the alleged operation called 'Operation Neretva' which the Prosecution submits was carried out in Herzegovina in September 1993.[128]

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[123] Rule 111 of the Rules. *See* also Practice Direction on Formal Requirements for Appeals from Judgement, para. 4.
[124] *See supra,* para. 14.
[125] Prosecution Notice of Appeal, para. 4(i). This allegation is raised under sub-grounds 2 and 3, where the Prosecution claims that "the Trial Chamber erred in law and fact at paragraphs 372 and 752 in finding that the Prosecution had failed to prove beyond reasonable doubt that Sefer Halilović was *de facto* commander of an operation called 'Operation Neretva'" (Prosecution Notice of Appeal, paras 4(ii) and 4(iii)).
[126] Respondent's Brief, para. 10.
[127] Prosecution Appeal Brief, para. 2.3 (emphasis added).
[128] Prosecution Appeal Brief, para. 2.17. Paragraph 372 of the Trial Judgement is further quoted in the Prosecution Appeal Brief, para. 2.41, where the Prosecution submits that the Trial Chamber required it to prove not only that the military operation took place, but also that the name of this operation was "Neretva".

47. Thus, the Prosecution Appeal Brief and the Prosecution Reply Brief do not appear, at first glance, to argue that the Trial Chamber erred in failing to find that Halilović was the *de facto* commander of the combat activities that took place in Herzegovina in September 1993 and which the Trial Judgement refers to as "Operation Neretva".[129] Rather, the substance of the Prosecution's argument seems to be that Halilović had effective control over the perpetrators of the crimes committed in Grabovica on other bases.[130]

48. In light of the foregoing, the Appeals Chamber invited the Prosecution to clarify during the Appeal Hearing whether the allegation in question had in fact been abandoned.[131] At the Appeal Hearing, the Prosecution asserted that the allegation in question is not abandoned[132] and referred to the following paragraphs of the Prosecution Appeal Brief in support: 2.3, 2.10, 2.11, 2.23, 2.47, 2.50, 2.52, 2.59, 2.83, 2.86, 2.94 and 2.98.[133]

49. At the Appeal Hearing, Halilović responded that the allegation in question was either abandoned or inadequately argued and supported.[134] Considering that paragraph 2.16 of the Prosecution Appeal Brief only states that the Trial Chamber had the duty to enquire whether Halilović had superior authority over the perpetrators because he was the most senior ABiH officer or because he was the Team Leader of the Inspection Team, Halilović argued that this effectively amounted to an explicit abandonment of the allegation that the Trial Chamber erred in failing to find that Halilović was the *de facto* commander of Operation Neretva.[135] Further, Halilović argued that although the Prosecution "skilfully constructs an argument that *de facto* command is just one of the small parts of effective control, [i]t's inconsistent with the criticisms levelled at the Trial Chamber for its focus on command and it's inconsistent with the argument that there was a case beyond command".[136]

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[129] *See* Trial Judgement, para. 175.
[130] Prosecution Appeal Brief, paras 2.6-2.40.
[131] The Appeals Chamber put the following question to the Prosecution: "1. In its Notice of Appeal, the Prosecution alleges that 'the Trial Chamber erred in law and in fact at paragraphs 372 and 752 [of the Trial Judgement] in finding that the Prosecution had failed to prove beyond reasonable doubt that Sefer Halilović was de facto commander of an operation called 'Operation Neretva''. Given that it is not explicitly reiterated in the Prosecution Appeal Brief, could this claim be deemed as having been abandoned? If not, can the Prosecution point at specific paragraphs in its Appeal Brief where this claim is substantiated?" (footnote omitted). Addendum to Scheduling Order for Appeal Hearing (Questions to the Parties), 19 June 2007, p. 2.
[132] AT. 6.
[133] AT. 6-7. The Prosecution also stated that: "[*d*]*e facto* superior is […] implicit in [paragraph 2.15 of the Prosecution Appeal Brief]". Paragraph 2.15 reads as follows: "Annex A to this brief contains thirteen other excerpts from the Judgement which further illustrate that the Trial Chamber's main line of inquiry was erroneously focused on command instead of effective control".
[134] AT. 74-77.
[135] AT. 76.
[136] AT. 76-77.

50. With respect to paragraph 2.3 of the Prosecution Appeal Brief, the Appeals Chamber has already noted that the specific allegation that the Trial Chamber erred in failing to find that Halilović was the *de facto* commander of Operation Neretva is not reiterated; no allegation of error was raised, and the Prosecution simply stated that "Halilović was the *de jure or de facto commander* of an operation called 'Neretva'".[137] Paragraph 2.10 states that the term "superior" includes (but is not limited to) military commanders. Paragraph 2.11 then goes on to state that "superior responsibility" extends to *de facto* superiors, as well as to non-military or civilian superiors who cannot be described as being "commanders"; in paragraph 2.23, the Prosecution suggested that the Trial Chamber failed to ask itself whether Halilović had "command authority" by virtue of his senior position; paragraph 2.47 states that formal designation as a commander is not a prerequisite and a *de facto* position as a "superior" is sufficient. Finally, paragraphs 2.50, 2.52, 2.59, 2.83, 2.86, 2.94 and 2.98 refer generally to Halilović being the *de facto* "superior" of "those who committed the crimes in Grabovica" during the military operation.

51. The review of these paragraphs shows that the terms "superior", "superior responsibility" and "command authority" are used interchangeably by the Prosecution in its Appeal Brief and are also intended to encompass "command" of Operation Neretva. During the Appeal Hearing, the Prosecution also clarified that "every time the Appeal Brief refers to Halilović's *de facto* superior position, it includes *de facto* command".[138] Finally, the Appeals Chamber emphasizes the Prosecution's concluding remarks on this issue:

> [T]he core of the Prosecution's argument is on effective control and superior position instead of *de facto* command. And this is reflected in the notice of appeal at paragraphs 3 and 4(i). In conclusion, the Prosecution's position is that Halilović was the *de facto* commander of the operation, but in any event he had effective control over those who committed the crimes. The Prosecution has not abandoned this position.[139]

52. In light of the foregoing, the Appeals Chamber denies Halilović's request for summary dismissal of the allegation that the Trial Chamber erred in law at paragraphs 372 and 752 of the Trial Judgement in finding that the Prosecution had failed to prove beyond reasonable doubt that Halilović was *de facto* commander of Operation Neretva.

(b) Failure to find that Halilović had effective control

53. The Prosecution Notice of Appeal states that the Trial Chamber's failure to find that Halilović was *de facto* commander of Operation Neretva "led to the further erroneous findings at paragraphs 747 and 752 that Sefer Halilović did not have effective control over the offending

[137] *See supra,* para. 45.
[138] AT. 7.
[139] AT. 7.

troops".[140] Halilović argues that this last allegation must be considered to have been abandoned since it "derived or resulted" from the abandoned allegation that the Trial Chamber erred in failing to find that he was *de facto* commander of Operation Neretva.[141] Halilović also avers that the following allegations contained in the Notice of Appeal have been abandoned: (1) that the Trial Chamber erred in law through a misapplication of the effective control test in a number of paragraphs in the Trial Judgement[142] and (2) that the Trial Chamber erred in law in concluding that a person tasked with "coordinating combat activities" could not, by virtue of this position, have had effective control over the offending troops.[143]

54. The Appeals Chamber finds that the Prosecution did not abandon these allegations of error. Paragraphs 2.6 to 2.40 of the Prosecution Appeal Brief seek to demonstrate that the Trial Chamber erred in its application of the effective control standard and in its conclusion that Halilović did not have effective control over the offending troops. Moreover, the Prosecution also argues that Halilović's coordinating role as Team Leader of the Inspection Team warrants a conclusion of effective control.[144] The Prosecution Notice of Appeal states that "the Trial Chamber erroneously required Sefer Halilović to have the position of a military 'commander' for him to have effective control over the offending troops".[145] This issue is intrinsically connected to the allegations made in the Prosecution Appeal Brief to the effect that the Trial Chamber erroneously focused on command and the Prosecution's general arguments on a "case beyond command". The Appeals Chamber finds that the Prosecution Appeal Brief does not vary the allegations of error made in the Prosecution Notice of Appeal, but merely develops arguments in support of these allegations. Thus, Halilović's request for summary dismissal regarding the alleged abandonment of the Prosecution's allegation is denied.

(c) Failure to meet burden of argument or persuasion

55. Halilović submits that, since the Prosecution has put forth unsubstantiated allegations that fall short of the required burden of persuasion, summary dismissal is justified.[146] The Appeals Chamber finds that the arguments advanced by Halilović in this respect are unconvincing. As a result, Halilović's request for summary dismissal on the basis of the alleged failure of the Prosecution to meet its burden of argument or persuasion is denied.

[140] Prosecution Notice of Appeal, para. 4(i).
[141] Halilović Respondent's Brief, paras 11 and 90.
[142] Respondent's Brief, paras 12 and 45.
[143] Respondent's Brief, para. 55.
[144] Prosecution Appeal Brief, paras 2.16, 2.24-2.26, 2.29 *et seq.*
[145] Prosecution Notice of Appeal, para. 4(i).
[146] *See* Respondent's Brief, paras 19-23.

(d) New allegation which did not form part of the Prosecution's case at trial

56. Halilović claims that a case of effective control beyond Halilović's role as commander of Operation Neretva was never pleaded at trial. He submits that therefore, since this is a new argument which did not form part of the Prosecution's case, no notice thereof was given and, therefore, summary dismissal of this argument is warranted.[147] The Appeals Chamber considers that a determination on the issue of whether the Prosecution pleaded a case of effective control beyond Halilović's role as commander of Operation Neretva at trial, and consequently the issue as to whether the Trial Chamber "erred in law in failing to make necessary findings concerning effective control beyond 'command'",[148] require a detailed analysis of the Indictment and the relevant submissions of the parties at trial. It would therefore not be appropriate to dismiss this sub-ground of appeal without considering its merits. Accordingly, Halilović's request for summary dismissal on the basis that the Prosecution raises a new allegation which did not form part of its case at trial is denied.

3. Whether the Trial Chamber required proof of command in determining superior responsibility

57. The Prosecution submits that the Trial Chamber erred in law in treating "command" as a legal requirement of superior responsibility pursuant to Article 7(3) of the Statute[149] and, as a consequence, in erroneously focusing on Halilović's role as commander of Operation Neretva and on his control of combat operations to determine his effective control over the offending troops.[150]

58. Halilović responds that the Trial Chamber correctly identified the three elements of superior responsibility; there is no indication that it regarded the position of "commander" as an element or condition of effective control.[151] He submits that the Trial Chamber found on the evidence that the Prosecution had failed to establish that he was the commander of an operation and consequently unable to exercise effective control over the perpetrators, as expressly pleaded in the Indictment.[152] Halilović argues alternatively that, even if the Trial Chamber erred, the Prosecution has failed to establish that the alleged error would invalidate the Trial Judgement, for the Trial Chamber thoroughly assessed all evidence relevant to Halilović's alleged effective control, including

[147] *See* Respondent's Brief, paras 24 and 40.
[148] Prosecution Appeal Brief, heading (B) p. 13. *See*, in particular, Prosecution Appeal Brief, paras 2.16-2.18.
[149] Prosecution Appeal Brief, paras 2.8-2.9. The Prosecution submits that the Trial Chamber erred in law by requiring "Halilović to have the position of a military 'commander' for him to have effective control over the offending troops". (Prosecution Notice of Appeal, para. 4(i)).
[150] Prosecution Appeal Brief, para. 2.12. *See also* AT. 8-10.
[151] Respondent's Brief, paras 46 (citing Trial Judgement, paras 57 *et seq*.) and 47-50; AT. 64 and 75.
[152] Respondent's Brief, paras 47-49. *See* also AT. 65-66.

evidence concerning his high-ranking position in the ABiH and his position as Team Leader of the Inspection Team.[153]

59. As a preliminary matter, the Appeals Chamber notes that, in paragraph 56 of the Trial Judgement, the Trial Chamber correctly set out the elements that must be satisfied to hold a superior responsible under Article 7(3) of the Statute:

> i. The existence of a superior-subordinate relationship;
>
> ii. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> iii. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Regarding the first of these elements, the Appeals Chamber recalls that the concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[154] Against this backdrop, the Appeals Chamber recalls that the necessity of proving that the perpetrator was the "subordinate" of the accused (against whom charges have been brought under Article 7(3) of the Statute) does not require direct or formal subordination. Rather, the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists.[155] The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to "prevent and punish" crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction. The Trial Chamber's analysis of the law on the first element of superior responsibility is consistent with this approach.[156]

60. At paragraph 57 of the Trial Judgement, the Trial Chamber stated that "[i]t is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his

[153] Respondent's Brief, paras 51-52; *see* also Respondent's Brief, paras 57-58.
[154] *Čelebići* Appeal Judgement, para. 256.
[155] *Čelebići* Appeal Judgement, para. 303.
[156] *See* Trial Judgement, paras 57-63.

corollary liability for a failure to do so".[157] In the following paragraphs,[158] the Trial Chamber correctly described the jurisprudence of the International Tribunal with respect to superior responsibility, particularly by identifying the threshold test as that of "effective control" and recognising the broad definition given to the term "command" so that *de facto* superiors may be found liable under Article 7(3) of the Statute.[159] The Trial Chamber therefore correctly articulated the law[160] and, contrary to the Prosecution's submissions,[161] did not consider a position of military command as a requirement for establishing superior responsibility.

61. The Appeals Chamber will now consider the Prosecution's submissions that the Trial Chamber erred in restating the law on the third element of superior responsibility.[162] According to the Prosecution, in paragraphs 81 to 90 of the Trial Judgement, the Trial Chamber created an unnecessary and unwarranted distinction between a general obligation and a specific obligation to prevent crimes.[163]

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[157] Trial Judgement, para. 57, citing *Aleksovski* Appeal Judgement, para. 76; ICRC Commentary, p. 1010; ILC Commentary, p. 36.
[158] Trial Judgement, paras 58-63.
[159] Trial Judgement, para. 60, citing *Čelebići* Appeal Judgement, paras 193, 195 and 303.
[160] The Appeals Chamber notes that the Prosecution acknowledged this during the Appeal Hearing (AT. 8-9).
[161] Prosecution Appeal Brief, paras 2.8-2.12.
[162] Prosecution Appeal Brief, paras 4.2-4.17. *See* also Halilović Respondent's Brief, paras 286-294; Prosecution Reply Brief, paras 5.1-5.4; AT. 53-55.
[163] Prosecution Notice of Appeal, para. 7 (which concerns the Prosecution's third ground of appeal). *See*, in particular, the following excerpts of the Trial Judgement (footnotes omitted):

> 81. The existence of a general obligation to prevent the commission of crimes stems from the duty of a commander, arising from his position of effective control, which places him in the best position to prevent serious violations of international humanitarian law. This obligation can be seen to arise from the importance which international humanitarian law places on the prevention of violations.
>
> 87. The Trial Chamber notes that it is well established that international humanitarian law intends to bar not only actual breaches of its norms, but aims also at preventing its potential breaches. As noted above, international humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason they are placed in a position of control over the acts of their subordinates, and it is this position which generates a responsibility for failure to act. It is a natural element of the *preventative* constituent of command responsibility that a commander must make efforts to ensure that his troops are properly informed of their responsibilities in international law, and that they act in an orderly fashion.
>
> 88. While it is evident that no criminal liability may attach to the commander for failure in this duty *per se*, it may be an element to be taken into consideration when examining the factual circumstances of the case. However, the adherence to this general obligation does not suffice by itself to avoid the commanders [sic] criminal liability in case he fails to take the necessary appropriate measure under his specific obligation.
>
> 89. As noted above, what the duty to prevent entails in a particular case will depend on the superior's material ability to intervene in a specific situation. In establishing individual responsibility of superiors military tribunals set up in the aftermath of World War II have considered factors such as the superior's failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to take disciplinary measures to

62. The Appeals Chamber acknowledges that the Trial Chamber's reference to both types of obligations – "general" and "specific" – under its analysis on the duty to prevent fosters confusion.[164] Hence, the Prosecution understood this distinction between general and specific obligation as being "an unhelpful addition to the correct legal standard".[165]

63. In discussing the "duty to prevent" in paragraphs 79 through 90 of the Trial Judgement, the Trial Chamber described what it termed a "general obligation" of each commander to maintain order and control of his own troops. 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.[166] The Appeals Chamber stresses 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.[167] What constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.[168]

64. The Appeals Chamber holds that the Trial Chamber erred when giving the impression that there is an additional requirement to the third element of superior responsibility and agrees with the Prosecution that 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.[169] Of course, this single standard will have to be applied differently in different circumstances; however, the

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> prevent the commission of atrocities by the troops under their command, the failure to protest against or to criticise criminal action, and the failure to insist before a superior authority that immediate action be taken. The Tokyo Trial held that a superior's duty may not be discharged by the issuance of routine orders and that more active steps may be required.

[164] *See*, in particular, paragraph 88 of the Trial Judgement: "While it is evident that no criminal liability may attach to the commander for failure in this duty *per se*, it may be an element to be taken into consideration when examining the factual circumstances of the case. However, the adherence to this general obligation does not suffice by itself to avoid the commanders [*sic*] criminal liability in case he fails to take the necessary appropriate measure under his specific obligation" (footnote omitted).
[165] Prosecution Appeal Brief, para. 4.9.
[166] *See,* for example, *Aleksovski* Appeal Judgement, para. 76.
[167] Article 86 of Additional Protocol I provides that superiors are responsible if, *inter alia* "[t]hey did not take all feasible measures within their power to prevent or repress the breach"; in this respect, the ICRC Commentary explains that, for a superior to be found responsible, it must be demonstrated that the superior "did not take the *measures within his power* to prevent it" and elaborates that these measures must be "'feasible' measures, since it is not always possible to prevent a breach or punish the perpetrators" (ICRC Commentary, paras 3543 and 3548, emphasis added); Article 87 adds the duty to "initiate such steps as are necessary to prevent such violations […] and, where appropriate, to initiate disciplinary or penal action against violators thereof." *See* also the US Supreme Court's holding in *In re Yamashita*, 327 US 1 (1945), at 16 ("such measures […] within his power and appropriate in the circumstances") and *US v. Karl Brandt et al.*, in TWC, Vol. II, p. 212 ("The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command…").
[168] *Blaškić* Appeal Judgement, para. 72.
[169] *See* Prosecution Appeal Brief, para. 4.9.

artificial distinction between "general" and "specific" obligations creates a confusing and unhelpful dichotomy.

65. Having solved this preliminary matter, the Appeals Chamber will now discuss whether the Trial Chamber erroneously required proof of command in determining Halilović's superior responsibility, as submitted by the Prosecution under the present sub-ground of appeal.

66. In determining whether a superior-subordinate relationship existed between Halilović and the perpetrators of the crimes committed in Grabovica, the Trial Chamber was obliged to assess, as it did, all the evidence presented. In doing so, the Trial Chamber must have determined whether the evidence contained indicators which showed, *inter alia,* that Halilović had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[170] Some factors indicative of effective control, such as the accused's position, his capacity to issue orders, his position within the military or political structure, the procedure for appointment and the actual tasks performed, were specifically identified in the Trial Judgement and considered by the Trial Chamber in reaching a determination as to whether the evidence presented established Halilović's effective control over the perpetrators of the crimes committed in Grabovica.[171]

67. In support of the contention that "[t]he Trial Chamber's ultimate conclusion was that 'command' is legally required for superior responsibility"[172] the Prosecution quotes part of paragraph 752 of the Trial Judgement:

> It is a principle of international criminal law that a commander cannot be held responsible for the crimes of persons who were not *under his command* at the time the crimes were committed. The Trial Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that Sefer Halilović was either *de jure* or *de facto* commander of an operation called "Operation Neretva", which the Prosecution alleges was carried out in Herzegovina.[173]

Nonetheless, when read in its entirety, paragraph 752 of the Trial Judgement does not support this contention. The Prosecution emphasizes the expression "under his command" and selectively omits this paragraph's first two sentences, thereby taking the excerpt cited in the Prosecution Appeal Brief out of context.[174] However, the Trial Chamber rightly relied here upon a principle laid down in the *Hadžihasanović* case, where the Appeals Chamber held that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the accused assumed

[170] *Cf. Blaškić* Appeal Judgement, para. 69.
[171] Trial Judgement, para. 58.
[172] Prosecution Appeal Brief, para. 2.12.
[173] Trial Judgement, para. 752, quoted in Prosecution Appeal Brief, para. 2.12 (emphasis added by the Prosecution).
[174] "The Trial Chamber recalls its finding that Sefer Halilović possessed a degree of influence as a high ranking member of the ABiH and as one of its founders. However, the Trial Chamber considers that Sefer Halilović's influence falls short of the standard required to establish effective control." (Trial Judgement, para. 752).

command over this subordinate.[175] By taking the Trial Chamber's reference to "command" in paragraph 752 of the Trial Judgement out of context, the Prosecution ignores the Trial Chamber's explicit consideration of Halilović's influence as falling short of the standard required to establish effective control. Contrary to the Prosecution's allegation, this paragraph does not focus on the term "command" as a requirement to establish superior responsibility.

68. The Appeals Chamber notes that, at trial, the Prosecution pleaded Halilović's role of military commander as a material fact underlying the allegation of Halilović's effective control over the perpetrators.[176] Paragraph 38 of the Indictment states that "[a]t all times relevant to the charges in the [I]ndictment, by virtue of his position and authority as Commander of the Operation [Halilović] had effective control over the units subordinated to him".[177] This is the only paragraph of the Indictment which explicitly pleads effective control. It is also a clear allegation that Halilović possessed effective control at the time of the crimes over the 9th Motorised Brigade, the 10th Mountain Brigade, the 2nd Independent Battalion and the Prozor Independent Battalion, *by reason* of his position and authority as Commander of Operation Neretva. The Appeals Chamber notes that Halilović was not alleged to be a civilian leader, but rather a commander of the troops participating in Operation Neretva, exercising both *de jure* and *de facto* "power" over the relevant units "by his control in military matters".[178] The Trial Chamber therefore did not err, as claimed by the Prosecution,[179] in assessing whether Halilović was indeed "commander" of Operation Neretva.

69. Similarly, while being in "overall control of combat operations" is not an express requirement under Article 7(3) of the Statute, the Trial Chamber is expected to make a finding in this respect if such a fact is pleaded as underlying one of the requirements of superior responsibility. In the present case, although the Prosecution did not explicitly allege "control of combat operations", it argued that Halilović had authority to "command combat activities"[180] and that he issued combat orders "consistent with those a commander of an operation would normally issue",[181] as a way of showing that a superior-subordinate relationship existed. The Trial Chamber was therefore expected to rule on this allegation as part of its overall analysis regarding Halilović's

[175] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Interlocutory Decision"), para. 51.
[176] On appeal, the Prosecution does not dispute that it pleaded Halilović's position of command as a basis for the charge of superior responsibility (Prosecution Appeal Brief, para. 2.20).
[177] *See* also Indictment, para. 4: "Sefer Halilović was the commander of the Operation and as such the troops involved in the 'NERETVA-93' Operation were under his command and control'".
[178] *See* Indictment, paras 38 and 39. *See* also Prosecution Pre-Trial Brief, para. 24; Prosecution Final Trial Brief, para. 186.
[179] Prosecution Notice of Appeal, para. 4(i).
[180] Prosecution Pre-Trial Brief, para. 27.
[181] Prosecution Pre-Trial Brief, para. 43.

authority to issue orders which would, in turn, assist in assessing whether a superior-subordinate relationship existed.[182]

70. The Prosecution further claims that the Trial Chamber erroneously focused on the existence of combat orders and evidence of formal subordination to establish Halilović's *command* instead of assessing whether Halilović had effective control over the perpetrators.[183] The Appeals Chamber considers that, in light of the Prosecution's pleadings at trial outlined above,[184] the Trial Chamber did not err in assessing Halilović's "command". In particular, the Prosecution itself pleaded the issuing of orders to demonstrate that Halilović had "both formal *de jure* and *de facto* power".[185] The capacity to issue orders can amount to a factor indicative of effective control.[186] The Trial Chamber did not err, as submitted by the Prosecution,[187] in examining the context in which Halilović issued his orders as a means to assess whether these orders could establish Halilović's effective control.[188] Indeed, the evidence indicated that the orders issued by Halilović were within the ambit of Rasim Delić's authority and not Halilović's.[189] The Trial Chamber did also find that some orders issued by Halilović were not followed[190] or were followed only after confirmation by Rasim Delić.[191]

71. Moreover, the issue of the 9th Brigade's subordination was relevant as an element to ascertain whether Halilović was able to control the troops in question.[192] Indeed, considering that the 9th Brigade was under the command of Zulfikar Ališpago,[193] any military chain of command might legitimately be considered as going through Ališpago. It was for the Prosecution to prove the existence of other indicators establishing effective control outside Ališpago's subordination to Halilović. Indeed, as the Trial Chamber correctly noted, command can also be "based on the

[182] Trial Judgement, para. 371.
[183] Prosecution Appeal Brief, paras 2.13 and 2.14, citing Trial Judgement, paras 735-752. *See* also AT. 13-14 and 16.
[184] *See supra*, para. 68.
[185] Indictment, para. 39.
[186] Trial Judgement, para. 58.
[187] Prosecution Appeal Brief, para. 2.14.
[188] Trial Judgement, paras 244 and 350; *see* also Trial Judgement, para. 741.
[189] *See* Trial Judgement, para. 370, where the Trial Chamber found that "an analysis of the evidence concerning orders issued by Sefer Halilović and information sent to him from the field indicates that the orders issued by Sefer Halilović were issued under the overall authority of Rasim Delić as Commander of the ABiH, and that orders issued by Sefer Halilović were, in general, implementing the instructions of the Commander". *See* also Trial Judgement, paras 199, 201 and 369.
[190] *See* Trial Judgement, paras 351 and 744, concerning the disobedience of Zulfikar Ališpago.
[191] *See* Trial Judgement, paras 233 and 743, concerning Vahid Karavelić's failure to carry out an order issued by Halilović on 2 September 1993 until it was confirmed by Delić.
[192] The Appeals Chamber notes the Prosecution's submissions to the effect that: "Halilović's orders flowed down to the corps and unit commanders. The corps and unit commanders followed these orders with the corps and unit command orders cascading down to brigade commanders and so on" (AT. 15).
[193] Trial Judgement, paras 345 and 744. *See* also Trial Judgement, para. 302, referring to Exhibit 503.

existence of *de facto* powers of control".[194] Therefore the Trial Chamber did not err in assessing the subordination of the 9th Brigade and its commander Ališpago to Halilović.

72. The Prosecution also submits that the Trial Chamber erred in assessing Halilović's actions as Team Leader of the Inspection Team only in view of his position as "commander" and in failing to consider whether these actions established that he had "effective control".[195] However, the Prosecution specifically pleaded that the Inspection Team had a "commanding role and function" and that Halilović was "its *commander*"[196] when alleging Halilović's effective control. The Trial Chamber was therefore expected to address this issue when assessing Halilović's role as Team Leader of the Inspection Team.[197] Indeed, the Trial Chamber heard evidence to the effect that the order appointing Halilović as Team Leader did not appoint him as commander of "Operation Neretva",[198] a position, as noted above, pleaded in the Indictment as the basis for Halilović's effective control over the troops in question.[199] The Appeals Chamber considers that the Prosecution, in its submissions at trial, did not substantiate how Halilović's role as Team Leader allegedly gave him "effective control" other than through his alleged position as commander.

73. Nevertheless, and contrary to the Prosecution's claim on appeal,[200] the Trial Chamber's analysis of Halilović's role as Team Leader of the Inspection Team was not confined to his alleged position as commander. In fact, the Trial Chamber first considered in detail evidence regarding the establishment and specific functions of the Inspection Team,[201] as well as Halilović's role as its Team Leader.[202] The Trial Chamber found that the Inspection Team was charged with inspection, coordination and cooperation among units,[203] and had to submit reports to Rasim Delić, who would then give the order to use or replace a unit.[204] The Trial Chamber also found that Halilović implemented Rasim Delić's orders in keeping with his role as Team Leader responsible for coordinating and monitoring units.[205] It is against this background that the Trial Chamber found that the documents sent by Halilović during the relevant time were consistent with his coordination role as Team Leader of the Inspection Team and that the orders he issued were all within the framework

[194] Trial Judgement, para. 60, quoting *Čelebići* Appeal Judgement, para. 195.
[195] Prosecution Appeal Brief, para. 2.14. *See* also AT. 14.
[196] Prosecution Pre-Trial Brief, para. 27 (emphasis added).
[197] Trial Judgement, paras 202-210 and 369.
[198] Trial Judgement, paras 210 and 364.
[199] Indictment, para. 38. *See supra*, para. 68.
[200] Prosecution Appeal Brief, para. 2.14.
[201] Trial Judgement, paras 193-205. The Trial Chamber concluded that the Inspection Team had been set up by the order issued by the Commander of the Supreme Command Staff, Rasim Delić, dated 30 August 1993 "to *coordinate* the work and tasks of units in the zones of responsibility of the 4th and 6th Corps" (Trial Judgement, para. 210 (emphasis added)).
[202] Trial Judgement, paras 199 and 202-205. S*ee* also Trial Judgement, paras 355-364, concerning Halilović's role as Team Leader of the Inspection Team.
[203] Trial Judgement, paras 350 and 364.
[204] Trial Judgement, para. 350.
[205] Trial Judgement, para. 244. *See* also Trial Judgement, para. 741.

of the orders issued by Rasim Delić.[206] Similarly, the Appeals Chamber notes that, at trial, the Prosecution specifically pleaded Halilović's organisation regarding the redeployment of units in the context of his position as a commander, since this redeployment began upon his "appointment as commander of the operation by Delić and [is] demonstrative of the Accused's command responsibilities related to Operation-93".[207] In fact, contrary to the Prosecution's arguments on appeal,[208] the Trial Chamber assessed the reorganisation and resubordination of troops as such,[209] before making a finding on Halilović's role. The Trial Chamber concluded, in this context, that Halilović implemented the orders of Rasim Delić "in keeping with his role as Team Leader of the Inspection Team charged with coordinating and monitoring functions".[210] The Appeals Chamber therefore considers that the Trial Chamber analysed Halilović's coordinating functions in the context of indicators of effective control, finding that the functions bestowed upon Halilović and the restrictions within which he was bound to act[211] were not sufficient to establish his effective control beyond reasonable doubt.

74. Thus, the Trial Chamber did ascertain whether Halilović held the position of military commander because this fact was pleaded by the Prosecution as a material fact in support of the allegation that he had effective control over the units subordinated to him.[212] However, this does not mean that, upon concluding that Halilović was not the *de jure* military commander of Operation Neretva, the Trial Chamber failed to further address other indicators of effective control. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not treat military command as a necessary element of superior responsibility, thereby committing an error of law and, as the Prosecution suggests, "shift[ing] the focus of the [Trial] Judgement away from a determination of effective control".[213]

4. Whether the Trial Chamber erred in failing to consider a case beyond command

75. The Trial Chamber considered that the Prosecution based its charge of Halilović's individual criminal responsibility solely on his alleged position as Commander of Operation

[206] Trial Judgement, para. 742. *See* also Trial Judgement, para. 359, for evidence that Halilović had issued orders but that they had to remain within the limits of the order issued by Rasim Delić.
[207] Prosecution Pre-Trial Brief, para. 31.
[208] Prosecution Appeal Brief, para. 2.14.
[209] Trial Judgement, paras 222-244.
[210] Trial Judgement, para. 244. *See* also Trial Judgement, para. 741.
[211] *See*, for example, Trial Judgement, para. 743, where the Trial Chamber notes that Vahid Karavelić did not carry out an order from Halilović until it had been confirmed by Rasim Delić.
[212] The Prosecution conceded that at trial it failed to prove that Halilović was the *de jure* commander of Operation Neretva (AT. 141).
[213] Prosecution Appeal Brief, para. 2.8.

Neretva-93.[214] It found on the evidence that (i) the Prosecution had not established beyond reasonable doubt that Halilović was *de jure* or *de facto* commander of Operation Neretva[215] and that (ii) the Prosecution had not proven beyond reasonable doubt that Halilović had effective control over the troops which committed the crimes in Grabovica and Uzdol.[216]

76. The Prosecution submits that, after having reached the conclusion that Halilović was not a formal or *de jure* commander of Operation Neretva, the Trial Chamber was under a duty to continue its inquiry and to determine whether he nevertheless had superior authority over the perpetrators of the crimes by virtue of the other factual bases pleaded at trial.[217] These alternative bases were Halilović's position as the most senior ranking ABiH officer in Herzegovina at the time[218] and his position as Team Leader of the Inspection Team.[219] The Prosecution claims that the Trial Chamber erred in law in failing to make "necessary" findings concerning effective control beyond command[220] and in assuming that the Prosecution's case was limited to Halilović's command over Operation Neretva.[221] The Prosecution requests the Appeals Chamber to intervene and correct this error by entering its own findings on the other bases of superior responsibility pleaded in the Indictment.[222]

77. Halilović responds that the Prosecution has waived its right to invoke these allegations on appeal, since it did not plead them at trial or pleaded them so inadequately that the Defence could not be said to have received adequate and timely notice.[223] He further argues that the Trial Chamber was under no obligation to consider a case beyond command, a case that was not clearly pleaded or argued at trial.[224] In particular, Halilović contends that the Prosecution alleged his role as Team Leader of the Inspection Team and his senior status in the ABiH only in order to demonstrate his command of the operation and not as alternative bases for a conclusion of effective control.[225] Halilović also submits that the Trial Chamber did consider all matters and evidence relevant to the issue of effective control, including the evidence pertaining to his senior status and his coordinating role as Team Leader of the Inspection Team, but found that this evidence did not show that he had

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[214] Trial Judgement, para. 111 and fn. 267, citing Indictment, para. 38; Prosecution Final Brief, para. 186; Prosecution Pre-Trial Brief, paras 203 and 207-208. *See* also Trial Judgement, paras 342 and 735.
[215] Trial Judgement, para. 372. *See* also Trial Judgement, para. 752.
[216] Trial Judgement, paras 747 and 752.
[217] Prosecution Appeal Brief, paras 2.16, 2.18-2.19 and 2.21. *See* also AT. 12, 14 and 17-18.
[218] Prosecution Appeal Brief, paras 2.16, 2.19 and 2.21-2.23, citing, *inter alia*, para. 36 of the Indictment.
[219] Prosecution Appeal Brief, paras 2.16, 2.19, 2.21 and 2.24-2.26, citing paras 1, 3, 31 and 39 of the Indictment.
[220] Prosecution Appeal Brief, heading (B) p. 13. *See*, in particular, Prosecution Appeal Brief, paras 2.16-2.18.
[221] Prosecution Appeal Brief, paras 2.19-2.20, citing Trial Judgement, paras 111, 342 and 735. Prosecution Reply Brief, paras 2.5-2.11. *See* also AT. 12.
[222] Prosecution Appeal Brief, para. 2.27. *See* also AT. 17.
[223] Respondent's Brief, paras 24-44, 54, 60, 71 and 92. *See* also AT. 112: "The case beyond command we say was waived and it's no error to ignore it".
[224] Respondent's Brief, paras 61 and 63. *See* also AT. 68-69.
[225] Respondent's Brief, paras 66, 73-74 and 78.

effective control over the perpetrators.[226] The Prosecution reiterates in its Reply Brief that "a case beyond command" was pleaded at trial.[227]

78. The Appeals Chamber deems it useful at this juncture to recall the material facts which must be pleaded in the indictment where criminal responsibility pursuant to Article 7(3) of the Statute is alleged:

> (1) that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (2) the criminal acts of such persons, for which he is alleged to be responsible;
>
> (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
>
> (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[228]

Bearing in mind these principles of pleading settled in the jurisprudence of the Appeals Chambers of the International Tribunal and the ICTR, the present judgement turns to analyse the Indictment in conjunction with the Prosecution's submissions on appeal.

79. Paragraph 38 of the Indictment states that "[a]t all times relevant to the charges in the [I]ndictment, by virtue of his position and authority as Commander of the Operation [Halilović] had effective control over the units subordinated to him". As noted above, this is the only paragraph of the Indictment which explicitly pleads effective control.[229] Nevertheless, the Prosecution submits on appeal that the Trial Chamber failed to fully address two further factual bases pleaded in the Indictment.

80. The first such factual basis is Halilović's position as the most senior ranking ABiH officer in Herzegovina,[230] as set out in paragraph 36 of the Indictment:

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[226] Respondent's Brief, paras 65 and 67-70. *See* also AT. 112: "The Trial Chamber at 752 and 746 still dealt with effective control and found that it was not established".
[227] *See* Prosecution Reply Brief, paras 2.5-2.11.
[228] *Ntagerura et al.* Appeal Judgement, para. 26 (regarding the corresponding provision under Article 6(3) of the ICTR Statute), referring to *Blaškić* Appeal Judgement, para. 218 and *Naletilić and Martinović* Appeal Judgement, para. 67. The Appeals Chamber notes that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue" (*Blaškić* Appeal Judgement, para. 218 and accompanying references).
[229] *See supra*, para. 68.
[230] *See* Prosecution Appeal Brief, paras 2.19 and 2.22-2.23. At paragraph 2.21 of its Appeal Brief, the Prosecution only adds that paragraphs 1, 4, 36, 37 and 39 of the Indictment pleaded facts relating to Halilović's superior responsibility as the most senior ranking officer in Herzegovina at the time.

> **Sefer HALILOVIĆ** was Chief of the Supreme Command Staff, one of Rasim Delic's [sic] deputies and was the most senior ranking Commander in Herzegovina at that time for the Operation. The ABiH Disciplinary Regulations, in particular those gazetted on 13 August 1992, as amended, to implement the rules relating to the investigation of war crimes, also bound him.

The other factual basis is the fact that "Halilović was a superior because he was the Team Leader of the Inspection Team".[231] The Prosecution relies on paragraphs 1, 3, 31 and 39 of the Indictment to support this contention:[232]

> 1. **Sefer HALILOVIĆ**: the son of Rustem, born on 6 January 1952 in Prijepolje in the region of Serbia known as Sandžak. He attended the military academy in Belgrade in 1971 for 3 years. In 1975 he went to the military school in Zadar where he became an Officer in the Yugoslav People's Army (JNA). On 31 August 1990 he went to Belgrade and attended a two-year course at the school for commanders.
> When **Sefer HALILOVIĆ** left the JNA in September 1991 he was a professional military officer who had attained the rank of Major. He returned to Bosnia-Herzegovina in September 1991, joined the Patriotic League and planned the defence of Bosnia-Herzegovina. On 25 May 1992 he was appointed by the Presidency of the Republic of Bosnia and Herzegovina (RBiH) as Commander of the Territorial Defence (TO) Staff of the RBiH, replacing Hasan Efendić.
> Consequently he became the most senior Military Commander of the armed forces of the RBiH.
> During the period 25 May 1992 until early July 1992, whilst the TO evolved into the Army, as per the Law of the Army of the Republic of Bosnia and Herzegovina dated 20 May 1992, **Sefer HALILOVIĆ** performed the function of the Commander of the TO Staff of the RBiH. His function meant he was also a member of the War Presidency. After July 1992, he functioned as the Chief of the General Staff of the Army of the Republic of Bosnia and Herzegovina (ABiH).
> On 18 August 1992 the Presidency formed five corps of the ABiH with **Sefer HALILOVIĆ** as Chief of the Supreme Command Staff/ Chief of the Main Staff.
> On 8 June 1993 a new position was created, Commander of the Supreme Command Staff. Rasim Delić filled this post. **Sefer HALILOVIĆ** retained the post of Chief of the Supreme Command Staff of the ABiH until November 1993.
> Between 18 July 1993 to November 1993 **Sefer HALILOVIĆ** held the post of Deputy Commander of the Supreme Command Staff of the ABiH as well as Chief of the Supreme Command Staff.
> After a meeting in Zenica on 20-21 August 1993 **Sefer HALILOVIĆ** was appointed Head of an Inspection Team and commander of an Operation called "NERETVA-93".
> He is now a retired General of the ABiH and is a Minister in the Government of Bosnia-Herzegovina.

> 3. At a meeting on 21 to 22 August 1993 in Zenica, attended by most of the senior military commanders of the ABiH including Rasim Delić, it was decided that the ABiH would conduct a military Operation in Herzegovina. It was called "NERETVA-93". The main purpose of the Operation was to capture territory held by the Bosnian Croat forces (HVO) from Bugojno to Mostar thereby ending the blockade of Mostar. In order to achieve these aims the ABiH would launch offensives within this area. At the meeting an Operational plan which had been prepared and tabled by **Sefer HALILOVIĆ** was discussed. The Commander of the Supreme Command Staff, Rasim Delić, who was also present, agreed that an Inspection Team headed by his Deputy, **Sefer HALILOVIĆ** who was then also Chief of the Supreme Command Staff, would go to Herzegovina to command and co-ordinate the Operation. Units from the 1st, 3rd, 4th and 6th Corps including a unit which was commanded by Zulfikar Ališpago were to be subordinated to **Sefer HALILOVIĆ** for the Operation.

> 31. On 20 September 1993 **Sefer HALILOVIĆ** and the other members of his Inspection Team signed a report about their mission in Herzegovina. The report recommends criminal procedures be instituted against certain military officers and civilian officials yet makes no mention about the Grabovica or Uzdol incidents.

[231] Prosecution Appeal Brief, heading (b) p. 15.
[232] *See* Prosecution Appeal Brief, paras 2.19 and 2.24-2.25. At paragraph 2.21 of its Appeal Brief, the Prosecution states that paragraphs 1, 3, 4, 5 and 39 of the Indictment pleaded information relating to Halilović's superior responsibility as Team Leader of the Inspection Team, but it does not discuss paragraphs 4 and 5 of the Indictment further.

> 39. **Sefer HALILOVIĆ** demonstrated both formal *de jure* and *de facto* power, by his 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. He also assigned lines of attack and coordinated the combat activities of the units. He planned and was instrumental in the implementation of the military operations carried out by the units which took part in the "NERETVA-93" Operation.

81. The Appeals Chamber considers that the paragraphs quoted above do not demonstrate that the Indictment clearly pleaded a "case beyond command". On the contrary, paragraph 38 of the Indictment is an unambiguous allegation that Halilović possessed effective control at the time of the crimes over the 9th Motorised Brigade, the 10th Mountain Brigade, the 2nd Independent Battalion and the Prozor Independent Battalion *by reason* of his position and authority as Commander of Operation Neretva-93.

82. In light of this specificity, the Defence was entitled to understand that this was the only basis advanced by the Prosecution to demonstrate Halilović's effective control over the perpetrators of the crimes. While other paragraphs in the Indictment refer to Halilović's high rank in the ABiH and his role as Team Leader of the Inspection Team, these facts are not clearly presented or pleaded as alternative bases for a finding of effective control. In other words, the Prosecution did not clearly allege that, even if Halilović was not in command of Operation Neretva-93, he still had effective control over the troops in question by means of his position as Team Leader of the Inspection Team or of his high rank in the ABiH.

83. This conclusion is further supported by the following paragraphs in the Indictment. Paragraph 1 provides background information concerning Halilović's career and lists his titles and appointments. The gist of paragraphs 3, 4 and 5 is that Halilović was commander of a military operation called Operation Neretva-93. The Prosecution referred to the fact that the Commander of the Supreme Command Staff, Rasim Delić, agreed that Halilović would head the Inspection Team and to the fact that Halilović was the most senior military commander for Operation Neretva-93. The Prosecution used this fact to support its allegation that Halilović was the Commander of the operation and, therefore, the troops involved in Operation Neretva-93 were under his command and control.

84. Paragraph 31 of the Indictment, which concerns the report authored by the Inspection Team, suggests that Halilović failed to take necessary and reasonable measures to initiate criminal proceedings against officials responsible for the crimes committed in Grabovica and Uzdol. This paragraph cannot be read as an allegation that, even if Halilović was not a commander of Operation Neretva-93, he nonetheless had the material ability to initiate proceedings against the perpetrators of the crimes committed in Grabovica by reason of his position as Team Leader of the Inspection Team. Paragraph 36 of the Indictment states that Halilović "was Chief of the Supreme Command

Staff, one of [ABiH Commander] Rasim Delić's deputies and was the most senior ranking Commander [as opposed to officer] in Herzegovina at that time for the Operation". A plain reading of this sentence leads to the conclusion that this paragraph may not be read as an alternative basis for the allegation that Halilović had effective control over the units subordinated to him (the allegation expressed in paragraph 38 of the Indictment), but rather as a mere argument in support of this allegation. The same is true for paragraph 37 of the Indictment.

85. Paragraph 39 of the Indictment further elaborates on paragraph 38 and sets out examples of how Halilović "demonstrated both formal *de jure* and *de facto* power, by his command and control in military matters". There is no clear indication in this paragraph that Halilović's role as Team Leader of the Inspection Team constitutes an alternative basis for a finding of effective control. In fact, paragraph 39 of the Indictment does not even refer to his role as Team Leader of the Inspection Team. Moreover, the exercise of effective control by reason of Halilović's position as the most senior ranking officer in Herzegovina cannot be said to have been pleaded implicitly in this paragraph either, mainly because, for the purposes of criminal responsibility as a superior, *de jure* power is not synonymous with effective control. In fact, the former may not in itself amount to the latter. The same applies with respect to *de facto* power: a *de facto* superior must be found to wield substantially similar powers of control as *de jure* superiors who exercise effective control over subordinates to be held criminally responsible for their acts. It therefore cannot be said that pleading the exercise of both *de jure* and *de facto* power amounts to pleading effective control.[233]

86. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.[234] In this respect, in line with the principles of pleading recognised by the Appeals Chambers of the International Tribunal and the ICTR set out above, the Indictment pleads that Halilović had effective control over the units subordinated to him. The manner in which such control was exercised might encompass facts which are not required to be alleged as long as there is a clear indication that he possessed effective control at the time of the crimes.[235] With respect to the degree of specificity with which the material facts must be pleaded, Chambers of the International Tribunal have held that each of the material facts must usually be pleaded expressly, although in

[233] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 17 (footnotes omitted), citing and elaborating on the principle enshrined in *Čelebići* Appeal Judgement, paras 196-198 and 266.
[234] *Ntagerura et al.* Appeal Judgement, para. 121; *Krnojelac* Appeal Judgement, para. 132; *Kupreškić et al.* Appeal Judgement, para. 89.
[235] *Cf. Prosecutor v. Rasim Delić,* Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 10.

some circumstances it may suffice if they are expressed by necessary implication[236] and that, in any case, an indictment "is to be read as a whole, not as a series of paragraphs existing in isolation".[237] The allegation in paragraph 38 of the Indictment states that Halilović possessed effective control at the time of the crimes over the 9th Motorised Brigade, the 10th Mountain Brigade, the 2nd Independent Battalion and the Prozor Independent Battalion, "by virtue of his position and authority as Commander of the Operation". These were the military units, which, according to the Prosecution, were involved in Operation Neretva-93[238] and responsible for killing 33 Bosnian Croat civilians in Grabovica.[239] If one is to consider these facts as a whole, a reasonable conclusion is that they plainly allege that Halilović had effective control over the units in question at the time of the relevant events *by reason* of his position as Commander of Operation Neretva-93. Accordingly, when read as a whole, the Indictment does not unambiguously plead that Halilović had effective control by means *other* than his alleged position as commander of Operation Neretva-93. Nor can it be said that Halilović's effective control by virtue of his position as the most senior ranking officer in Herzegovina or by virtue of his position as Team Leader of the Inspection Team are implicitly pleaded in the Indictment when read as a whole.

87. The Appeals Chamber now turns to determine whether, as argued by the Prosecution,[240] timely, clear and consistent information might have put Halilović on notice throughout the proceedings that effective control beyond command was part of the Prosecution case. [241]

88. While Halilović asserts that a case of effective control beyond command was never pleaded or argued at trial,[242] the Prosecution replies that "[t]he trial record proves the contrary" and refers to the Prosecution Appeal Brief for relevant references in support.[243] However, the references in

[236] *Blaškić* Appeal Judgement, para. 219; *Prosecutor v. Mitar Rasević,* Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004, para. 18; *Prosecutor v. Mile Mrkšić,* Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 12; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 10; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Indictment, 20 February 2001, para. 48.

[237] *Enver Hadžihasanović and Amir Kubura* Trial Judgement, para. 266; *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, 18 October 2005, para. 78; *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, 22 July 2005, paras 13 and 50; *Prosecutor v. Mile Mrkšić,* Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 28; *see* also *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 38.

[238] Indictment, para. 4.

[239] Indictment, para. 21; *see* also Prosecution Pre-Trial Brief, paras 3 and 9.

[240] Prosecution Reply Brief, para. 2.5. *See* also AT. 12.

[241] *Simić* Appeal Judgement, paras 23-24; *Ntagerura et al.* Appeal Judgement, paras 28 and 30; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 114.

[242] *See* Halilović Respondent's Brief, para. 24.

[243] Prosecution Reply Brief, para. 2.9, citing Prosecution Appeal Brief, para. 2.21.

question only concern paragraphs 1, 3 to 5, 36 to 37 and 39 of the Indictment, which have already been addressed above.[244]

89. The Prosecution also avers that "[r]eferences to the case theory and facts in support of effective control are found in the Indictment, Prosecution and Defence Pre-trial Briefs, Prosecution and Defence Final Trial Briefs and the Judgement".[245] However, on the basis of the submissions before it, the Appeals Chamber concludes that the Prosecution's contention throughout the pre-trial and trial proceedings was that Halilović's effective control was exercised by virtue of his position and authority as Commander of Operation Neretva-93, not by means of his senior rank in the ABiH or his role as Team Leader of the Inspection Team, the "alternative bases" mentioned above.

90. Among the paragraphs in the Pre-Trial Brief cited by the Prosecution, paragraph 4 states that "[t]he Accused had effective control over the units [in question] by virtue of being the commander of an operation called 'NERETVA-93' (the Operation)". Paragraph 5 states that "as the most senior commander [as opposed to officer] in charge in the theatre of operation, the Accused had effective control over the troops and was considered by them to be the supreme commander in the field". Paragraph 16 does state that Halilović was appointed commander of the TO on 25 May 1992 becoming "the most senior military commander". However, the Appeals Chamber notes that he held a different position at the time relevant to the Indictment (September 1993). Paragraph 42 states that "the Accused was the most senior member of the ABiH in the area. He had been its supreme commander up until July 2003". Nonetheless, this statement is made to support the allegation that he *commanded* Operation Neretva.[246] In paragraph 172, the Prosecution contends that "the Accused had effective control over the troops subordinated to him *for the Operation,* as evidenced both by his *de jure* authority and the cumulative effect of the facts, which establish that he was a *de facto* commander who was able to exercise effective control over the troops who committed the crimes referred to in the [I]ndictment".[247]

91. These paragraphs support the conclusion that the Prosecution's case was that Halilović had effective control over the units subordinated to him solely by virtue of his command of Operation

[244] In response to a question posed by the Bench regarding the way in which it pleaded its case at trial, the Prosecution submitted during the Appeal Hearing that: "the Defence was always aware […] that the Prosecution's case was based on an allegation that Halilović was the superior over subordinates who committed the crime and not solely on whether he was the commander of the operation" (AT. 138). In support of its position, the Prosecution again relied upon paragraphs 1, 3, 4, 35-39 and 43 of the Indictment (AT. 139-140).
[245] Prosecution Reply Brief, para. 2.9 (footnote omitted).
[246] The emphasis in this paragraph is on the fact that Halilović was regarded as the commander of Operation Neretva-93 by the members of the Inspection Team, by the troops and by civilian authorities.
[247] Emphasis added. *See* also AT. 140-142 where the Prosecution relies, *inter alia*, on paragraph 172 of the Prosecution Pre-Trial Brief in support of its argument that "the Defence […] were fully aware of the fact that the [Prosecution's]

Neretva-93.[248] In fact, the section of the Prosecution Pre-Trial Brief entitled "Effective Control of the Accused" is premised on Halilović's command of Operation Neretva.[249] The following portions of the Prosecution Pre-Trial Brief illustrate this point:

> The Prosecution avers that the evidence will demonstrate that [Halilović] was commander both in law and in fact and as such had effective control to prevent the killings in Grabovica and Uzdol, initiate investigations to identify the perpetrators and thereafter punish them.[250]
>
> On 30 August 1993 Commander Delić appointed the Accused to be *de jure* commander of Operation Neretav-93 [*sic*].[251]
>
> Commander Delić's order dated 30 August 1993 gave the Team, under the command of the Accused, the authority to, *inter alia,* co-ordinate and command combat activities in the area […] Although the team was called an Inspection Team, it had authority that exceeded mere preparation and conduct of the operation. It had a commanding role and function and the Accused was its commander.[252]
>
> Upon the appointment as commander of the operation by Delić and demonstrative of the Accused's command responsibilities related to Operation-93 in the Neretva Valley, HALILOVIĆ deployed in the area of operations and began to organise the redeployment of units required for the task.[253]
>
> …The members of the Team that were with [Halilović] regarded him as commander of the Operation, as did the troops and their commanders in the area in which the Team operated. Even the military commander of the 6th Corps who ordinarily was the *de jure* commander in the territory that included Grabovica stated that once the Operation commenced the area fell under the command and control of the commander of the operation, that being the Accused. The civilian authorities also regarded him as commander of the Operation.[254]

The Prosecution's opening statement confirms that the Prosecution sought to establish that Halilović exercised effective control over the units in question *only* by virtue of Halilović's command of Operation Neretva-93.[255]

92. The Prosecution also relies upon its submissions in the Prosecution Final Trial Brief.[256] However, these submissions cannot constitute timely notice that "effective control beyond command was always part of the Prosecution's case"[257] and that the Prosecution was seeking to establish effective control also through the other two factual bases. The thesis proposed in the

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case was not based solely on the *de facto* commander position, but went beyond that to include superior authority" (AT.140).

[248] *See* also Prosecution's Supplementary Explanation to its Pre-Trial Brief, 22 December 2004, paras 7-8.

[249] *See* Prosecution Pre-Trial Brief, paras 24-45.

[250] Prosecution Pre-Trial Brief, para. 24.

[251] Prosecution Pre-Trial Brief, para. 26.

[252] Prosecution Pre-Trial Brief, para. 27.

[253] Prosecution Pre-Trial Brief, para. 31.

[254] Prosecution Pre-Trial Brief, para. 42.

[255] *See*, in particular, T. 15-17 (31 January 2005). The Prosecution argued that, although the team headed by Halilović was called an "inspection team", it had a command function and Halilović did in fact command Operation Neretva-93 and had full authority over the troops to be deployed in that operation (T. 15). The Prosecution argued that Halilović's seniority in the ABiH invested him with the "gravitas" that ensured respect for his command authority (T. 16).

[256] Prosecution Appeal Brief, para. 2.16, citing Prosecution Final Trial Brief, paras 142-186. *See* also AT. 17-18 and Prosecution Reply Brief, paras 2.5-2.6.

[257] Prosecution Reply Brief, para. 2.5.

Prosecution Final Trial Brief is that Halilović was in command of Operation Neretva-93 and that therefore he had effective control over the perpetrators of the crimes charged: the Prosecution did not clearly argue that, even if Halilović was not in command of this operation, he nevertheless had effective control over the perpetrators for other reasons.[258] It appears that, when the Prosecution referred to Halilović's position in the ABiH or his role as Team Leader of the Inspection Team, this was done in support of its argument that Halilović was the commander of Operation Neretva-93.[259] The following paragraphs sum up the Prosecution's position:

> The Prosecution submits that the evidence adduced at trial has proved beyond a reasonable doubt that Halilović planned, organized, commanded, coordinated and inspected Operation Neretva. Halilović had command authority over the units that participated in Operation Neretva. The evidence also establishes that this command authority was effective, and that Halilović's command was obeyed in practice. Therefore he had effective control of the troops who participated in this military Operation.[260]
>
> As shown above Halilović had effective control over the units subordinated to him as the leader of the inspection team *commanding combat operations* in Operation Neretva 93.[261]

93. The Prosecution also points to a number of paragraphs from the Defence Pre-Trial Brief and the Defence Final Trial Brief in support of the argument that a "case beyond command" had been clearly pleaded at trial.[262] The Appeals Chamber recalls that such submissions "may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations".[263]

94. However, an analysis of the Defence Pre-Trial Brief and of the Defence Final Trial Brief shows that these documents do not support the argument advanced by the Prosecution. On the contrary, they indicate Halilović's understanding that the allegations made against him hinged on his position as commander of Operation Neretva-93.[264] The following examples illustrate this point:

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[258] *See* Prosecution Final Trial Brief, paras 148-186.
[259] *See* Prosecution Final Trial Brief, para. 187.
[260] Prosecution Final Trial Brief, para. 186 (footnotes omitted).
[261] Prosecution Final Trial Brief, para. 187 (emphasis added).
[262] *See* Prosecution Reply Brief, paras 2.8-2.9 and fns 9-11. *See* also AT. 143, where the Prosecution refers to the "Response to Prosecution's Application pursuant to Rule 92*bis* (A), filed on 2 February 2004, and paragraphs 163, 164, 169, 199 and 200 of the Defence Pre-Trial Brief, as clarifying "that there was no misunderstanding as to the scope of the allegations in the [I]ndictment and that they included, indeed, *superior responsibility*" (emphasis added).
[263] *Naletilić and Martinović* Appeal Judgement, para. 27. *See* also *Simić* Appeal Judgement, para. 24; *Kvočka et al.* Appeal Judgement, paras 52-53 and *Kordić and Čerkez* Appeal Judgement, para. 148.
[264] *See*, in particular, Defence Pre-Trial Brief, paras 161-164, pp. 31-32 (where the Defence argues that Halilović was not the commander of Operation Neretva-93) and Defence Final Trial Brief, paras 162 ff. (where the Defence argues that the relevant question is whether Halilović was *de jure* or *de facto* commander of the troops), 329-353 (where the Defence argues that there was no chain of command between Halilović and the perpetrators).

> We point out again that there was no separate command for carrying out Operation *Neretva 93*. BH Army GŠ Commander Rasim DELIĆ commanded all units of the BH Army through the corps commanders, including the units which carried out Operation *Neretva 93*.[265]
>
> The Defence further points out [that] even when a commander transfers command rights to another person, he cannot transfer responsibility for the consequences of exercising command.
>
> Operation *Neretva 93* was planned and approved by the BH Army GŠ Commander [Rasim Delić], so he was the commander of the operation. The highest military experts of the BH Army took part in planning this operation. During the planning of Operation *Neretva 93*, they worked out the following in detail: the command and control system, the assignment of combat zones to specific units and commands, the axes of attack for lower-ranking units, etc. Therefore, it was precisely known which commander in which zone of responsibility was in charge of carrying out which task. In this operation, the Accused was not in charge of any of the operations zones, nor of the operation as a whole, nor did he have any command rights over any units.[266]

95. The Prosecution also argues that a pre-trial decision issued on 17 December 2004 put the Defence on notice "that the charges of superior responsibility were based on a broad range of facts",[267] and not just on command of the military operation. The Prosecution's choice of words is interesting in this respect, as it refers to the broader term of "superior responsibility", rather than to "effective control". In any event, and regardless of the language used by the Prosecution, the decision in question states that "[a]ll the material facts listed in paragraph (a) quoted above – the superior-subordinate relationship, effective control, and the Accused's responsibility for the crimes of his subordinates – are explicitly included in the Current Indictment". [268] The Trial Chamber then referred in a footnote to paragraphs 1, 3 to 5, 35 to 39 and 43 of the Indictment.[269] The Appeals Chamber finds that this decision could not have put the Defence on notice that the Prosecution sought to establish effective control on bases other than Halilović's command of Operation Neretva-93 as pleaded in paragraph 38 of the Indictment.

96. The fact that the Indictment, the Prosecution Pre-Trial Brief and the evidence adduced at trial by the Prosecution showed the Prosecution's attempt to establish effective control through *command* is further illustrated by the way in which the Prosecution closed its case:

> In fact [in] all our pleadings, pre-trial brief, opening statement, we have consistently maintained this position. The accused went to Herzegovina to command Operation Neretva by the authority of Commander Delić. That is our position. A huge section of the Defence brief is similarly devoted to the duties of a Chief of Staff, which are not denied and they are correctly stated, but it has never been our case that the accused was in Herzegovina within his duties and capacity as Chief of Staff.

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[265] Defence Pre-Trial Brief, para. 62, pp. 9-10 (Section entitled: "1. Effective Control Over the Combat Units Assigned to the Operation").
[266] Defence Pre-Trial Brief, paras 163-164, p. 33 (Section entitled: "i. Superior-Subordinate Relationship").
[267] Prosecution Appeal Brief, para. 2.21, citing Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("Decision of 17 December 2004"), para. 15, fn. 31. *See* also AT. 139, lines 20-23. The Appeals Chamber notes that the transcript of the Appeal Hearing refers to "the decision of 17 February 2004"; however, it is clear from the context of the Prosecution's submissions that it was, in fact, citing fn. 31 of the Decision of 17 December 2004.
[268] Decision of 17 December 2004, para. 15 (footnote omitted).
[269] Decision of 17 December 2004, fn. 31.

> The accused went to Herzegovina to command Operation Neretva by the authority of Commander Delić. That is our position.[270]
>
> All the evidence adduced in this case viewed as a whole, the only reasonable inference which can be drawn from this evidence is that the accused was the commander of Operation Neretva and the superior of -- superior of the perpetrators who committed the crimes. And the Prosecution invites the Trial Chamber to so hold.[271]

97. On the basis of the foregoing, the Appeals Chamber finds that no timely, clear and consistent information was provided during the trial proceedings to put the Defence on notice that, even if Halilović was not *de jure* or *de facto* commander of Operation Neretva-93, he allegedly still had effective control over the perpetrators of the crimes charged in the Indictment, on the basis of his position as the most senior ranking ABiH officer in Herzegovina or due to his position as Team Leader of the Inspection Team. Accordingly, the Prosecution cannot argue on appeal that "the Trial Chamber failed to address the additional ways in which Halilović could have exercised effective control".[272]

98. For these reasons, the Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber "erred in law in failing to make the necessary findings concerning effective control beyond command".[273] The Appeals Chamber considers that the Trial Chamber committed no error of law invalidating its decision in: (1) failing to consider whether Halilović had effective control over the perpetrators of the crimes charged in the Indictment by reason of his position as Team Leader of the Inspection Team or by virtue of his position as the most senior ranking officer in Herzegovina at the time;[274] and in (2) "confining its consideration of effective control to evaluating the evidence of whether Halilović was the military commander over the offending troops".[275] The Trial Chamber has not failed to make the necessary legal findings relating to Halilović's position as the most senior ranking officer in the ABiH and his position as Team Leader of the Inspection Team.

99. This part of sub-ground 1 is therefore dismissed.

5. Whether the Trial Chamber erred in fact in concluding that Halilović was not the superior of the perpetrators of the crimes

100. The Prosecution submits that the Trial Chamber erred in fact in reaching the conclusion that Halilović was not the superior of the perpetrators of the crimes committed in Grabovica. It suggests

[270] Prosecution's closing argument, T. 20 (30 August 2005).
[271] Prosecution's closing argument, T. 35 (30 August 2005).
[272] Prosecution Appeal Brief, para. 2.18.
[273] Prosecution Appeal Brief, heading (B), p. 13. *See*, in particular, Prosecution Appeal Brief, paras 2.16-2.18 and 2.27.
[274] *See* Prosecution Appeal Brief, paras 2.19 and 2.21-2.26. *See* also AT.14.
[275] Prosecution Brief in Reply, para. 3.1.

that the factual findings in the Trial Judgement do establish Halilović's material ability to prevent, punish and initiate measures leading to proceedings against the perpetrators.[276] The Prosecution avers that, in light of the totality of those findings, the Trial Chamber's conclusion that Halilović did not have effective control should be reversed as unreasonable.[277]

101. In light of its previous findings on the alleged errors of law, the Appeals Chamber need not address the Prosecution's claim whether the Trial Chamber's misplaced focus on determining whether Halilović was the commander of Operation Neretva caused the Trial Chamber to ignore or underestimate the importance of its findings regarding his material ability to prevent, punish or initiate proceedings against the perpetrators in order to determine whether Halilović had effective control.[278]

102. The analysis of sub-ground 1 has led the Appeals Chamber to conclude that, given that the Prosecution did not plead a "case beyond command" at trial, the Trial Chamber committed no error of law in not considering whether Halilović had effective control over the perpetrators of the crimes charged in the Indictment by reason of his positions as Team Leader of the Inspection Team or as the most senior ranking ABiH officer in Herzegovina beyond his alleged position as commander of Operation Neretva.

103. However, it still falls upon the Appeals Chamber to consider the remainder of the sub-grounds alleged under the Prosecution's first ground of appeal in light of Halilović's alleged position as the *de facto* commander of Operation Neretva. Only by considering the arguments advanced under these sub-grounds as a whole, will the Appeals Chamber be in a position to assess whether the Trial Chamber erred "in finding that the Prosecution had not proven beyond reasonable doubt that Sefer Halilović was the superior of subordinates who committed the crimes in Grabovica, and in entering an acquittal".[279]

[276] Prosecution Appeal Brief, para. 2.7. *See* Prosecution Appeal Brief, paras 2.28-2.40 for detailed arguments in support of this allegation.
[277] Prosecution Appeal Brief, para. 2.28.
[278] Prosecution Appeal Brief, para. 2.28.
[279] Prosecution Notice of Appeal, para. 3, concerning the general allegations raised under the first ground of appeal.

D. Standard of proof (Sub-grounds 5, 2 and 3)

104. Under sub-ground 5, the Prosecution submits that the Trial Chamber erred in law in misapplying the standard of proof throughout the Trial Judgement.[280] Under sub-grounds 2 and 3, the Prosecution raises two specific allegations of errors of law also concerned with the alleged misapplication of the standard of proof.[281] Considering the way in which the arguments of the Prosecution are presented, the Appeals Chamber deems it useful to analyse these sub-grounds in conjunction with each other, starting with the general allegation raised under sub-ground 5 and then applying its conclusions to sub-grounds 2 and 3.

1. Sub-ground 5: Standard of proof beyond reasonable doubt

(a) Introduction

105. In submitting that the Trial Chamber erred in misapplying the standard of proof throughout the Trial Judgement, the Prosecution raises two distinct points: (i) the Trial Chamber's interpretation of the *in dubio pro reo* principle;[282] and (ii) the Trial Chamber's application of the "beyond reasonable doubt" standard to its findings.[283] The Appeals Chamber will first examine Halilović's request for summary dismissal of the Prosecution's arguments under sub-ground 5.

(b) Halilović's request for summary dismissal

106. Halilović requests that sub-ground 5 be summarily dismissed for various reasons: (i) the vagueness and oppressiveness of the Prosecution's arguments;[284] (ii) the impermissible variation and abandonment of this ground of appeal;[285] (iii) the Prosecution's failure to meet its burden of argument or persuasion;[286] (iv) the fact that this sub-ground of appeal is an attempt to turn appeal proceedings in this matter into a trial *de novo*;[287] and (v) the fact that in the *Ntagerura et al.* Appeal Judgement, the ICTR Appeals Chamber rejected similar arguments.[288] The Appeals Chamber finds

[280] In its Notice of Appeal, the Prosecution alleges that the Trial Chamber erred in law, at paragraph 433 of the Trial Judgement, in requiring the Prosecution to prove beyond reasonable doubt even those facts, allegations or events that were not an element of the crime or of the mode of liability. It further submits that, although this standard was applied throughout the Trial Judgement, the error was made manifest in paragraphs 189 and 221. *See* Prosecution Notice of Appeal, para. 4(v). *See* also Prosecution Appeal Brief, para. 2.127.
[281] Prosecution Appeal Brief, paras 2.41-2.82 (sub-ground 2) and paras 2.83-2.106 (subground 3). *See* also AT. 11.
[282] This principle provides that any ambiguity must accrue to the defendant's advantage (*Tadić* 1999 Sentencing Judgement, para. 31). The principle of *in dubio pro reo* is one of the foundational precepts of contemporary criminal law recognised in the jurisprudence of the International Tribunal (*Čelebići* Trial Judgement, para. 601, *Jelisić* Trial Judgement, para. 108 and *Limaj* Appeal Judgement, para. 21. *See* also *Akayesu* Trial Judgment, para. 319).
[283] Prosecution Appeal Brief, paras 2.121-2.123.
[284] Halilović Respondent's Brief, paras 185-187 and 190-191.
[285] Halilović Respondent's Brief, para. 183.
[286] Halilović Respondent's Brief, para. 189.
[287] Halilović Respondent's Brief, para. 184.
[288] Halilović Respondent's Brief, para. 192.

that none of these arguments warrant the summary dismissal of sub-ground 5, and, as a result, denies Halilović's request.

(c) The Trial Chamber's interpretation of the *in dubio pro reo* principle

107. The Prosecution first avers that the Trial Chamber erred in law in stating, at paragraph 12 of the Trial Judgement, that "[a]ny ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*",[289] rather than referring to any *reasonable* ambiguity or doubt.[290] Since this error, the Prosecution argues, calls into question *all* of the findings of the Trial Chamber,[291] the Appeals Chamber should re-evaluate all of the evidence at trial applying the correct standard of proof.[292] Halilović responds that, when read in its full context (including footnotes 24 and 25, to which the Prosecution fails to refer), the passage in paragraph 12 of the Trial Judgement clarifies that it is only *reasonable* doubts that will be considered in determining whether the Prosecution has proven its case.[293] Moreover, even if a legal error had been established, the Prosecution identified no instance where this standard was applied by the Trial Chamber. In practice, Halilović argues, in assessing whether he had effective control over the perpetrators of the crimes committed in Grabovica, the Trial Chamber did explicitly – at paragraph 747 of the Trial Judgement – set out the appropriate standard.[294]

108. Paragraph 12 of the Trial Judgement in its entirety reads as follows:

> Article 21(3) of the Statute provides that the Accused shall be presumed innocent until proven guilty. The Prosecution therefore bears the burden of establishing the guilt of the Accused, and, in accordance with Rule 87(A) of the Rules, the Prosecution must do so beyond reasonable doubt. In determining whether the Prosecution has done so with respect to the Count in the Indictment, the Trial Chamber has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused Any [sic] ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*.[295]

109. When the portion of the Trial Judgement identified by the Prosecution as a basis for its allegation is read in context with the rest of the paragraph as a whole, including the footnote references to the jurisprudence of the International Tribunal and that of the ICTR,[296] it is clear that

[289] Prosecution Appeal Brief, para. 2.133, quoting Trial Judgement, para. 12 (footnote omitted).
[290] Prosecution Notice of Appeal, para. 4(v); Prosecution Appeal Brief, para. 2.122.
[291] Prosecution Appeal Brief, paras 2.134-2.135.
[292] Prosecution Appeal Brief, para. 2.136.
[293] Respondent's Brief, paras 209-210, citing Trial Judgement, para. 12 and fns 24-25.
[294] Respondent's Brief, para. 211. *See* also Respondent's Brief, para. 212.
[295] Trial Judgement, para. 12 (footnotes omitted).
[296] The Appeals Chamber notes the following statement in fn. 24 of the Trial Judgement: "The Trial Chamber interprets the standard 'beyond reasonable doubt' to mean a high degree of probability; it does not mean certainty or proof beyond the shadow of doubt". The Appeals Chamber further notes that the references in fn. 25, related to the last sentence in paragraph 12 of the Trial Judgement, include: *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998 (filed 16 October 1998), para. 73; *Čelebići* Trial Judgement, para. 601; *Akayesu* Trial Judgement, para. 319.

the Trial Chamber considered only *reasonable* doubts as relevant in determining whether the Prosecution had proven its case. The reference to "[a]ny ambiguity or doubt" should be read in light of the caveat that "the Trial Chamber has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused", which is a way to express the appropriate standard. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in law at paragraph 12 of the Trial Judgement.

110. The fact that the Trial Chamber properly expressed the standard of proof in the section of the Trial Judgement containing its general considerations on the evaluation of evidence does not in principle prevent the Prosecution from raising this allegation of error of law with regard to specific factual findings. However, since in its submissions under sub-ground 5 the Prosecution does not provide specific reference to factual findings where the Trial Chamber allegedly misapplied the *in dubio pro reo* principle, the Appeals Chamber will address this allegation only insofar as it has been raised with regard to specific factual findings under other sub-grounds of appeal.

(d) The Trial Chamber's application of the "beyond reasonable doubt" standard

111. The second error alleged by the Prosecution under sub-ground 5 relates to the principle, enshrined in Rule 87(A) of the Rules, that guilt must be proven beyond reasonable doubt. According to the Prosecution, in application of this principle, all elements of the crime as well as all requirements for a specific mode of responsibility must be proven beyond reasonable doubt in order for an accused to be convicted.[297] The Prosecution explicitly refers to the *Ntagerura et al.* Appeal Judgement in this respect, which states that the beyond reasonable doubt standard is applicable to all facts "indispensable for entering a conviction".[298] However, the Prosecution submits that the Trial Chamber wrongly applied the standard of proof beyond reasonable doubt to "predicate facts".[299]

112. As a preliminary matter, the Appeals Chamber makes the following terminological observations. A predicate fact is a fact from which a presumption or inference arises, and it is also termed "foundational fact" or "evidentiary fact".[300] However, for the purposes of the present judgement and in light of the Prosecution's submissions,[301] the Appeals Chamber understands the expression "predicate facts" to encompass those factual allegations that are not essential to prove the elements of the crime or the mode of responsibility alleged.

[297] Prosecution Appeal Brief, paras 2.124 and 2.126.
[298] AT. 10-11.
[299] Prosecution Appeal Brief, para. 2.121. *See* also Prosecution Notice of Appeal, para. 4(v) and AT. 11.
[300] Black's Law Dictionary, 7th Edition (St. Paul, West Group, 1999).
[301] Prosecution Notice of Appeal, para. 4(v); Prosecution Appeal Brief, para. 2.121, and heading (A), p. 46 and paras 2.124-2.125; Prosecution Reply Brief, heading (A), p. 18 and para. 3.26.

113. The Prosecution asserts that the beyond reasonable doubt standard does not apply to "predicate facts".[302] Moreover, "individual [facts] or factual allegations" contained in an indictment are subject to this standard only if they are essential to proving an element of the offence or mode of liability.[303] Consequently, it claims that the Trial Chamber erred in requiring the Prosecution to prove each factual allegation of the Indictment beyond reasonable doubt.[304] In doing so, the Trial Chamber in effect allegedly "created a two-stage application of the beyond reasonable doubt standard – applying it first to the evidence or proof of facts and then again to the ultimate issue of guilt".[305] Such a misapplication of the required standard, the Prosecution argues, permeates the whole Trial Judgement, thus affecting each disputed fact.[306]

114. According to the Prosecution, this error had an important impact on the Trial Chamber's assessment of the evidence. In the introduction to the first ground of appeal, the Prosecution submits that "[t]he requirement that the Prosecution prove *intermediate* facts 'beyond reasonable doubt', for example, led to the Trial Chamber's conclusion that the Prosecution had not proven the existence of an IKM and an operation called 'Neretva'''.[307] The Prosecution further submits that "[t]he name of the operation, the exact meeting at which it was planned, and the establishment of an IKM are merely factual allegations, not elements of the crimes charged",[308] thus appearing to suggest that they amount to "predicate facts". By subjecting these "predicate facts" to the beyond reasonable doubt standard, the Trial Chamber concluded that they had not been proven. Therefore, during its final analysis on Halilović's criminal responsibility, the Trial Chamber referred to its conclusions about these "predicate facts" and effectively excluded relevant evidence that should have been considered in its final analysis.[309] Instead, the Prosecution concludes, the Trial Chamber should have weighed the evidence *as a whole* to determine whether Halilović's superior responsibility had been proven beyond reasonable doubt.[310]

115. The Prosecution cites two specific paragraphs of the Trial Judgement where mere factual allegations are allegedly treated by the Trial Chamber as elements of the crimes charged and, as

[302] Prosecution Appeal Brief, heading (A) p. 46; Prosecution Reply Brief, heading (A), p. 18.
[303] Prosecution Appeal Brief, para. 2.125. The quote actually reads: "individual factual or factual allegations".
[304] Prosecution Appeal Brief, para. 2.127.
[305] Prosecution Appeal Brief, para. 2.132.
[306] Prosecution Appeal Brief, para. 2.127.
[307] Prosecution Appeal Brief, para. 2.5 (emphasis added). The Appeals Chamber notes that this is the only instance where the Prosecution uses the expression "intermediate facts", without explicitly explaining what it means. Considering the context of the Prosecution's submissions, the Appeals Chamber infers that the expressions "intermediate facts" and "predicate facts" are essentially equivalent.
[308] Prosecution Appeal Brief, para. 2.129.
[309] *See* Prosecution Appeal Brief, paras 2.129-2.131.
[310] Prosecution Appeal Brief, paras 2.129 and 2.132; AT. 10-11.

such, requiring proof beyond reasonable doubt.[311] Paragraph 189 reads, in its relevant part, as follows:

> … the Prosecution has not established beyond reasonable doubt that an "Operation Neretva" or the question who would be the commander of such an operation was discussed at the meeting in Zenica, nor that any specific and detailed operation to liberate Mostar was planned at that meeting.

Paragraph 221 reads, in its relevant part, as follows:

> …the Prosecution has failed to prove beyond reasonable doubt that an IKM was established for the purpose of commanding an "Operation Neretva".

116. Halilović responds that the alleged error has not been properly argued or established,[312] since the Prosecution identified only three factual matters to which the beyond reasonable doubt standard was allegedly misapplied, but did not establish the significance of this alleged error in respect of all predicate facts, allegations or events.[313] Moreover, Halilović argues that the Trial Chamber correctly applied the "beyond reasonable doubt" standard in paragraphs 189 and 221 of the Trial Judgement, because these were all material facts pleaded in the Indictment as relevant and central to establishing Halilović's responsibility.[314] He adds that the findings at paragraphs 189 and 221 of the Trial Judgement, even if reversed, would not compel a finding of effective control by Halilović over the perpetrators of the crimes committed in Grabovica.[315]

117. The Prosecution appears to raise two distinct issues under the same heading.[316] First, it suggests that there is no legal authority to support the proposition that "individual pieces of evidence should be subjected to the beyond reasonable doubt standard".[317] This matter pertains to the evaluation of single items of evidence tendered and introduced into the trial record during the proceedings. Second, the Prosecution contends that "[t]he Trial Chamber erred by requiring the Prosecution to prove each factual allegation of the [I]ndictment beyond reasonable doubt, whether or not that factual allegation was necessary for conviction".[318] This matter relates to the way in which specific allegations are to be proven and will partly hinge on whether an allegation is supported by an individual piece of evidence or must be proven through the combined assessment of various pieces of evidence. The Appeals Chamber will deal with these two allegations in turn.

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[311] Prosecution Appeal Brief, paras 2.127-2.129. At the Appeal Hearing, the Prosecution also suggested that sub-grounds 2 and 3 serve as examples of this erroneous approach (AT. 11). The Appeals Chamber will consider this issue *infra* in its discussion of those sub-grounds of appeal.
[312] Respondent's Brief, paras 193-194.
[313] *See* Respondent's Brief, paras 194, 196-200 and 204.
[314] Respondent's Brief, paras 201-202 and 208.
[315] Respondent's Brief, para. 205.
[316] Prosecution Appeal Brief, heading (A), entitled: "The 'beyond reasonable doubt' standard does not apply to predicate facts'", p. 46.
[317] Prosecution Appeal Brief, para. 2.126; *see* para. 2.132, which also appears to relate to this argument.
[318] Prosecution Appeal Brief, para. 2.127. The following paragraphs (2.128-2.131) appear to relate to this argument.

(i) Whether the Trial Chamber properly evaluated individual pieces of evidence

118. The Prosecution submits that the Trial Chamber erred in suggesting in paragraph 15 of the Trial Judgement that "individual pieces of evidence should be subjected to the beyond reasonable doubt standard".[319] The relevant portion of paragraph 15 reads as follows:

> In some instances, the Trial Chamber has relied upon circumstantial evidence in order to determine whether or not a certain conclusion could be drawn. The Trial Chamber follows the Appeals Chamber when considering that "[s]uch a conclusion must be established beyond reasonable doubt. […] It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is [as] consistent with the [innocence of an accused as with his or her guilt], he or she must be acquitted."[320]

119. In the view of the Appeals Chamber, the concerns of the Prosecution in respect to this statement are misplaced. The paragraph in question has to be read as a whole. The sentences preceding the portion relied upon by the Prosecution concern the probative value of evidence and its reliability.[321] In light of this context, the Appeals Chamber understands the portion of paragraph 15 of the Trial Judgement quoted above as a statement made pursuant to the Appeals Chamber's holdings in *Čelebići*. The effect of this is that the Trial Chamber's overall conclusions, drawn from circumstantial evidence pointing to the guilt of the accused, must be drawn beyond reasonable doubt.[322] Further, the Appeals Chamber notes that, in accordance with the principle that the assessment of the credibility of relevant evidence cannot be undertaken by a piecemeal approach, individual items have to be analysed in light of the entire body of evidence.[323] The Trial Chamber stated that it had "carefully considered the charges against [Halilović] in light of the entire record, including all evidence put forth by the Prosecution and the Defence".[324] Another related matter raised under this sub-ground is the contention that the Trial Chamber excluded relevant evidence in reaching its final conclusions.[325]

120. The Appeals Chamber understands this last contention to suggest that the Trial Chamber, by applying the "beyond reasonable doubt" standard twice, to each piece of evidence and then again to

[319] Prosecution Appeal Brief, para. 2.126.
[320] Trial Judgement, para. 15 (footnote, referring to *Čelebići* Appeal Judgement, para. 458, omitted).
[321] "In addition to direct evidence, the Trial Chamber has admitted hearsay and circumstantial evidence. Hearsay evidence is evidence of facts not within the testifying witness' own knowledge. In evaluating the probative value of hearsay evidence, the Trial Chamber has carefully considered indicia of its reliability and, for this purpose, it has evaluated whether the statement was 'voluntary, truthful and trustworthy' and has considered the content of the evidence and the circumstances under which it arose."(Trial Judgement, para. 15 (footnotes omitted)).
[322] Footnote 30 in paragraph 15 of the Trial Judgement is a citation to *Čelebići* Appeal Judgement, para. 458: "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt". This finding was reached by the Appeals Chamber when dealing with the issue of the reliability of circumstantial evidence. *See,* generally, *Čelebići* Appeal Judgement, paras 450-457.
[323] *Ntagerura et al.* Appeal Judgement, para. 174.
[324] Trial Judgement, para. 14.

the ultimate issue of guilt, effectively dismissed relevant evidence that could have been relied upon to find Halilović commander of the operation in question. The Appeals Chamber recalls that a party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision.[326] Where an error of law is found, it is open to the Appeals Chamber to review the relevant findings of the Trial Chamber according to the correct legal standard.[327] In cases like the instant one, however, where it is submitted that an error of law potentially impacts every single piece of evidence and, by implication, every finding made by the Trial Chamber, the appellate party is required to develop its arguments more precisely by referring to specific portions of the Trial Judgement, thus limiting the import of its allegations – lest the appeal procedure effectively becomes a trial *de novo*.[328] The Prosecution has failed to properly fulfill this requirement. Therefore, the Appeals Chamber dismisses the allegation that the Trial Chamber excluded probative evidence or subjected it to an inappropriate standard.

121. The contention by the Prosecution that the Trial Chamber excluded, and effectively dismissed, relevant evidence – in light of other arguments elsewhere by the Prosecution that the Trial Chamber *ignored* certain exhibits[329] – might also be interpreted as suggesting that, since the Trial Chamber dismissed the Prosecution's contentions on the Zenica meeting and on the IKM, it disregarded evidence relating to those issues when making its final determination on Halilović's guilt. It is a settled principle in the jurisprudence of the International Tribunal that a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record. There is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[330]

122. The Appeals Chamber notes that the Trial Chamber explicitly stated, in paragraph 747 of the Trial Judgement that:

> *[h]aving examined all the evidence presented to it and in light of its factual findings,* the Trial Chamber finds that the Prosecution has not proven beyond reasonable doubt that Sefer Halilović had effective control over the troops that were in Grabovica on 8 and 9 September 1993, which the Trial Chamber has found committed the crimes.[331]

123. Such a statement does not, of course, establish an irrebuttable presumption that all of the evidence was indeed considered by the Trial Chamber.[332] It would have been preferable if the Trial Chamber had systematically analyzed and explicitly assessed the evidence in order to reach its

[325] Prosecution Appeal Brief, paras 2.131-2.132.
[326] *See supra*, paras 7 and 12-13.
[327] *Blaškić* Appeal Judgement, para. 15.
[328] *See supra*, para. 10.
[329] Prosecution Appeal Brief, para. 2.74.
[330] *Kvočka et al.* Appeal Judgement, para. 23.
[331] Trial Judgement, para. 747 (emphasis added).

factual findings. The Prosecution, however, generally has not identified specific pieces of evidence that would have been wrongly evaluated by the Trial Chamber.

124. As the Prosecution points out, Exhibit 498 was not mentioned at all in the Trial Judgement.[333] Having carefully analysed the relevant portions of the Trial Judgement, the Appeals Chamber considers that the fact that this exhibit was not referred to by the Trial Chamber might be an indication that it disregarded relevant evidence.[334] This document is a letter written in 1995 by Halilović himself to BiH President Alija Izetbegović, where Halilović declared, among other things, that the Inspection Team headed by him carried out "Operation Neretva 93", thereby corroborating exhibits and testimonies that the Trial Chamber considered unreliable[335] and contradicting the final conclusions reached in the Trial Judgement.[336] The Appeals Chamber is however mindful that the Trial Chamber might legitimately have looked with extreme caution at a document written many months after the events by an accused who chose not to testify. It cannot be said that, even considering this piece of evidence, no reasonable trier of fact could have reached the conclusions that the Trial Chamber reached. In light of these considerations, and since the Prosecution has generally not identified specifically where the Trial Chamber might have erred, the Appeals Chamber will not entertain this contention further.

125. With respect to the process through which a trier of fact evaluates the evidence, the Appeals Chamber endorses the following considerations of the ICTR Appeals Chamber:

> - At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.
>
> - Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

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[332] *Kvočka et al.* Appeal Judgement, para. 23.
[333] Prosecution Appeal Brief, para. 2.1.
[334] *Kvočka et al.* Appeal Judgement, para. 23.
[335] *See*, for example: Bakir Alispahić, T. 62 (23 May 2005) and T. 33 (27 May 2005); Vahid Karavelić, T. 107 (19 April 2005) (cited in Trial Judgement, para. 183); Salko Gušić, T. 43 (7 February 2005) (cited in Trial Judgement, para. 191); Ramiz Delalić, T. 25 (18 May 2005) (cited in Trial Judgement, para. 219); Exhibit 131 (a map erroneously cited in Trial Judgement, para. 175, as the only exhibit mentioning "Operation Neretva"); Exhibit 281, p. 2 (the book "A Cunning Strategy" by Sefer Halilović cited, *inter alia*, in Trial Judgement, para. 258).
[336] Trial Judgement, paras 189, 210 and 737.

> - At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.[337]

The ICTR Appeals Chamber also clarified that "'material facts' which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt".[338] Following this principle, the Appeals Chamber has acknowledged that not every factual finding in a Trial Judgement must be established beyond reasonable doubt and has unequivocally stated that "[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, *and any fact which is indispensable for the conviction*, beyond reasonable doubt".[339] With these considerations in mind, the Appeals Chamber turns to address the second part of the argument raised by the Prosecution under the heading "standard of proof".

(ii) Whether the Trial Chamber misapplied the standard of proof to its factual findings

126. With respect to the allegation that the Trial Chamber erred in requiring the Prosecution to prove each factual allegation in the Indictment beyond reasonable doubt regardless of whether this fact was necessary for conviction, the Appeals Chamber notes that the Prosecution only identified two paragraphs (189 and 221) in the Trial Judgement where the Trial Chamber allegedly committed such an error.[340] Apart from these examples, the Appeals Chamber was not provided with specific references to factual findings affected by the alleged error. Given that the alleged error of law potentially impacts on every finding made by the Trial Chamber, the Prosecution was required to develop its arguments more precisely by referring to specific paragraphs of the Trial Judgement. Indeed, the appealing party must explain how the alleged error invalidates the decision in practice; it is not enough to point to a general deficiency throughout the Trial Judgement and request review of unspecified factual findings.[341] The Appeals Chamber also notes that the paragraphs mentioned contain a total of four factual findings. In particular, paragraph 189 contains the finding that the Prosecution had not proven beyond reasonable doubt that, at the Zenica meeting, its participants: (i) discussed "Operation Neretva", (ii) discussed who would be commander of such an operation, and (iii) planned a specific and detailed operation to liberate Mostar. Paragraph 221 contains the finding

[337] *Ntagerura et al.* Appeal Judgement, para. 174 (footnote omitted).
[338] *Ntagerura et al.* Appeal Judgement, fn. 356.
[339] *Blagojević and Jokić* Appeal Judgement, para. 226 (emphasis added). *See* also *Ntagerura et al.* Appeal Judgement, para. 174; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Order to File Table, 24 July 2006 ("*Brdanin* Order to File Table"), p. 1. For an application of this principle, *see Kupreškić et al.* Appeal Judgement, para. 226.
[340] Prosecution Appeal Brief, paras 2.127-2.131.

that the Prosecution had not proven beyond reasonable doubt that (iv) an IKM was established for the purpose of commanding an "Operation Neretva".[342]

127. Sub-ground 5, as part of the first ground of the Prosecution's appeal, relates to Halilović's superior position over the soldiers who committed the crimes in Grabovica. Indeed, the Prosecution submits that the Trial Chamber's improper application of the standard of proof resulted in the erroneous conclusion – at paragraphs 372, 747 and 752 of the Trial Judgement – that Halilović did not have effective control over the subordinates in question.[343] The Prosecution alleges that by requiring it to prove "predicate facts" – paragraphs 189 and 221 of the Trial Judgement being highlighted as findings based on such facts – beyond reasonable doubt, the Trial Chamber removed these facts from the Trial Chamber's ultimate findings.[344] This legal error allegedly affected the Trial Chamber's ultimate findings on whether Halilović's superior responsibility had been established.[345]

128. The Appeals Chamber finds that it is not strictly relevant whether the Prosecution considers the factual allegations in question "central" to establishing responsibility or whether they are pleaded in a specific section of the Indictment.[346] The task of a trier of fact is that of assessing all the relevant evidence presented with a holistic approach; this is all the more necessary in cases as complex as the ones before the International Tribunal. According to the Statute and the Rules, a trier of fact should render a reasoned opinion on the basis of the entire body of evidence and without applying the standard of proof "beyond reasonable doubt" with a piecemeal approach.

129. The four findings in paragraphs 189 and 221 of the Trial Judgement were reached "beyond reasonable doubt", as the Trial Chamber evidently considered them material to reaching a conclusion on Halilović's form of responsibility.[347] As the Prosecution itself acknowledges,[348] a trier of fact is called upon to make findings beyond reasonable doubt based on all of the evidence on the trial record – direct or circumstantial – not only on facts which are essential to proving the elements of the crimes and the forms of responsibility. There might be other facts that need to be proven beyond reasonable doubt due to the way in which the case was pleaded in the indictment and presented during trial to the Defence and to the Trial Chamber. All facts underlying the

[341] *See supra*, para. 7; *see* also *supra*, para. 120.
[342] For the relevant text of the two paragraphs in question, *see supra*, para. 115.
[343] Prosecution Notice of Appeal, para. 4(v).
[344] *See supra,* para. 114.
[345] *See* Prosecution Appeal Brief, paras 2.129-2.130.
[346] Respondent's Brief, paras 201 and 208.
[347] It is, of course, irrelevant whether the Prosecution itself at trial considered these findings to have been proven beyond reasonable doubt. *See* Respondent's Brief, para. 197.
[348] AT. 11.

elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt.[349]

130. In *Vasiljević*, for example, the Appeals Chamber addressed very clearly the issue that a specific factual finding may or may not be necessary to reach a conclusion beyond reasonable doubt as to the element of a crime, depending on the specific circumstances of the case and on the way the case was pleaded.[350]

131. In the present case, the Prosecution specifically claims under this part of sub-ground 5 that the Trial Chamber erred in requiring the Prosecution to prove *each* factual allegation in the Indictment beyond reasonable doubt and that this error "permeates the [Trial] Judgement".[351] However, as explained above, the Appeals Chamber has only considered the Prosecution's challenges relating to paragraphs 189 and 221.[352] The Prosecution has not shown how the alleged misapplication of the standard of proof in paragraphs 189 and 221 of the Trial Judgement could impact the ultimate finding it is attempting to challenge, namely Halilović's effective control over the perpetrators.[353] This allegation is accordingly dismissed.

132. However, since the four factual findings contained in paragraphs 189 and 221 of the Trial Judgement are strictly related to sub-grounds 2 and 3, the Appeals Chamber will bear them in mind when dealing with these two other sub-grounds. This is so because, while the Prosecution itself recognizes that sub-grounds 2 and 3 are exemplary of the overall error alleged in sub-ground 5,[354]

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[349] *Ntagerura et al.* Appeal Judgement, para. 174; *Blagojević and Jokić* Appeal Judgement, para. 226.

[350] The *Vasiljević* Trial Chamber had found that Mitar Vasiljević had forcibly transported seven Muslim men to the eastern bank of the Drina River, where they were shot. Despite not being satisfied that Vasiljević had personally killed any of the victims, the Trial Chamber considered other factual findings (reached beyond reasonable doubt) and concluded that Vasiljević indeed shared the intent to kill them (*Vasiljević* Trial Judgement, paras 112, 113 and 208). It convicted him for persecution pursuant to Article 5(h) of the Statute and for murder pursuant to Article 3 of the Statute (*Vasiljević* Appeal Judgement, paras 2 and 88). The Appeals Chamber subsequently reversed one of the findings underpinning Vasiljević's conviction, namely that "he had knowledge that the seven Muslim men were to be killed and not exchanged based on the information provided to him" (*Vasiljević* Appeal Judgement, para. 124). The Appeals Chamber then concluded that, since the Trial Chamber had found that Vasiljević knew that the seven men would be killed when he escorted them to the bank of the Drina River and stood behind them shortly before the shooting occurred, it had been able to establish his *mens rea* beyond reasonable doubt, despite the fact that he had not fired his weapon. However, after the Appeals Chamber overturned the finding that Vasiljević knew that the men were to be killed at the time he accompanied the group, the remaining factual findings did not suffice to reach the conclusion, as the only reasonable inference available on the evidence, that he had the intent to kill the seven Muslim men (*Vasiljević* Appeal Judgement, para. 131). In the circumstances of that case, that finding was necessary to reach a conclusion beyond reasonable doubt as to one element of the crime. Nonetheless, this was not strictly a finding on an element of the crime *in abstracto*; it had become indispensable for entering a conviction due to the way the case had developed on the basis of the pleadings and of the evidence presented.

[351] Prosecution Appeal Brief, para. 2.127.

[352] *See*, *inter alia*, Prosecution Reply Brief, para. 2.19.

[353] In fact, as part of its arguments concerning paragraphs 189 and 221 of the Trial Judgement, the Prosecution mainly limits itself to claiming that the Trial Chamber should have assessed the evidence relating to the name of the operation, the exact meeting at which it was planned, and the establishment of an IKM "together, along with the rest of the evidence adduced at trial, to determine whether the elements of the crimes were established beyond reasonable doubt" (Prosecution Appeal Brief, para. 2.129).

[354] AT. 11.

the Appeals Chamber considers paragraphs 189 and 221 of the Trial Judgement as containing the only factual findings being properly appealed by the Prosecution under sub-ground 5.

133. For the foregoing reasons, sub-ground 5 is dismissed.

2. Sub-Ground 2: The name of the operation

(a) Introduction

134. The Prosecution submits that the Trial Chamber erred in law at paragraph 175 of the Trial Judgement in requiring the Prosecution to prove not only the existence of combat operations in Herzegovina to lift the HVO blockade of Mostar, but also that the name of these operations was "Operation Neretva" as a prerequisite to find that Halilović had effective control over the troops who committed the crimes in Grabovica.[355] The Prosecution claims further that the Trial Chamber erred in fact in finding that the Prosecution had failed to prove that the operation in question was called "Operation Neretva".[356]

(b) Halilović's request for summary dismissal

135. Halilović requests that this sub-ground of appeal be summarily dismissed on the basis that (i) the Prosecution impermissibly varied this sub-ground of appeal; (ii) it failed to meet the requisite standard of review; (iii) it failed to meet the burden of argument or persuasion; and (iv) it failed to raise this argument at trial.[357] The Appeals Chamber finds that none of these arguments warrants the summary dismissal of this sub-ground of appeal, and thus denies Halilović's request.

(c) Whether the Trial Chamber erred in law by requiring proof beyond reasonable doubt of the name of the combat operations

136. The Prosecution claims that the Trial Chamber erred when requiring proof beyond reasonable doubt of the formal denomination of the military operation in question,[358] arguing that "the law on superior responsibility does not require the identification of the specific/official/formal name of the military operation during which crimes were committed".[359] Echoing its arguments under sub-ground 5 that not all facts in the Indictment need to be proven, the Prosecution further argues that the Trial Chamber erroneously considered that the name of the operation had to be established,[360] while only the operation's existence (as opposed to its denomination) might have an impact on the findings in relation to a superior-subordinate relationship.[361] It avers that the Trial

[355] Prosecution Notice of Appeal, para. 4(ii); Prosecution Appeal Brief, paras 2.41-2.42; AT. 10 and 137-138.
[356] Prosecution Notice of Appeal, para. 4(ii).
[357] Respondent's Brief, paras 110-115.
[358] Prosecution Appeal Brief, paras 2.43 and 2.51. *See* also Prosecution Reply Brief, para. 3.14; AT. 10-11.
[359] Prosecution Appeal Brief, para. 2.44. *See* also AT. 137-138.
[360] Prosecution Appeal Brief, para. 2.53.
[361] Prosecution Appeal Brief, paras 2.45-2.46; Prosecution Reply Brief, para. 3.8. *See* also Prosecution Appeal Brief, paras 2.54-2.58.

Chamber adopted an overly formalistic approach in appraising the evidence, implicitly requiring a *de jure* structure and erroneously excluding a *de facto* superior-subordinate relationship.[362]

137. Halilović responds that no error of law has been established by the Prosecution as the Trial Chamber did not require the Prosecution to prove the name of the operation as a pre-condition to establishing superior responsibility.[363] Moreover, he avers, even if the Trial Chamber had erred in requiring the Prosecution to prove the name of the operation, such an error could never invalidate the judgement as this was a "mere preliminary and peripheral matter".[364] At the Appeal Hearing, Halilović further suggested that the Trial Chamber, considering the military setting of the events and the chain of command described in the Indictment, adopted the right approach in assuming that proof of a formalized military structure within Operation Neretva-93 would have been pivotal for the Prosecution case. In this context, the name of the operation itself was an indispensable fact for the Trial Chamber when assessing whether Halilović's responsibility was proven.[365] He claimed that, having failed to prove at trial that Operation Neretva-93 was ever mounted by the ABiH, the Prosecution may not suggest an error of law to overcome its failure to provide evidence supporting its allegations.[366]

138. While clearly the formal denomination of a combat operation is not an express criterion under Article 7(3) of the Statute, if such a fact was pleaded in support of the allegation that one of the requirements for establishing superior responsibility was met, then the Trial Chamber is expected to make a finding on whether such a fact was proven.[367] In this respect, the Appeals Chamber recalls that "the Prosecution must always prove the existence of the facts charged as well as the accused's responsibility therefor".[368] In the present case, the Prosecution alleged in the Indictment that Halilović commanded a military Operation called "NERETVA-93" as a basis for its claim that a superior-subordinate relationship existed.[369] In order to address the Prosecution's allegation and to assess Halilović's role, the Trial Chamber was expected to make findings on the specificity of the pleaded military operation allegedly under Halilović's command. The Appeals Chamber therefore finds that the Trial Chamber did not err when considering the alleged name of the combat operation as one of the elements of the Prosecution's case.[370]

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[362] Prosecution Appeal Brief, para. 2.47. *See* also Prosecution Appeal Brief, paras 2.48-2.50.
[363] Respondent's Brief, para. 116, citing Trial Judgement, paras 174 and 737-739; AT. 114-115.
[364] Respondent's Brief, para. 125.
[365] AT. 112-115.
[366] AT. 113-116.
[367] *See* also *supra*, para. 69.
[368] *Kayishema and Ruzindana* Appeal Judgement, para. 113. *See* also *Rutaganda* Appeal Judgement, para. 172.
[369] Indictment, paras 3-4.
[370] Indictment, paras 3-4. *See* also Prosecution Pre-Trial Brief, para. 4, where the Prosecution reiterated that the "Accused had effective control over both these units by virtue of being the commander of an operation called 'Neretva-

139. The Trial Chamber detailed the elements of command responsibility to be taken into account when assessing the liability of a superior.[371] In particular, when outlining the elements necessary to establish a superior-subordinate relationship,[372] the Trial Chamber gave examples of factors it considered indicative of an accused's position of authority and effective control. These factors were: the official position held by the accused, his capacity to issue orders, the procedure for appointment, the position of the accused within the military or political structure and the actual tasks that he performed.[373] Nothing in this portion of the Trial Judgement indicates that the Trial Chamber required proof of a formal denomination of the military operation to establish a superior-subordinate relationship. In light of the examination of the relevant findings of the Trial Chamber, the Appeals Chamber finds that the Prosecution failed to substantiate how the Trial Chamber's conclusion that it was "not convinced that these combat operations *were called* 'Operation Neretva'",[374] or any other finding relied upon,[375] showed that the Trial Chamber required the Prosecution to prove the name of the operation as an element necessary for establishing the existence of a superior-subordinate relationship between Halilović and the offending troops.

140. More specifically, when considering Halilović's role in the context of the military operations carried out in Herzegovina, the Trial Chamber made findings with regard to the existence of a military operation, which – according to the Prosecution – was called "NERETVA-93".[376] This is the first finding in the Trial Chamber's analysis of this military operation and Halilović's role therein.[377] The Trial Chamber concluded this analysis by finding that "the Prosecution has failed to prove beyond reasonable doubt that Sefer Halilović was either *de jure* or *de facto* commander of the alleged operation called 'Operation Neretva' which the Prosecution submit[s] was carried out in Herzegovina in September 1993".[378] Contrary to the Prosecution's arguments,[379] this finding does not demonstrate that the name of the operation was a requirement for the establishment of a superior-subordinate relationship between Halilović and the offending troops. Rather, this finding was aimed at assessing Halilović's responsibility within the context of his alleged command of one specific operation as charged in the Indictment.

93'". In the Prosecution Final Trial Brief, paras 142 and following, the Prosecution argued in detail the specifics of Operation Neretva, including its name (*see*, *inter alia*, Prosecution Final Trial Brief, para. 145: "Alispahić later learned that the Operation was code-named Neretva and that Halilović was to command the Operation.").

[371] Trial Judgement, paras 55-100.

[372] Trial Judgement, paras 57-63.

[373] Trial Judgement, para. 58.

[374] Prosecution Appeal Brief, para. 2.41, citing Trial Judgement, para. 175 (emphasis added by the Prosecution).

[375] The Prosecution refers in particular to Trial Judgement, paras 372, 737 and 752 (Prosecution Appeal Brief, para. 2.41).

[376] Trial Judgement, paras 174-175, quoting Indictment, para. 3.

[377] Trial Judgement, paras 174-372 (Section IV.C., entitled "Operation Neretva").

[378] Trial Judgement, para. 372.

[379] *See* Prosecution Notice of Appeal, para. 4(ii). *See* also Prosecution Appeal Brief, paras 2.41-2.42.

141. The Prosecution does concede that the "*existence* of a military operation may have an impact on the findings in relation to the superior-subordinate relationship".[380] When assessing Halilović's position as commander of the military operation Neretva-93, the Trial Chamber specifically focused on the *existence* of a military operation relevant in the context of the Indictment. Indeed, the Trial Chamber stated that it had been "presented with evidence that there were combat operations in Herzegovina to lift the HVO blockade of Mostar at the time relevant to the Indictment", and, although it was "not convinced that these combat operations were called 'Operation Neretva'", it chose to "use the term 'Operation Neretva' to refer to the combat operations which took place in Herzegovina at the relevant time".[381] The Trial Chamber further found that "combat operations were carried out by units, which included the 9th Brigade, the 10th Brigade, the 2nd Independent Battalion and the Prozor Independent Battalion, in the areas around Grabovica and Uzdol in September 1993".[382]

142. These findings do not show that the Trial Chamber gave undue weight to the formal denomination of such an operation. In fact, the Trial Chamber continued its analysis of Halilović's alleged position as commander, irrespective of its finding that the name "Operation Neretva" had not been established.[383] Considering that the establishment of the formal denomination of the operation was not essential to the Trial Chamber's findings concerning Halilović's position in that operation, it is therefore moot to consider the Prosecution's further claim that by requiring the Prosecution to prove the formal name, the Trial Chamber implicitly required a *de jure* structure and wrongly excluded a *de facto* superior-subordinate relationship.[384] In any event, the Prosecution failed to substantiate on appeal any argument that would allow the Appeals Chamber to conclude that the mere existence of a military operation "together with the entirety of the evidence presented at trial, would have [lead to the conclusion] that Halilović was at least the *de facto* superior of those who committed the crime in Grabovica during this military operation".[385]

143. In light of the foregoing, the Appeals Chamber dismisses the allegation that the Trial Chamber erroneously required the Prosecution to prove that the combat operations carried out in Herzegovina in September 1993 to lift the HVO blockade of Mostar were called "Operation Neretva" as a necessary pre-condition for a finding of effective control and, therefore, for Halilović's conviction.

[380] Prosecution Appeal Brief, para. 2.46.
[381] Trial Judgement, para. 175.
[382] Trial Judgement, para. 737.
[383] *See*, in particular, Trial Judgement, paras 363-372.
[384] Prosecution Appeal Brief, para. 2.47. *See* also Prosecution Appeal Brief, paras 2.48-2.50.
[385] Prosecution Appeal Brief, para. 2.52.

(d) Whether the Trial Chamber erred in fact in finding that the Prosecution did not prove that the operation was called "Operation Neretva"

144. The Appeals Chamber has found that the Trial Chamber did not require the establishment of the formal denomination of the military operation carried out in Herzegovina when assessing Halilović's alleged position as the *de jure* or *de facto* commander of this operation.[386] Moreover, it is not established that the Trial Chamber relied on the name of this operation in its final conclusion that Halilović was not responsible under Article 7(3) of the Statute for the crimes committed in Grabovica.[387] Therefore, notwithstanding the vast amount of evidence on the trial record suggesting that an "Operation Neretva" (or "Neretva-93") did indeed exist,[388] the Appeals Chamber finds it moot to consider whether the Trial Chamber erred in fact when concluding that it was not convinced that the name of the military operation in question was "Neretva". Such an error, even if proven, could not eliminate "all reasonable doubt of the accused's guilt".[389]

145. In light of this finding, the Appeals Chamber does not need to address the Prosecution's allegations – under sub-ground 5 of its appeal in relation to the finding of fact in paragraph 189 of the Trial Judgement[390] – that the Trial Chamber erred in requiring proof "beyond reasonable doubt" to establish that, at the Zenica meeting, the participants discussed an "Operation Neretva" as well as who would be the commander of such an operation, or that they planned a specific and detailed operation to liberate Mostar.[391] Due to their nature, these factual findings would only assist in establishing the formal denomination of the operation, the formal appointment of Halilović (or of somebody else) as a commander, or some aspects of the planning of a military operation. In other words, they would not by themselves be able to overturn the Trial Chamber's conclusion regarding Halilović's effective control as a commander over the perpetrators of the Grabovica murders.

146. For the foregoing reasons, sub-ground 2 is dismissed.

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[386] Trial Judgement, para. 372.
[387] Trial Judgement, para. 752.
[388] *See*, for example: Bakir Alispahić, T. 62 (23 May 2005) and T. 33 (27 May 2005); Vahid Karavelić, T. 107 (19 April 2005) (cited in Trial Judgement, para. 183); Salko Gušić, T. 43 (7 February 2005) (cited in Trial Judgement, para. 191); Ramiz Delalić, T. 25 (18 May 2005) (cited in Trial Judgement, para. 219). The Appeals Chamber notes that the Trial Chamber stated that it was not fully satisfied that the evidence from these witnesses was entirely reliable (Trial Judgement, fn. 34). Exhibit 131 (a map erroneously cited in Trial Judgement, para. 175, as the only exhibit mentioning "Operation Neretva"); Exhibit 281, p. 2 (the book "A Cunning Strategy" by Sefer Halilović cited, *inter alia*, in Trial Judgement, para. 258) and Exhibit 498 (letter from Sefer Halilović to Alija Izetbegović, dated 1 May 1995).
[389] *Bagilishema* Appeal Judgement, para. 14. *See supra*, para. 11.
[390] *See supra*, para. 126.
[391] Prosecution Appeal Brief, para. 2.127.

3. Sub-Ground 3: The IKM

(a) Introduction

147. Paragraph 221 of the Trial Judgement reads as follows:

> The Trial Chamber finds that the Inspection Team was based in Jablanica. However, the Trial Chamber also finds that while that this [*sic*] location, on occasion, was referred to as an IKM, the evidence does not establish that this location was an IKM in the true sense of the rules applicable in the ABiH as explained to the Trial Chamber by witnesses. In this respect, the Trial Chamber notes that the expression IKM was also used for the Zulfikar Detachment's base in Donja Jablanica. The Trial Chamber therefore finds that the Prosecution has failed to prove beyond reasonable doubt that an IKM was established for the purpose of commanding an "Operation Neretva". For the purposes of this Judgement, for clarity, the Trial Chamber will however, continue to use the term IKM for the location of the Inspection Team in Jablanica.

148. The Prosecution submits that the Trial Chamber erred in law in requiring the Prosecution to prove as a pre-condition for conviction that the location where the Inspection Team was accommodated in Jablanica was a "forward command post" or IKM[392] from which a military "operation" in Herzegovina was commanded.[393] The Prosecution further argues that the Trial Chamber also erred in fact in concluding that the evidence presented at trial was insufficient to support a finding that the location where the Inspection Team was accommodated in Jablanica was an IKM from which the operation in question was directed.[394]

149. More specifically, the Prosecution asserts that the Trial Chamber's requirement to prove the existence of a "formal IKM" constituted an error in defining the law on superior responsibility,[395] particularly in the context of a *de facto* superior-subordinate relationship.[396] It submits that there was a command post in Jablanica from which military operations were coordinated and controlled, regardless of whether it met the formal military definition of IKM.[397] It notes that the Trial Chamber recognised that "the term IKM was used as 'jargon' to denote the location of senior officers".[398] The Prosecution further claims that, although a finding that an IKM was established in Jablanica could not by itself have led to the conclusion that Halilović was *de facto* superior, "the

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[392] "Forward command post" is a translation of "*Istureno komandno mesto*"; "IKM", the acronym of the expression in its original language, was used throughout the case (Trial Judgement, fn. 659).
[393] Prosecution Notice of Appeal, para. 4(iii). *See* also Prosecution Appeal Brief, para. 2.83; Prosecution Reply Brief, paras 3.15 and 3.18; AT. 10.
[394] Prosecution Notice of Appeal, para. 4(iii); Prosecution Appeal Brief, para. 2.106.
[395] Prosecution Appeal Brief, para. 2.85, quoting Trial Judgement, para. 365.
[396] Prosecution Appeal Brief, para. 2.86.
[397] Prosecution Appeal Brief, para. 2.87.
[398] Prosecution Appeal Brief, para. 2.87, quoting Trial Judgement, para. 365. *See* also Prosecution Appeal Brief, para. 2.91.

existence of an IKM or operational command post used by Halilović is an indicator of effective control which can support a positive finding of *de facto* superior".[399]

150. Second, reiterating that only facts which are necessary to establish an element of the offence or mode of liability must be proven beyond reasonable doubt,[400] the Prosecution claims that the existence of an IKM was not such an "essential" fact.[401] It argues that, in any event, the Defence was clearly informed by the Indictment that the Prosecution's case was that a command post was established in Jablanica to command the combat operation, so that the absence of formal orders establishing a command post as an IKM did not affect in any way Halilović's rights to an informed and proper defence.[402]

151. Moreover, the Prosecution claims that, even if the existence of an IKM had to be proven beyond reasonable doubt, a reasonable trier of fact could only have concluded on the basis of the evidence presented at trial, that a "formal" forward command post[403] was established in Jablanica and that the operation at issue was directed from there.[404]

(b) Halilović's request for summary dismissal

152. Halilović requests that this sub-ground of appeal be summarily dismissed on three distinct grounds, namely (i) that it has been impermissibly varied; (ii) that it is incapable of meeting the relevant standard of review; and (iii) that the Prosecution has failed to meet its burden of argument or persuasion.[405] The Appeals Chamber finds that none of these arguments warrants the summary dismissal of this sub-ground. Moreover, the assertions regarding the existence of an IKM in Jablanica should be considered in light of the Prosecution's broader arguments on whether the Trial Chamber erred in defining and applying the law on superior responsibility.[406] Accordingly, Halilović's request for summary dismissal of sub-ground 3 is denied.

[399] AT. 10. The Appeals Chamber notes that this appears to show a different focus than the Prosecution's arguments in the Prosecution Appeal Brief, para. 2.94: "The fact that a command post existed from which Halilović operated was sufficient. If the Trial Chamber, instead of focusing on the alleged failure to prove that the command post in Jablanica was a formal IKM […] had focused on whether there was a *de facto* command post from which the military operation was directed by Halilović, it would have concluded that Halilović was at least the *de facto* superior of those who committed the crimes during the military operation he directed from the *de facto* IKM".
[400] Prosecution Appeal Brief, para. 2.96. The Prosecution here refers to its arguments in the Prosecution Appeal Brief, paras 2.53-2.56, relating to the formal denomination of Operation Neretva.
[401] Prosecution Appeal Brief, para. 2.95, citing Indictment, para. 4; Prosecution Reply Brief, para. 3.18; AT. 10.
[402] Prosecution Appeal Brief, para. 2.97, citing Indictment, para. 4.
[403] Prosecution Appeal Brief, para. 2.99.
[404] Prosecution Appeal Brief, paras 2.99 and 2.106.
[405] Respondent's Brief, paras 140-147.
[406] Prosecution Appeal Brief, paras 2.85-2.94.

(c) Whether the Trial Chamber erred in law in requiring proof beyond reasonable doubt of the existence of an IKM

153. The Prosecution essentially claims that the Trial Chamber erred in law when, in order to enter a conviction under Article 7(3) of the Statute, it required proof beyond reasonable doubt that the command post from which the military operation was conducted was a formally established IKM.[407] Halilović responds that the Trial Chamber did not require proof of existence of an IKM as a legal "pre-condition for conviction" and that the impugned paragraphs of the Trial Judgement do not contain a legal finding, but a finding of fact.[408] While it is true that a finding on the existence of an IKM is in essence a factual finding, the Appeals Chamber considers that the Trial Chamber appears to have based its conclusion that Halilović was not *de jure* or *de facto* commander of Operation Neretva, *inter alia*, on the finding that "the evidence presented by the Prosecution [was] insufficient to support a finding that the location where the Inspection Team was accommodated in Jablanica was an IKM from which an 'operation' in Herzegovina was commanded".[409] The Trial Chamber therefore relied, *inter alia*, on such a factual finding to establish whether Halilović had effective control over the perpetrators of the crimes committed in Grabovica.

154. The Prosecution claims that the Trial Chamber erred in law in considering that the allegation in the Indictment that an operation was commanded from an IKM in Jablanica needed to be proven beyond reasonable doubt.[410] In this respect, the Appeals Chamber recalls that the establishment of an IKM was a fact not only alleged in the Indictment, where the Prosecution claimed that the "operation was commanded and co-ordinated from the Forward Command Post in Jablanica".[411] This fact was also pleaded by the Prosecution throughout the trial proceedings.[412] The Prosecution specifically highlighted the importance of an IKM's existence in Jablanica when it argued that "[a]nother piece of evidence proving that Halilović commanded Operation Neretva was that of the establishment of a forward command post […] in Jablanica".[413] The Appeals Chamber considers that the qualification of a location as an IKM bears significance as "IKMs were used by commanders in order to exercise command when they were in the field"[414] and their establishment could as such amount to one of the "indicators of effective control" as outlined by the Trial

[407] Prosecution Appeal Brief, paras 2.84 (citing Trial Judgement, para. 221) and 2.86; AT. 10 and 137-138.
[408] Respondent's Brief, para. 148, citing Trial Judgement, paras 221, 365 and 375.
[409] Trial Judgement, para. 365; *see* also Trial Judgement, para. 372. Although, as claimed by Halilović (Respondent's Brief, para. 154), proof of the existence of a "*de facto* IKM" would not by itself establish Halilović's authority over the perpetrators, the arguments raised under this sub-ground of appeal are to be read in conjunction with the other arguments advanced under the first ground of appeal in support of the contention that Halilović was the superior officer of subordinates who committed the crimes in Grabovica.
[410] Prosecution Appeal Brief, paras 2.95-2.96.
[411] Indictment, para. 4.
[412] Prosecution Final Trial Brief, para. 177; Prosecution's closing argument, T. 69-70 (30 August 2005).
[413] Prosecution Final Trial Brief, para. 177.

Chamber.[415] Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in considering that the allegation in the Indictment that an operation was commanded from an IKM in Jablanica needed to be proven beyond reasonable doubt. The Appeals Chamber will now turn to address the parties' submissions concerning the distinction between a "formal" and a "*de facto*" IKM.

(d) Distinction between "formal" and "*de facto*" IKM

155. The Prosecution focuses its claim under this sub-ground of appeal on the allegation that the Trial Chamber erroneously required proof of a "*formal* IKM",[416] and proof that the "command post was *formally established* as an IKM for the operation",[417] in order to establish Halilović's superior responsibility. This allegation is based on the Trial Chamber's finding that "this location was [not] an IKM *in the true sense of the rules applicable in the ABiH*".[418] Halilović responds that the distinction between a "formal IKM" and a "*de facto* IKM" was never advanced at trial[419] and that, in any event, a "*de facto* command post" was not a meaningful term which could impact upon the issue of effective control.[420] Indeed, the Prosecution did not draw a distinction between the existence of a "*de facto* IKM" and a "formal IKM" at trial. However, the Appeals Chamber considers that the Prosecution does not seek to argue that such a distinction was indeed pleaded at trial. On the contrary, its argument hinges on the contention that the Trial Chamber erroneously made this distinction, by allegedly requiring the *formal establishment* of a forward command post, instead of focusing on the existence of an IKM from which Halilović directed Operation Neretva.[421] Moreover, the Appeals Chamber considers that the Prosecution's submissions at trial do not show, contrary to Halilović's claim,[422] that the Prosecution actually argued that the "military expression IKM" was significant. Rather, it used the term "IKM" to refer to a "center established to command an operation",[423] and submitted that "an IKM in general terms is a centre from which a commander can issue commands while a commander is in the field".[424]

[414] Trial Judgement, para. 212. *See* also Prosecution Final Trial Brief, para. 177.
[415] Trial Judgement, para. 58 (citing *Blaškić* Appeal Judgement, para. 69) and paras 363-372 (making the findings based on the above-mentioned indicators).
[416] Prosecution Appeal Brief, paras 2.84-2.86 (emphasis added).
[417] Prosecution Appeal Brief, para. 2.94 (emphasis added).
[418] Prosecution Appeal Brief, paras 2.93 (quoting Trial Judgement, para. 221, emphasis added by the Prosecution) and 2.94.
[419] Respondent's Brief, paras 152 and 155.
[420] Respondent's Brief, para. 152.
[421] Prosecution Appeal Brief, para. 2.94.
[422] Respondent's Brief, paras 150 and 155. Rather, it was Halilović who argued at trial that, in order for the location in Jablanica to function as an IKM, it had to be formally established by an order, which he claimed was not the case here (Defence Final Trial Brief, paras 257 and 260).
[423] Prosecution Pre-Trial Brief, para. 28.
[424] Prosecution's closing argument, T. 69 (30 August 2005).

156. In its analysis, the Trial Chamber first specifically considered testimonies to ascertain the military rules underlying the setting up of IKMs in general,[425] as it had "not [been] provided with any written rules or regulations concerning the establishment of IKMs".[426] Then, it proceeded to assess if the location where the Inspection Team had been accommodated in Jablanica could be considered an IKM pursuant to these rules.[427] The Appeals Chamber therefore considers that, when analysing the evidence regarding the existence of an IKM in Jablanica, the Trial Chamber indeed focused on the establishment of what the Trial Chamber itself called an "*official* IKM",[428] which – it found – needed to be set up by a specific order.[429] As Halilović suggests, this approach was probably prompted by the way in which the case was pleaded: formal establishment of an IKM would have assisted in determining whether Halilović was *de jure* commander of the military operation in question, the first logical step in assessing his effective control as a commander.[430]

157. While recognising that the expression "IKM" is a specific military term, the Appeals Chamber considers that the issue here is whether a forward command post existed in Jablanica, as claimed by the Prosecution at trial, and whether Halilović commanded Operation Neretva and issued orders from this command post. These findings, in the opinion of the Prosecution and of the Trial Chamber itself, are relevant in establishing whether Halilović had control over the perpetrators of the crimes committed in Grabovica.[431] In this respect, the focus by the Trial Chamber on the formal establishment of an IKM through an order was unreasonable. The Appeals Chamber therefore finds that the Trial Chamber erred when it required the establishment of an "official IKM" to be proven beyond reasonable doubt in order to ascertain whether the Prosecution had proven that Operation Neretva was commanded from this location.[432]

158. In light of this finding, the Appeals Chamber will now turn to determine whether the Prosecution did prove, as it contends,[433] that there was an IKM in Jablanica from which Operation Neretva was directed by Halilović.

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[425] Trial Judgement, paras 212-213.
[426] Trial Judgement, para. 212.
[427] Trial Judgement, paras 214-221.
[428] Trial Judgement, para. 215: "The Trial Chamber heard testimony that there was no *official* IKM in Jablanica."
[429] Trial Judgement, paras 213 and 217.
[430] AT. 117-119. The Appeals Chamber notes that the Prosecution conceded that, at trial, it failed to prove that Halilović was the *de jure* commander of Operation Neretva (AT. 141).
[431] In this context, Jusuf Jašarević (Chief of the Main Staff Security Administration), who made a distinction between an IKM according to the "rules" and those locations only defined as a "forward command post" (because of the presence of a group of superior officers), noted that elements of command and control were present even in the latter, non-official, IKMs. *See* Trial Judgement, para. 217.
[432] Trial Judgement, paras 221 and 365.
[433] *See* Prosecution Appeal Brief, para. 2.98. *See* also AT. 137-138 (requesting that the Appeals Chamber apply the correct legal standard to the evidence relating to this sub-ground and therefore, by implication, to make a finding on the existence of the IKM).

(e) Whether the Prosecution proved that an IKM was established for the purpose of commanding Operation Neretva

159. As noted earlier, the Prosecution argues that the Trial Chamber also erred in fact in concluding that the evidence presented at trial was insufficient to support a finding that the location where the Inspection Team was accommodated in Jablanica was an IKM from which Operation Neretva was directed.[434] In support of this allegation, the Prosecution submits that it proved at trial that an IKM was established in Jablanica for the purpose of commanding Operation Neretva.[435]

160. The Trial Chamber noted that the "term IKM was used as 'jargon' to denote the location of senior officers",[436] this being "the practice within the ABiH",[437] and quoted several witnesses stating that the location of the Inspection Team in Jablanica was referred to as "forward command post", although no official IKM was set up there on the basis of an order.[438]

161. In particular, Halilović himself wrote in the Final Report of the Inspection Team that an IKM was set up in Jablanica with the aim of coordinating and executing combat operations.[439] Moreover, Halilović's superior, Rasim Delić, also addressed an order to the "Forward Command Post of the Supreme Staff of the Armed Forces".[440] The Trial Chamber further noted that seven documents submitted as evidence were sent from the "IKM" in Jablanica,[441] including four orders issued by Halilović himself.[442] The Appeals Chamber considers that the reference to an IKM in these documents has a meaning beyond their qualification as "jargon" and points to the actual existence of an IKM. This language and the qualification of a forward command post, as noted above,[443] could in theory be an "indicator of effective control", as they might establish Halilović's capacity to issue orders.

162. Nevertheless, in light of the testimonies considered by the Trial Chamber, it remains unclear whether the IKM in Jablanica indeed had all the trappings of a real forward command post with

[434] Prosecution Notice of Appeal, para. 4(iii); Prosecution Appeal Brief, para. 2.106.
[435] Prosecution Appeal Brief, heading (B) p. 38 and paras 2.99-2.105.
[436] Trial Judgement, para. 365.
[437] Trial Judgement, para. 217, quoting the testimony of Namik Džanković.
[438] Trial Judgement, fn. 696, quoting the testimonies of Namik Džanković, Bakir Alispahić and Jusuf Jašarević. *See* also testimony of Vehbija Karić, T. 19 (2 June 2005).
[439] Trial Judgement, para. 214, citing Exhibit 130.
[440] Exhibit 120, Order on organisational changes in the zone of responsibility of the 1st, 4th and 6th Corps, 1 September 1993 ("Reorganisation Order"), cited in Trial Judgement, para. 216. *See* also Trial Judgement, para. 225, quoting point 7 of the Reorganisation Order, which instructs the "Officers from the Forward Command Post – Staff of Supreme Command" to provide the necessary specialised assistance to the commands of the 4th and 6th Corps in the tasks set forth in the order.
[441] Trial Judgement, para. 216. The Trial Chamber noted that four of these documents bore the heading "IKM Jablanica".
[442] Trial Judgement, para. 216 and fns 683 and 686, citing Exhibits 118 (the only order sent by Halilović bearing the heading "IKM"), 161, 122 and 123.
[443] *See supra*, para. 154.

actual command and control functions. This uncertainty is reflected in paragraph 215 of the Trial Judgement:

> Vehbija Karić testified that [the IKM in Jablanica] was not an IKM or a temporary command post "in the traditional sense, with its prerogatives, with its communication centre, with all its organs and the commands." Reports were not submitted to them daily and they did not issue 'dozens' of orders every day, as is the case when commands have such authority. They used the communication system of another brigade as they did not have their own. Salko Gušić testified that the IKM did not have all the facilities of a proper command post, but had sufficient resources in terms of accommodation and communications. They had many of the elements that an IKM has to have, the essential ones such as a communications centre, and their security.[444]

163. The Trial Chamber itself noted a possible source of confusion, since the term IKM was also used with reference to the base of Zulfikar Ališpago in Donja Jablanica.[445] Ramiz Delalić's testimony, relied upon by the Prosecution to show that Operation Neretva was commanded from the Jablanica IKM,[446] actually refers to the base of the Zulfikar Detachment in Donja Jablanica.[447] The other witness clearly stating that "[t]he operation was coordinated and carried out from the Jablanica forward command post, and [that] General Halilović was in charge of it",[448] was Salko Gušić, whose evidence the Trial Chamber deemed not to be "entirely reliable" and, as such, required corroboration.[449]

164. In light of the foregoing, while agreeing with the Prosecution that a post described as "IKM" was indeed set up in Jablanica by the Inspection Team,[450] the Appeals Chamber finds that the finding that "the Prosecution ha[d] failed to prove beyond reasonable doubt that an IKM was established *for the purpose of commanding an 'Operation Neretva'*",[451] was not unreasonable. In other words, establishing that an IKM did exist does not suffice to show *why* it was established and, above all, *what role*, if any, this post played in practice with respect to Operation Neretva. While, as noted above,[452] the existence of an IKM *might* indicate that an operation was commanded from this location, the Prosecution has failed to establish how the "military documents, orders, requests, [and] reports" issued[453] would support not only the existence of a forward command post in Jablanica, but also the Prosecution's claim that Halilović commanded Operation Neretva from this IKM.

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[444] Trial Judgement, para. 215 (footnotes omitted).
[445] Trial Judgement, para. 219.
[446] Prosecution Appeal Brief, para. 2.104.
[447] Trial Judgement, para. 219, citing Ramiz Delalić, T. 25 (18 May 2005).
[448] Salko Gušić, T. 62 (3 February 2005).
[449] Trial Judgement, para. 17 and fn. 34.
[450] Exhibit 130, Final Report of the Inspection Team, p. 1: "With the aim of co-ordinating and executing combat operations, an IKM/forward command post/ was set up in Jablanica, where the team planned the operation, […] and ensured logistic means for the operation".
[451] Trial Judgement, para. 221 (emphasis added).
[452] *See supra,* para. 154.
[453] Prosecution Appeal Brief, para. 2.105.

165. The Appeals Chamber finds that the Prosecution failed to substantiate its claim that, had the existence of an IKM in Jablanica been established at trial, the Trial Chamber "would have concluded that Halilović was at least the *de facto* superior of those who committed the crimes during the military operation he directed from the *de facto* IKM".[454] In light of this finding, the Appeals Chamber does not need to address the Prosecution's allegation – under sub-ground 5 in relation to the finding of fact in paragraph 221 of the Trial Judgement[455] – that the Trial Chamber erred in requiring proof "beyond reasonable doubt" that an IKM was established for the purpose of commanding an "Operation Neretva".

166. For the foregoing reasons, sub-ground 3 is dismissed.

[454] Prosecution Appeal Brief, para. 2.94.
[455] *See supra*, para. 126.

E. Sub-ground 4: Material ability to punish

1. Introduction

167. Paragraph 746 of the Trial Judgement reads as follows:

> The Trial Chamber also notes that, in relation to the investigations of the crimes in Grabovica, Sefer Halilović, in the evening of 9 September, instructed Namik Džanković, a member of the Inspection Team and the UB ["Main Staff Security Administration"], to work together with the MUP, as well as with other members of the SVB ["Military Security Service"], and to keep "the Sarajevo command", rather than himself, informed. The evidence shows that at this point in time investigations were already under way. The evidence does not show that Sefer Halilović initiated the investigations or that the investigations were in any way carried forward through his actions. The evidence further shows that the 6th Corps SVB, the Military Police Battalion of the 6th Corps and the Military Police of the 44th Brigade were involved in the investigation into the events in Grabovica and that the Chief of the UB of the Main Staff, Jusuf Jašarević, was kept informed of the results of their investigations. The Trial Chamber finds that based on the evidence, it cannot be concluded that Sefer Halilović had the material ability to punish the perpetrators of the crimes committed in Grabovica.[456]

168. The Prosecution submits that the Trial Chamber erred in law in concluding that Halilović did not have the material ability to punish the perpetrators of the crimes committed in Grabovica based, in large part, on its conclusion that the evidence did not show that he initiated or carried forward investigations.[457] It claims that the Trial Chamber's findings were unreasonable, submitting that "the fact that Halilović *did not* punish the perpetrators does not imply that he *could not*".[458]

2. Halilović's request for summary dismissal

169. Halilović requests that this sub-ground of appeal be summarily dismissed.[459] First, he submits that the Prosecution's claim that the error in paragraph 746 of the Trial Judgement "significantly affected" the finding on the existence of a superior-subordinate relationship relies on a standard that falls short of the applicable standard of review because the Prosecution does not argue that the alleged error had the effect of invalidating the Trial Judgement.[460] Regardless of the fact that the terminology used by the Prosecution is perhaps unfortunate, the Appeals Chamber finds that the relevant issue is whether the error of law alleged by the Prosecution invalidates the decision.[461] Second, the Prosecution contends that the Trial Chamber concluded that Halilović did not have the material ability to punish, based, *in large part,* on evidence that he did not initiate investigations, which shows that the Prosecution acknowledges that the Trial Chamber did not base

[456] Footnote omitted.
[457] Prosecution Notice of Appeal, para. 4(iv); Prosecution Appeal Brief, para. 2.107.
[458] Prosecution Appeal Brief, para. 2.108.
[459] Respondent's Brief, paras 168-172.
[460] Respondent's Brief, para. 170, citing Prosecution Appeal Brief, para. 2.118.
[461] *See supra*, para. 7.

the challenged finding *solely* on evidence that he did not initiate the investigation.[462] The Appeals Chamber reiterates that the relevant issue is whether the Prosecution has demonstrated that the Trial Chamber's reliance on evidence that Halilović did not initiate the investigation into the Grabovica crimes was erroneous and that such an error invalidates the judgement.[463] Third, Halilović claims that this sub-ground of appeal is replete with "grave, un-substantiated, assertions and distortions of factual findings" in the Trial Judgement, which warrant summary dismissal as an abuse of process.[464] Halilović's arguments in support of this claim are without merit. While some of the identified statements from the Prosecution Appeal Brief do not always reflect the Trial Judgement's paragraphs in question with utmost clarity, this is not sufficient to compel a conclusion that the Prosecution significantly misrepresents the Trial Chamber's findings to the point that the Prosecution's arguments should not be addressed on the merits.

170. For the foregoing reasons, Halilović's request for summary dismissal of sub-ground 4 is denied.

3. Whether the Trial Chamber erred in basing its conclusion on Halilović's failure to punish

171. The Prosecution submits that "in seeming contradiction to its findings, the Trial Chamber concluded that Halilović did not have the material ability to initiate and conduct his own effective investigation".[465] It claims that Halilović's instruction to Namik Džanković to investigate, as well as Rasim Delić's order to Halilović to investigate, isolate the perpetrators and order the 9th Brigade back to Sarajevo, establish at least "that Halilović had the material ability to investigate, order an investigation, have the facts presented to him, and then prepare a report for his superiors".[466] The Prosecution asserts that the only reasonable conclusion is that he disobeyed Delić's order and failed to take the steps to punish the perpetrators who were within his power and responsibility.[467] Additionally, the Prosecution avers that the Trial Chamber apparently concluded that, since various persons were conducting some form of investigations, Halilović was exonerated from his duty to investigate.[468] As a result, the Trial Chamber concluded that Halilović did not have the material

[462] Respondent's Brief, para. 168 (emphasis added by Halilović).
[463] *See supra*, para. 7.
[464] Respondent's Brief, para. 172, citing Trial Judgement, paras 307-308, and Prosecution Appeal Brief, para. 2.111.
[465] Prosecution Appeal Brief, para. 2.112, citing Trial Judgement, para. 746.
[466] Prosecution Appeal Brief, para. 2.115. *See* also Prosecution Appeal Brief, para. 2.111, citing Trial Judgement, para. 521 and Exhibit 157.
[467] Prosecution Appeal Brief, para. 2.112.
[468] Prosecution Appeal Brief, para. 2.114.

ability to punish,[469] implying that Halilović did not have the "material ability to investigate", either.[470]

172. The Prosecution submits that, while the Trial Chamber "correctly found that Halilović did not initiate or carry forward the investigations"[471] and that accordingly Halilović's "actions fell short of his obligation under the third element [of superior responsibility] to conduct an effective investigation",[472] it reached the erroneous conclusion that he did not have the material ability to punish the perpetrators.[473] According to the Prosecution, the Trial Judgement is premised on the assumption that Halilović's inactions demonstrate that he could not punish or investigate.[474] The finding in paragraph 746 of the Trial Judgement significantly affected the finding on the existence of a superior-subordinate relationship between him and the perpetrators.[475] This, in turn, led to the conclusion that Halilović did not have effective control, a conclusion that resulted in his acquittal.[476] Claiming that the Trial Chamber failed to apply a correct analysis, the Prosecution concludes by outlining the process by which a proper determination of Halilović's responsibility under Article 7(3) of the Statute should have been conducted.[477]

173. Halilović responds that the Trial Chamber did not err in law by using evidence of Halilović's role in the investigation of crimes to assess whether or not he had the material ability to prevent and punish the Grabovica crimes.[478] He adds that there is a close evidentiary nexus between the first and the third elements of superior responsibility, given that the "effective control" of a superior is based on his "material ability to prevent offences or punish the principal offenders".[479] Halilović asserts that, contrary to the Prosecution's suggestion, the Trial Chamber did not conclude that Halilović had no effective control "in large part" because he did not initiate or carry forward an investigation. Rather, he submits, the Trial Chamber simply found that the evidence of Halilović's role in the investigation process concerning the Grabovica crimes did not provide positive evidence of his effective control over the perpetrators.[480]

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[469] Prosecution Appeal Brief, para. 2.117. *See* also Prosecution Appeal Brief, para. 2.113, citing Trial Judgement, para. 746: "The evidence does not show that Sefer Halilović initiated the investigations or that the investigations were in any way carried forward through his actions."
[470] Prosecution Appeal Brief, para. 2.117. *See* also Prosecution Appeal Brief, paras 2.112, 2.114, 2.118, 2.119 and fn. 188.
[471] Prosecution Appeal Brief, para. 2.118, citing Trial Judgement, para. 746.
[472] Prosecution Appeal Brief, para. 2.117.
[473] Prosecution Appeal Brief, para. 2.118. *See* also Prosecution Reply Brief, para. 3.24, and AT. 61.
[474] Prosecution Appeal Brief, para. 2.118.
[475] Prosecution Appeal Brief, para. 2.118, citing Trial Judgement, para. 747.
[476] Prosecution Appeal Brief, paras 2.118-2.119.
[477] Prosecution Appeal Brief, para. 2.120. *See* also AT. 61.
[478] Respondent's Brief, para. 173. *See* also AT. 100-101.
[479] Respondent's Brief, para. 174, citing *Čelebići* Appeal Judgement, paras 196-198; *Bagilishema* Appeal Judgement, paras 49-55; *Kayishema and Ruzindana* Appeal Judgement, para. 294.
[480] Respondent's Brief, para. 176.

174. The Prosecution argues in essence that, in reaching its conclusions in paragraph 746 of the Trial Judgement, "the Trial Chamber used evidence that the third element of command responsibility was satisfied to infer that the first element of command responsibility was not".[481] At the outset, the Appeals Chamber recalls that each of the three elements of superior responsibility, as set out above,[482] must be proven beyond reasonable doubt in order for a Trial Chamber to establish that an accused is responsible under Article 7(3) of the Statute. A Trial Chamber will first ascertain whether the superior had effective control over the persons committing crimes subject to the jurisdiction of the International Tribunal (in the sense of possessing the material ability to prevent or punish the commission of the crimes in question) and then proceed to determine whether the second and third elements of superior responsibility are met.[483] In the present case, the Appeals Chamber must therefore determine if the Trial Chamber erred when assessing whether a superior-subordinate relationship pursuant to Article 7(3) of the Statute existed between Halilović and the perpetrators of the crimes committed in Grabovica. In so doing, the Trial Chamber had to consider whether the evidence on the record contained indicators establishing beyond reasonable doubt that Halilović was the superior of the alleged perpetrators and had effective control over them.[484] Considering the facts in this case, this essentially hinged on a finding about whether he had the power to punish criminal conduct or initiate measures leading to proceedings against the alleged perpetrators.

175. The Appeals Chamber notes that the Trial Chamber correctly outlined, in its analysis of the applicable law,[485] the need to establish the position of command of a superior over a subordinate by means of his effective control – in the sense of "the material ability to prevent and punish criminal conduct"[486] – (the first element enshrined in Article 7(3) of the Statute) before subsequently addressing the separate obligation to take necessary and reasonable measures to prevent the commission of crimes and to punish the perpetrators once crimes have been committed (the third element under Article 7(3) of the Statute).[487] Therefore, the Trial Chamber clearly distinguished the different elements of superior responsibility and addressed the need to prove whether each of these elements has been established.

[481] Prosecution Appeal Brief, para. 2.107 (footnotes omitted).
[482] *See supra*, para. 59.
[483] *Blaškić* Appeal Judgement, para. 484.
[484] *Cf. Blaškić* Appeal Judgement, para. 69.
[485] Trial Judgement, paras 55-100, section titled: "3. The Elements of Command Responsibility". During the Appeal Hearing, the Prosecution itself conceded that the Trial Chamber set out the correct legal standard with regard to the application of Article 7(3) of the Statute (AT. 8-9).
[486] Trial Judgement, para. 58, quoting *Čelebići* Appeal Judgement, para. 256.
[487] Trial Judgement, paras 72-78 and 91-100.

176. The Trial Chamber then went on to consider in detail the specific rules governing *in concreto* the ABiH investigations on military personnel suspected of killing civilians.[488] In particular, based on oral and written evidence, the Trial Chamber concluded that the ABiH and the MUP were competent to carry out investigations in these cases and noted that cooperation between military organs and civilian police was often required.[489] In light of this analysis, the Trial Chamber then proceeded to consider evidence on the authority to conduct investigations into the crimes committed in Grabovica[490] and finally set out and analysed the evidence regarding the actual measures taken to report and investigate those crimes.[491]

177. The Appeals Chamber considers that the conclusion reached in paragraph 746 of the Trial Judgement must be read in light of the totality of the Trial Chamber's findings regarding investigations into the crimes committed in Grabovica. The Appeals Chamber acknowledges that the statement that "[t]he evidence does not show that Sefer Halilović initiated the investigations or that the investigations were in any way carried forward through his actions"[492] could be misleading. The Appeals Chamber considers that such a statement, made within the context of the Trial Chamber's concluding remarks on Halilović's material ability to punish, may be confusing, since failure to initiate investigations is not, as such, an indication of lack of power to investigate.

178. However, even the Prosecution concedes that the Trial Chamber did not base its finding that Halilović did not have the material ability to punish *solely* on its conclusion that the evidence did not show that he had initiated investigations.[493] Rather, the Trial Chamber took into account the evidence relating to all investigations into the crimes committed in Grabovica, which it had previously analysed in the Trial Judgement.[494] This evidence included: (i) Halilović's instruction to Namik Džanković; (ii) the fact that other investigations were already underway at that time; and (iii) evidence of those investigations in which the 6th Corps SVB, the Military Police Battalion of

[488] Trial Judgement, paras 653-659. The Trial Chamber specifically found that there was a "dual chain of command", considering that "[a]t the brigade level and higher up in the military structure, there were military police units specifically assigned with the task of carrying out investigations" and that the "military police acted on orders of the unit commander or of the chief of the [Military Security Service]" (Trial Judgement, para. 657). *See* also Trial Judgement, paras 112-114 on the role and the functioning of the Military Security Service.
[489] Trial Judgement, paras 653 and 654.
[490] *See*, in particular, Trial Judgement, paras 663-671 and 677.
[491] Trial Judgement, paras 660-701.
[492] Trial Judgement, para. 746.
[493] The Appeals Chamber notes in this respect the Prosecution's use of the expression "based in large part" both in its Notice of Appeal, para. 4(iv) ("The Trial Chamber erred in law at paragraph 746 wherein it concluded that Sefer Halilović did not have the material ability to punish the perpetrators of the crimes committed in Grabovica *based, in large part,* on its conclusion that the evidence did not show that Sefer Halilović initiated investigations or that investigations were in any way carried forward through his actions." (emphasis added)) and in its Appeal Brief, para. 2.107 ("The Trial Chamber concluded that Halilović did not have the material ability to punish the perpetrators of the crimes committed in Grabovica *based in large part* on the lack of evidence that Halilović initiated investigations into the crimes or that investigations were carried forward through his actions." (emphasis added)).
[494] Trial Judgement, paras 660-701.

the 6th Corps and the Military Police of the 44th Brigade were involved.[495] The Trial Chamber placed emphasis on the fact that the evidence demonstrated that "the Sarajevo command" and the "Chief of the UB of the Main Staff, Jusuf Jašarević", were kept informed of the results of the investigations by the 6th Corps SVB, the Military Police Battalion of the 6th Corps and the Military Police of the 44th Brigade.[496]

179. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not erroneously rest its finding that Halilović did not have the material ability to punish the perpetrators of the crimes committed in Grabovica on its conclusion that the evidence failed to show either that he initiated the investigations or that the investigations were in any way carried forward through his actions.

180. Accordingly, the Appeals Chamber dismisses the Prosecution's allegation that the Trial Chamber improperly used evidence that Halilović did not take necessary and reasonable measures in order to support its finding that he was not the superior of the troops who committed the crimes in Grabovica.

4. Whether Halilović had the material ability to punish

181. The Prosecution claims that the evidence submitted at trial establishes that Halilović had the material ability to punish the perpetrators.[497] It specifically refers to Halilović's instruction given to Džanković on 9 September 1993, together with the order issued by Delić on 12 September 1993,[498] as well as the final report drawn up by the Inspection Team.[499] The Prosecution claims that, in contradiction with its own findings, the Trial Chamber concluded that Halilović did not have the "material ability to initiate and conduct his own effective investigation"[500] and stresses the importance of Halilović's material ability to punish, directly focusing on the "effective control test".[501]

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[495] Trial Judgement, para. 746.
[496] Trial Judgement, para. 746.
[497] Prosecution Brief in Reply, paras 3.23 and 3.25. *See* also Prosecution Appeal Brief, paras 2.115 and 2.117; AT. 33-34 and 42-43. During the Appeal Hearing, the Prosecution claimed that Halilović had accepted his material ability to punish his subordinates and his correspondent duty to investigate, but that he failed to take the corresponding measures (AT. 32-33).
[498] Prosecution Appeal Brief, paras 2.111-2.115 and fn. 189, where the Prosecution claimed that "Halilović ordering [Namik] Džanković to investigate is sufficient evidence of his material ability to investigate. So is Delić's order to Halilović to investigate". *See* also Prosecution Reply Brief, paras 3.23-3.25.
[499] AT. 40, citing Exhibit 130. The Prosecution claims that this report shows that criminal investigations were recommended with regard to "various members of the ABiH as well as other measures", but that Halilović did not make recommendations with regard to the crimes committed in Grabovica (AT. 40). *See* also AT. 51.
[500] Prosecution Appeal Brief, para. 2.112, citing Trial Judgement, para. 746.
[501] AT. 32.

182. At the outset, the Appeals Chamber notes that, in the present case, the issue of Halilović's alleged material ability to punish the perpetrators in order to establish his effective control over them is not based on his ability to impose sanctions or take punitive actions, but rather on his capacity to initiate investigations leading to the criminal prosecution of the perpetrators.[502] On the one hand, the Appeals Chamber agrees with Halilović that the issue of the alleged failure to investigate has to be seen as an integral part of the assessment of a superior's duty to punish.[503] On the other hand, however, the ability to initiate criminal investigations against the perpetrators may be an indicator of effective control.[504] Therefore, Halilović's ability in this respect has to be carefully assessed in order to establish whether he had effective control over the perpetrators of the crimes committed in Grabovica. Indeed, as the Trial Chamber correctly outlined, "the duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and *if the superior has no power to sanction, to report them to the competent authorities*".[505] In this regard, the instruction Halilović gave Džanković "to collect as much information as possible and send it and inform the Sarajevo command about it",[506] read together with Delić's order to Halilović,[507] could suggest that Halilović had at least the ability to order an investigation and then prepare a report for his superiors.[508] The Appeals Chamber recalls in this regard that "reporting criminal acts of subordinates to appropriate authorities is eviden[ce] of the material ability to punish them in the circumstances of a certain case, albeit to a very limited degree".[509]

183. The Appeals Chamber notes that the Trial Chamber considered in detail the rules governing ABiH investigations on military personnel suspected of killing civilians, thereby setting out the framework of a commander's material ability to punish his subordinates.[510] According to the applicable ABiH rules,[511] reflected in the findings of the Trial Chamber,[512] it was the Military

[502] The arguments of both parties focus solely on Halilović's alleged material ability to take effective steps to initiate proceedings against the perpetrators. *See*, in particular, the submissions of the Prosecution (AT. 32-34 and 45-46) and Halilović's submissions (AT. 99 and 101-104).
[503] *Cf. Blaškić* Appeal Judgement, paras 68-69, relating to the duty of commanders to *report* to competent authorities, as well as paras 499 and 511. *See* AT. 97.
[504] *Cf. Blaškić* Appeal Judgement, paras 68-69.
[505] Trial Judgement, para. 97 (emphasis added), referring to *Kordić and Čerkez* Trial Judgement, para. 446. *See* also *Blaškić* Appeal Judgement, paras 68-69, 499 and 511.
[506] Trial Judgement, paras 521 and 670, both quoting Namik Džanković, T. 28 (21 March 2005).
[507] Trial Judgement, paras 307-308, quoting Exhibit 157 ("Check the accuracy of information regarding the genocide committed against the civilian population by the members of the 1st Corps 9th bbr/ Mountain Brigade/. If the information is correct, isolate the perpetrators and take energetic measures").
[508] Prosecution Appeal Brief, para. 2.115. *See* also AT. 33 and 42.
[509] *Blaškić* Appeal Judgement, para. 499.
[510] *See supra,* para. 176.
[511] Rules for the Military Security Service in the Armed Forces of the Republic of Bosnia and Herzegovina, Sarajevo 1992 ("Rules for the Military Security Service"), Exhibit 137, in particular Articles 39-41.
[512] Trial Judgement, paras 653-659. *See* also Trial Judgement, paras 112-114 on the role and the functioning of the Military Security Service.

Security Service or SVB which had to "take the necessary measures to find the perpetrator of the criminal offence" when there was "*reasonable suspicion* that a criminal offence triable by military courts ha[d] been committed".[513]

184. However, the evidence heard by the Trial Chamber, including the analysis of applicable ABiH regulations,[514] is ambiguous as to who would have had the duty and the ability to initiate an investigation into the killings committed in Grabovica: both the ABiH and the MUP were legally competent to initiate a criminal investigation in such a case.[515] In this context, the Appeals Chamber observes that contradictory evidence is reflected in the Trial Judgement. Such contradictions are exemplified in paragraph 677 of the Trial Judgement, which points out that, while Ramiz Delalić testified that "it was Sefer Halilović's duty to order Zulfikar Ališpago to undertake measures and conduct an investigation in order to find the perpetrators of the crime",[516] Vehbija Karić stated that "the Main Staff [Security Administration] was in charge of collecting all the information about the perpetrators and then handing them over to the military prosecutor",[517] and that "the Inspection Team did not have any authority to file criminal reports and initiate court proceedings".[518]

185. The Prosecution specifically claims that the fact that the Trial Chamber did not mention Delić's order of 12 September 1993 in paragraph 746 of the Trial Judgement constitutes an error.[519] However, Delić's order of 12 September 1993 was but one of the items of evidence properly considered by the Trial Chamber. Recalling that failure to list in the Trial Judgement each and every circumstance on the record does not necessarily mean that the Trial Chamber ignored or failed to evaluate the factor in question,[520] the Appeals Chamber considers that the Trial Chamber did not "fail" to mention Delić's order.

186. The Trial Chamber did indeed mention this order several times in the Trial Judgement, as illustrated by the following references: paragraph 7 (where the Trial Chamber noted the allegation that Halilović failed to implement Delić's order); paragraphs 307 and 308 (where the text of the order is quoted and the testimony of witness Hodžić is recounted); and paragraph 680 (in the section of the Trial Judgement entitled "Investigations into Murders committed in Grabovica").

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[513] Rules for the Military Security Service, Article 40 (emphasis added).
[514] Trial Judgement, paras 653-659. *See* also Trial Judgement, paras 112-114.
[515] Trial Judgement, para. 653.
[516] Ramiz Delalić, T. 10 (18 May 2005).
[517] Trial Judgement, para. 677, citing Exhibit 444 (Transcript of the Deposition of Witness Vehbija Karić).
[518] Trial Judgement, fn. 2424, citing Exhibit 444 (Transcript of the Deposition of Witness Vehbija Karić), T. 120-121.
[519] Prosecution Appeal Brief, para. 2.114: after noting that the Trial Chamber stated that "(ineffectual) investigations were underway by [Namik] Džanković [and others]" and noted Halilović's order to Namik Džanković in paragraph 746 of the Trial Judgement, the Prosecution claims that the Trial Chamber "failed to mention Delić's order to Halilović to investigate".
[520] *Kupreškić et al.* Appeal Judgement, para. 458.

These references indicate that the Trial Chamber did take Delić's order of 12 September 1993 into account when assessing Halilović's material ability to punish.

187. Similarly, in the context of the Trial Chamber's analysis of the "Investigations into Murders committed in Grabovica",[521] Halilović's instruction of 9 September 1993 to Namik Džanković and the steps undertaken pursuant to such instruction were duly considered by the Trial Chamber in reaching its findings.[522] Indeed, the Trial Chamber took into account that, on the evening of 9 September 1993 (after having heard what had happened in Grabovica), Halilović instructed Džanković "to collect as much information as possible and send it and inform the Sarajevo command about it".[523] At this time, Džanković, as a member of the UB, had already sent a short report about the events to Jusuf Jašarević, Chief of the UB.[524] All further reports Džanković compiled about the events in Grabovica were likewise sent to Jašarević.[525]

188. The Appeals Chamber therefore finds that the Trial Chamber indeed took Halilović's instruction of 9 September 1993 to Džanković and Delić's order of 12 September 1993 into account. In this regard, the Appeals Chamber reiterates that where the evidence is discussed in a Trial Judgement, it must be presumed to have been considered for each finding that it affects.[526] More broadly, the Appeals Chamber recalls its previous holding to the effect that,

> [i]t is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[527]

Considering that the Trial Chamber specifically addressed the two orders in question in its factual findings, the Appeals Chamber concludes that there is no indication that the Trial Chamber disregarded this evidence. In particular, the instruction Halilović gave Džanković to initiate investigations was specifically mentioned in the impugned paragraph 746 of the Trial Judgement.[528]

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[521] Trial Judgement, paras 660-701.
[522] Trial Judgement, paras 670, 686, 694, 697 and 698. *See* also Trial Judgement, para. 521.
[523] Trial Judgement, paras 521 and 670, both quoting Namik Džanković, T. 28 (21 March 2005).
[524] Trial Judgement, paras 522 and 660-661.
[525] Trial Judgement, paras 686, 694 and 697-698.
[526] *Blagojević and Jokić* Appeal Judgement, para. 227.
[527] *Kvočka et al.* Appeal Judgement, para. 23 (footnotes omitted); *see* also *Kvočka et al.* Appeal Judgement, para. 288.
[528] *See* Trial Judgement, para. 746.

189. These considerations must be borne in mind when examining the issue of whether the Trial Chamber correctly analysed the relevant evidence (including Halilović's instruction of 9 September 1993 to Džanković and Delić's order of 12 September 1993 to Halilović) in order to ascertain (i) whether the evidence contained indicators showing that Halilović had the power to punish criminal conduct or initiate measures leading to proceedings against the alleged perpetrators of the crimes committed in Grabovica and (ii) whether the evidence established beyond reasonable doubt that Halilović had effective control over the perpetrators.[529]

190. With regard to Halilović's instruction to Džanković, of 9 September 1993, the Appeals Chamber recalls that Džanković was a member of the UB[530] and, as such, was a representative of the SVB within the Inspection Team.[531] This is particularly relevant because, as mentioned above, it fell in principle upon the SVB to investigate allegations of crimes committed by military personnel against civilians.[532] It is in his function as member of the UB that Džanković sent his reports on the events in Grabovica to Jašarević, Chief of the UB.[533] In fact, it is noteworthy that Džanković had already sent his first short report to Jašarević regarding the events in question, indicating that more information would follow,[534] before being instructed by Halilović on the evening of 9 September 1993 to collect information about the events and inform the Sarajevo command.[535] As mentioned above, all further reports Džanković compiled about the events in Grabovica were also sent to Jašarević.[536] The Trial Chamber considered in detail the impact of Džanković's second report and the steps undertaken by Jašarević thereafter.[537] The Appeals Chamber also notes that, as mentioned above,[538] different high ranking officials initiated several investigations into the events in

[529] *Cf. Blaškić* Appeal Judgement, para. 69.
[530] *See* Trial Judgement, paras 205 and 660 on the role of Namik Džanković within the Inspection Team. *See* also, in particular, Trial Judgement, fn. 2498, detailing the "dual line of responsibility" of Namik Džanković: "He had to obey commands of his superior officer, in that case, Sefer Halilović; but he had also an obligation to report up the professional line to Jusuf Jašarević".
[531] "The [UB] was at the top of the SVB" (Trial Judgement, para. 112, footnotes omitted).
[532] *See supra*, para. 176, fn. 488 and para. 183. *See* also Trial Judgement, para. 677, where the Trial Chamber considered the testimony of Vehbija Karić (senior officer in the Main Staff and member of the Inspection Team), that "the [UB] was in charge of collecting all the information about the perpetrators and then handing them over to the military prosecutor", and Trial Judgement, para. 679, referring to the testimony of Salko Gusić (Commander of the 6th Corps) that "under the rules, investigations into the killings in Grabovica had to be a criminal investigation conducted by the SVB and the civilian police".
[533] *See* Trial Judgement, fn. 2498: "Namik Džanković testified that in a matter such as the investigation of the killings in Grabovica, he was obliged by the rules to report to Jusuf Jašarević".
[534] Trial Judgement, paras 522 and 660-661. Namik Džanković sent a first short report to Jusuf Jašarević on 9 September 1993, before being instructed to do so by Halilović (Trial Judgement, paras 522 and 660). He sent a second, detailed report to Jusuf Jašarević, dated 13 September 1993 (Exhibit 215), based on the instruction given by Halilović to investigate these events further (Trial Judgement, paras 521 and 686-689). Namik Džanković sent a third report to Jusuf Jašarević on 29 September 1993 (Exhibit 235), containing the information he had collected at the time (Trial Judgement, para. 697). The Prosecution itself acknowledged that Namik Džanković did not report to Halilović, but had to send his reports to the UB (AT. 34 and 45).
[535] Trial Judgement, para. 521.
[536] Trial Judgement, para. 686, fn. 2454, and para. 697.
[537] Trial Judgement, paras 690-696.
[538] *See supra*, para. 178.

Grabovica.[539] In particular, Jašarević issued a specific order to Nermin Eminović, Chief of the SVB of the 6th Corps, instructing him to undertake an investigation into the crimes committed in Grabovica.[540] In light of the foregoing, the Appeals Chamber finds that it cannot be concluded that the instruction Halilović issued to Džanković on 9 September 1993 was an order which only a commander could have issued. The Prosecution therefore failed to show how this instruction demonstrated Halilović's effective control over the perpetrators.

191. The Prosecution Appeal Brief states that the order issued by Delić to Halilović on 12 September 1993[541] is sufficient evidence of Halilović's material ability to investigate.[542] During the Appeal Hearing, the Prosecution further submitted that this order confirms that Halilović had effective control over the perpetrators of seven of the murders in Grabovica and that Halilović had the material ability to prevent and punish.[543] However, during its oral arguments in reply, the Prosecution stated that it did not rely on this order as a *basis* for Halilović's material ability to prevent and punish, but only as a *confirmation* of the effective control Halilović had over the troops at the relevant time.[544] The Prosecution now claims that this order's particular importance lies in the fact that it specifically identifies the alleged perpetrators of the crimes committed in Grabovica, namely the 9th Brigade,[545] and sets out all the reasonable and necessary measures that Halilović could have taken to punish the troops.[546]

192. Indeed, Delić's order is relevant especially in the assessment of the third element of superior responsibility under Article 7(3) of the Statute, which relates to the necessary and reasonable measures Halilović should have taken to punish the perpetrators of the crimes.[547] However, in light of the submissions noted above and considering, in particular, the fact that Delić's order, as stressed

[539] In particular, the Trial Chamber considered that: (i) Bakir Alispahić, Minister of the Interior during the time relevant to the Indictment, had tasked Emin Zebić with collecting as much information as possible and subsequently informing the MUP (Trial Judgement, para. 669); (ii) Namik Džanković testified that he had always exchanged information with Emin Zebić (Trial Judgement, para. 673); and (iii) the instruction given by Nermin Eminović, Chief of the SVB of the 6th Corps, to Nusret Sahić (Commander of the 6th Corps military police battalion) to investigate the crime scene and report back to him (Trial Judgement, para. 675).
[540] Trial Judgement, para. 683, quoting Jusuf Jašarević's order to Nermin Eminović (Exhibit 224) and para. 684, detailing the ensuing investigation led by Nermin Eminović.
[541] Exhibit 157, quoted in Trial Judgement, para. 307.
[542] Prosecution Appeal Brief, fn. 189.
[543] AT. 42. *See* also Prosecution Reply Brief, para. 3.25, where the Prosecution states that "Delić's order is further evidence that Halilović had the material ability to punish".
[544] AT. 147-148.
[545] AT. 42-43.
[546] AT. 148.
[547] The Appeals Chamber notes the Prosecution's submissions in this respect: "More important, we rely on the order as listing all of the -- all of the reasonable measures and necessary measures that he could have taken to punish the troops. So we don't rely on it for its purpose of establishing that Mr. Halilović was, in fact, commander on the 12th because we say that the order, in fact, confirms that he was the commander or superior of the troops prior to that date." (AT. 148).

by Halilović,[548] was only issued three days *after* the Grabovica murders were committed, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to assess the evidence as it did and conclude that the order in question was not sufficient to establish beyond reasonable doubt Halilović's effective control over the perpetrators at the time of the commission of crimes.[549]

193. Moreover, the Prosecution has neither demonstrated that Delić's order "confirms" a pre-existing material ability of Halilović to punish the perpetrators, nor has it shown that the Trial Chamber erred in its assessment of the order in question. The same holds true for the Final Report of the Inspection Team,[550] invoked by the Prosecution during the Appeal Hearing to demonstrate Halilović's "material ability to initiate measures" in order to punish the perpetrators.[551] Noting that the Trial Chamber examined this report in detail in the Trial Judgement,[552] the Appeals Chamber considers that it was duly taken into account by the Trial Chamber and finds that the Prosecution has not established any error in the Trial Chamber's assessment.

194. In light of the above, and considering in particular the Trial Chamber's findings that various officials had initiated investigations into the events in Grabovica,[553] the Appeals Chamber finds that the Prosecution has not shown any error in the Trial Chamber's assessment of the evidence as a whole with regard to Halilović's material ability to punish.[554] In particular, the Appeals Chamber considers that a reasonable trier of fact could have reached the conclusion that Halilović's ability to investigate and, more specifically, to draw up reports based on the information received did not necessarily amount to the threshold required to establish even a "very limited degree" of effective control over the perpetrators.[555] The Appeals Chamber therefore dismisses the Prosecution's arguments in this respect.

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[548] *See* AT. 106 and 136. *See* also AT. 147-148, where the Prosecution submitted that: "We do not rely on the 12th September order as the basis for the material ability to prevent and punish. If it was, I would agree with Mr. Mettraux that it would be *ex post facto*".
[549] *Cf. Hadžihasanović* Interlocutory Decision, para. 51.
[550] Exhibit 130, Final Report of the Inspection Team, dated 20 September 1993.
[551] AT. 40, where the Prosecution suggested that this report shows that the Inspection Team recommended criminal investigations and proceedings against various members of the ABiH, but that no recommendations were made with regard to the events in Grabovica.
[552] *See* Trial Judgement, paras 206-210 (section entitled "Report of the Inspection Team"), and para. 331. *See*, in particular, Trial Judgement, para. 209 and fn. 656, referring to the recommendation to initiate criminal proceedings against individuals collaborating with the HVO and noting the fact that the events in Grabovica and Uzdol were not mentioned.
[553] *See supra*, paras 178 and 190.
[554] The Appeals Chamber also notes that, contrary to the Prosecution's claim, Halilović did not "accept[…] that he had the material ability to punish" (AT. 32; *see* also AT. 33). *See*, in particular, Trial Judgement, para. 519, quoting the testimony of Šefko Hodžić, T. 101 (24 March 2005): Hodžić declared that Halilović had told him that "there were people around whose duty it was to investigate these matters".
[555] *Cf. Blaškić* Appeal Judgement, para. 499.

195. Having found that the Prosecution has failed to prove that the Trial Chamber erred in holding that Halilović had no material ability to punish based on the evidence before it,[556] the Appeals Chamber need not address the question as to what the duty to punish would have entailed *in concreto* in the present case[557] and whether Halilović discharged this duty, in particular through his instruction to Džanković to investigate.

196. For the foregoing reasons, the Appeals Chamber dismisses sub-ground 4.

[556] Trial Judgement, para. 746.
[557] During the Appeal Hearing, the Prosecution submitted that the "duty to punish requires the superior to conduct an effective investigation and to take active steps to ensure that the perpetrators will be brought to justice" (AT. 49).

F. Conclusions on the first ground of appeal

197. At the outset, the Appeals Chamber recalls that it has dismissed sub-ground 6 of the Prosecution's first ground of appeal, which sought the admission of the 1996 Statement into evidence.[558]

198. Under sub-ground 1 of its appeal, the Prosecution suggested that, although it had argued that the evidence regarding Halilović's role as a Commander was proffered with the aim of establishing his effective control over the troops responsible for the crimes in Grabovica, this did not foreclose the Trial Chamber from considering a "case beyond command" – "[i]n fact, the Trial Chamber was duty bound to consider the whole of the evidence of Halilović's role in determining the main issue of effective control".[559] Considering the way the Prosecution pleaded its case at trial, and in light of the fact that a trier of fact is necessarily bound by the theories of the case advanced by the Prosecution, the Appeals Chamber has dismissed the Prosecution's allegation that the Trial Chamber erred in failing to consider whether Halilović had effective control over the perpetrators of the crimes charged in the Indictment by reason of his position as Team Leader of the Inspection Team or by virtue of his position as the most senior ranking ABiH officer in Herzegovina at the time.[560]

199. As a result, the Appeals Chamber limited its analysis to the Prosecution's submissions regarding Halilović's effective control over the perpetrators of the crimes committed in Grabovica in light of his alleged position as commander of Operation Neretva. In so doing, the Appeals Chamber focused its assessment specifically on Halilović's alleged position as *de facto* commander.[561]

200. In this respect, the Appeals Chamber addressed the Prosecution's allegation raised under sub-ground 5 that the Trial Chamber erred in law in misapplying the standard of proof, as this general allegation of error was claimed to have had an impact on findings throughout the Trial Judgement. The Appeals Chamber found that the Prosecution did not properly identify any specific piece of evidence which would have been evaluated by the Trial Chamber according to an erroneous standard.[562] Since an alleged misapplication of the required standard of proof to factual allegations may only be considered in relation to specifically identified findings, the Appeals

[558] *See supra*, para. 41.
[559] Prosecution Reply Brief, para. 2.6.
[560] *See supra,* paras 97-98.
[561] The Prosecution itself conceded during the Appeal Hearing that Halilović "did not have the formal title of commander of Operation Neretva" (AT. 19. *See* also, *inter alia*, AT. 13, 21 and 23), and pleaded that Halilović was "*de facto* commander" of the operation (*see*, *inter alia*, AT. 7, 20 and 23).
[562] *See supra*, para. 123.

Chamber also found that the Prosecution did not clearly show how the alleged misapplication of the standard of proof within the only two paragraphs in the Trial Judgement specifically identified by the Prosecution could impact on the issue of Halilović's effective control.[563] Since the four factual findings identified within these two paragraphs and appealed by the Prosecution are strictly related to sub-grounds 2 and 3, the Appeals Chamber bore them in mind for its assessment of these two sub-grounds.[564]

201. With respect to sub-ground 2, the Appeals Chamber found that it has not been shown that the Trial Chamber required the Prosecution to prove the formal denomination of the military operation as an element necessary to establish the existence of a superior-subordinate relationship between Halilović and the offending troops.[565] Accordingly, the Appeals Chamber has dismissed the allegation that the Trial Chamber erroneously required the Prosecution to prove that the combat operations carried out in Herzegovina in September 1993 to lift the HVO blockade of Mostar were called "Operation Neretva" as a necessary pre-condition for a finding of effective control and, therefore, for Halilović's conviction.[566]

202. With respect to sub-ground 3, and despite the fact that the Trial Chamber did erroneously focus on the formal establishment of an IKM, thereby disregarding the possible existence of a *de facto* IKM,[567] the Appeals Chamber found that, even assuming the existence of an IKM in Jablanica, this finding could not in itself eliminate all reasonable doubt about Halilović's position as *de facto* superior of the perpetrators of the crimes in Grabovica.[568]

203. Thus, the errors alleged by the Prosecution in these sub-grounds could not, on their own, possibly invalidate the Trial Judgement.[569] However, the Appeals Chamber will nevertheless take these allegations of error into account in its assessment of whether, when considering the first ground of appeal as a whole and in light of the discussion on the appropriate standard of proof, they are capable of eliminating all reasonable doubt as to Halilović's effective control over the perpetrators of the crimes committed in Grabovica.

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[563] *See supra*, para. 131.
[564] The Prosecution recognized that sub-grounds 2 and 3 are exemplary of the overall error alleged in sub-ground 5 (AT. 11).
[565] *See supra*, paras 139 and 140.
[566] *See supra*, para. 143.
[567] *See supra*, para. 157.
[568] *See supra*, paras 164 and 165. *See* also *Bagilishema* Appeal Judgement, para. 14 and *supra*, para. 11.
[569] The Prosecution itself acknowledged during the Appeal Hearing that a finding on the existence of an IKM alone would not lead to the conclusion that Halilović was a *de facto* superior, but that this was an "indicator of effective control which can support a positive finding of *de facto* superior" (AT. 10).

204. The Prosecution generally claimed that Halilović's effective control was grounded "in his exercise of material abilities to take all measures associated with the planned combat operation",[570] and more specifically "in his actions and the actions of those he controlled".[571] Underlying these submissions was the Prosecution's claim that Halilović "issued orders that certainly confirmed that he [was] in charge".[572] As the Trial Chamber correctly set out, the capacity to issue orders can indeed amount to an indicator of the effective control exercised by a superior.[573] However, such orders do not *per se* prove effective control; the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators.[574]

205. The Appeals Chamber first notes that the Prosecution's submissions relating to Halilović's orders were based on his role as Team Leader of the Inspection Team, which, the Prosecution claimed, performed functions of central control over combat operations.[575] As considered above,[576] the Trial Chamber assessed in detail the evidence regarding the establishment and the specific functions of the Inspection Team, as well as Halilović's role as Team Leader, and found that the Inspection Team was tasked with inspection, coordination and cooperation among units.[577] Within its analysis, the Trial Chamber assessed the orders given by Halilović, in particular with regard to the reorganisation and resubordination of units.[578] The Appeals Chamber considers that it was not unreasonable for the Trial Chamber, on the basis of the evidence before it, to conclude that the orders issued by Halilović were consistent with the monitoring and coordination functions of the Inspection Team. The Prosecution has failed to show that these orders demonstrate that Halilović had any disciplinary powers which might establish his material ability to prevent or punish the perpetrators of the crimes committed in Grabovica, since a trier of fact could legitimately consider them mere indicia of some degree of organizational authority.

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[570] AT. 43.
[571] AT.14.
[572] AT. 20. *See* also AT. 8, 15-16, 30 and 43.
[573] Trial Judgement, para. 58. *See* also *supra*, para. 69.
[574] The Appeals Chamber agrees with Halilović that the "issuing of orders is not a matter that mathematically proves whether a person has effective control" (AT. 92). In this context, the Appeals Chamber also recalls that "the indicators of effective control are more a matter of evidence than of substantive law, and [that] those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate" (*Blaškić* Appeal Judgement, para. 69). As an example of the application of these principles to the circumstances of the case, the Appeals Chamber found, again in the *Blaškić* case, that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders" (*Blaškić* Appeal Judgement, para. 485).
[575] AT. 30.
[576] *See supra*, para. 72.
[577] *See*, in particular, the Trial Chamber's conclusions in paragraphs 210 and 364 of the Trial Judgement.
[578] *See*, in particular, Trial Judgement, paras 222-244. *See* also *supra*, para. 72.

206. In this respect, the Appeals Chamber notes that Halilović's authority to issue orders was already limited by the order establishing the Inspection Team.[579] In particular, orders given by Halilović were all issued under the overall authority of Rasim Delić:[580] this is reflected in the fact that Inspection Team members would wait for Delić's decision, for example, as to the use of certain units in combat operations.[581] This is further evidenced by the fact that the addressees of Halilović's orders requested confirmation from Delić before following them.[582] Contrary to the Prosecution's arguments that such confirmations should be seen as Delić's assertion of Halilović's command authority,[583] the Appeals Chamber considers that this course of action by Delić and Halilović may legitimately be considered by a trier of fact as reflecting Halilović's limited ability to issue effective orders on his own.

207. In this context, the Appeals Chamber considers that proof that an accused is not only able to issue orders but that his orders are actually followed, provides another example of effective control.[584] In the present case, the Trial Chamber made specific findings with regard to the resistance – even disobedience – that the Inspection Team and Halilović as its Team Leader encountered from Corps and unit commanders.[585] The Prosecution has submitted that there was, "in each of these cases a following-up and a following through of the order".[586] Nonetheless, the Appeals Chamber considers that, as the Prosecution itself concedes,[587] in most of these cases only Delić's intervention led to the execution of Halilović's orders. The Appeals Chamber therefore finds that a reasonable trier of fact could have concluded that Halilović's orders were not followed and could have taken into account this important consideration in the overall assessment of Halilović's effective control over the perpetrators.

208. The Appeals Chamber therefore finds that a reasonable trier of fact could have reached the conclusion that the orders issued by Halilović as Team Leader of the Inspection Team were not by themselves sufficient to demonstrate Halilović's material ability to prevent or punish crimes, thereby establishing his effective control over the perpetrators.

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[579] *See* Trial Judgement, para. 369, where the Trial Chamber noted Halilović's limitation to issue orders: "first in that for any 'drastic proposals' Sefer Halilović had to consult with Rasim Delić, and secondly, by this order Sefer Halilović only had the power to issue orders 'in keeping with his authority'". *See* also Trial Judgement, para. 198, quoting the 30 August 1993 order (Exhibit 146).
[580] Trial Judgement, paras 369-370.
[581] *See* Trial Judgement, para. 247, quoting a Report of the Inspection Team members Vehbija Karić, Rifat Bilajac and Zićro Suljević to Rasim Delić (Exhibit 406), and para. 369.
[582] *See*, for example, Trial Judgement, paras 233 and 743, where the Trial Chamber notes evidence that Vahid Karavelić did not carry out an order from Halilović until it had been confirmed by Rasim Delić (Exhibit 161). Karavelić testified specifically that "he contacted Rasim Delić because Sefer Halilović as 'Chief of Staff' could only issue orders with authorisation from the Commander" (Trial Judgement, para. 233, referring to Vahid Karavelić, T. 2-3 (20 April 2005)).
[583] AT. 23 and 41-42.
[584] *Cf. Blaškić* Appeal Judgement, para. 69.
[585] *See*, in particular, Trial Judgement, paras 351 and 744.

209. When submitting that Halilović exercised effective control over the perpetrators, the Prosecution relied specifically on Halilović's material ability to punish as "the most important discussion … because it focuses directly on the effective control test".[588] In its analysis of sub-ground 4, the Appeals Chamber has found that it was not unreasonable for the Trial Chamber to conclude that Halilović lacked the material ability to punish the persons who committed the crimes in Grabovica.[589]

210. In any event, even assuming that Halilović had the ability to contribute to an investigation or to the punishment of the perpetrators of the crimes committed in Grabovica, these abilities can only amount to effective control relevant for Article 7(3) of the Statute if they are the consequence of a relationship of subordination between Halilović and these perpetrators.[590] Indeed, the Appeals Chamber recalls that the material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command.[591] Of course, the concepts of subordination, hierarchy and chains of command need not be established in the sense of formal organisational structures so long as the fundamental requirement of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied.[592]

211. In the present case, the Prosecution has failed to show how Halilović's alleged position as *de facto* commander of Operation Neretva established a chain of command or a hierarchical relationship between him and the perpetrators amounting to a superior-subordinate relationship in which he could have exercised effective control over the perpetrators, in the sense of material ability to prevent or punish crimes. In particular, the Prosecution has failed to show how Halilović's

[586] AT. 147. *See* also AT. 15-16 and 43
[587] AT. 147. *See* also AT. 23 and 41.
[588] AT. 32.
[589] *See supra*, para. 194.
[590] *See supra*, para. 59.
[591] *Čelebići* Appeal Judgement, para. 303, where the Appeals Chamber explained that the doctrine of command responsibility "developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others". This approach also underlies the reasoning in the *Blaškić* Appeal Judgement, paras 372ff: the Appeals Chamber first ascertained whether Blaškić had "command authority" over the Military Police (an authority it found he could have for *ad hoc* missions pursuant to specific requests, paras 375-381), before assessing whether he had effective control over said Military Police (paras 382 ff). In the *Kajelijeli* Appeal Judgement (paras 85-86), the ICTR Appeals Chamber first recalled that "a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*" (para. 85), before outlining the threshold to be reached in establishing a superior-subordinate relationship, namely "that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates" (para. 86). *See* also *Blagojević and Jokić* Appeal Judgement, paras 301-303.
[592] *Čelebići* Appeal Judgement, para. 254.

role as Chief of Staff of the Main Staff of the Supreme Command of the ABiH[593] (and allegedly the most senior ABiH officer in Herzegovina) or his functions within the Inspection Team created such a chain of command.[594]

212. In fact, the most relevant issue in relation to these two positions is the authority and responsibility broadly associated with the functions of Chief-of-Staff.[595] In this context, the Appeals Chamber refers to the findings of the Military Tribunal in *United States v. Wilhelm von Leeb et al.*[596] As a commander-in-chief of an Army group, "the duties imposed upon [von Leeb] were exclusively operational and his headquarters and staff were strictly operational in their functions".[597] Therefore, "his authority in th[e] field [of executive power] was more in the nature of a right to intervene than a direct responsibility".[598] The Military Tribunal found that, under the circumstances of the case, "it [was] not considered […] that criminal responsibility attache[d] to him merely on the theory of subordination and over-all command".[599]

213. In the present case, the Appeals Chamber considers that the Prosecution has failed to show that no reasonable trier of fact could have reached the conclusion that the order establishing the Inspection Team did not create any type of subordination, hierarchy or chain of command between Halilović and the perpetrators going beyond Halilović's authority as Chief of Staff, or that Halilović had duties and responsibilities which were "exclusively operational".[600]

214. In particular, considering that criminal responsibility does not attach to a military official merely on the basis of his "over-all command", the Appeals Chamber finds that, even assuming Halilović was a *de facto* superior of the perpetrators of the murders in Grabovica, the Prosecution has failed to show that the Trial Chamber erred in finding that the mandate of the Inspection Team did not include duties or obligations related to the effective prevention or punishment of crimes (which would form the required basis for Halilović's effective control over the perpetrators).[601] The Appeals Chamber considers that, while it is true that the Inspection Team suggested the initiation of

[593] The Appeals Chamber notes that the Trial Chamber discussed extensively Halilović's role within the structure of the Main Staff, but made no ultimate finding as to his *de jure* or *de facto* position therein (Trial Judgement, paras 105 to 111). The Trial Chamber only held that Halilović's position "within the structure of the Main Staff was circumscribed as a result of the 8 June and 18 July Decisions" (Trial Judgement, para. 369).
[594] *Cf. supra,* para. 70, regarding the alleged subordination of the 9th Brigade and its commander Ališpago to Halilović.
[595] The Prosecution argued that the Inspection Team was appointed to perform a role of "central control" over the planned combat operation (AT. 30).
[596] *United States v. Wilhelm von Leeb et al.* (*"High Command* Case*"*), in TWC, Vol. XI.
[597] *High Command* Case, p. 554.
[598] *High Command* Case, p. 554.
[599] *High Command* Case, p. 555.
[600] *See* Trial Judgement, paras 198-205, assessing Delić's order of 30 August 1993 to form an Inspection Team.
[601] The Appeals Chamber notes that, of course, the distinction outlined above between a pre-existing *de facto* superior position, on the one side, and effective control, on the other, does not necessarily mean that findings on both these

some criminal proceedings in its Final Report,[602] a reasonable trier of fact could reach the conclusion that these mere "suggestions", in the context of an "estimate of the overall situation in the Neretva valley",[603] did not establish beyond reasonable doubt even a "very limited degree" of effective control of Halilović over the perpetrators.[604]

215. The Appeals Chamber therefore finds that, even assuming that (i) a *de facto* IKM was established, (ii) the name of the military operation in question was "Neretva", and (iii) the participants at the Zenica meeting discussed who would be commander of this operation and planned a specific and detailed operation to liberate Mostar,[605] the Prosecution has not shown that the Trial Chamber erred in concluding that the Prosecution did not prove beyond reasonable doubt that Halilović had the material ability to prevent or punish the crimes committed in Grabovica.

216. Therefore, the Prosecution failed to show that no reasonable trier of fact could have reached the conclusion that Halilović, as a commander of Operation Neretva, did not have the required degree of "effective control" over the perpetrators to establish his superior responsibility under Article 7(3) of the Statute. For the foregoing reasons, the first ground of appeal is dismissed.

217. Consequently, considering that the Prosecution has failed to show that the Trial Chamber erred in finding that the first element of superior responsibility had not been met, the Appeals Chamber need not address the Prosecution's arguments advanced under the remaining grounds of appeal.[606] These grounds, which concern the other two elements required to establish superior responsibility under Article 7(3) of the Statute, intrinsically hinge upon the outcome of the first ground of appeal.[607]

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requirements will not be based in whole or in part, in certain cases, on the same evidence related to the ability to prevent and punish.

[602] Trial Judgement, para. 209, referring to Exhibit 130, pp 4-5.

[603] Exhibit 130, p. 3.

[604] *Cf. Blaškić* Appeal Judgement, para. 499.

[605] *See supra*, para. 125, sub (ii) and (iii).

[606] Likewise, the Trial Chamber was not required to enter a finding to the effect that Halilović had failed to *punish* the perpetrators of the crimes, since it had found that Halilović had no effective control based on a superior-subordinate relationship over the troops which committed the crimes in Grabovica.

[607] The Appeals Chamber recalls that the Prosecution's second and third grounds of appeal concern the other two requirements of superior responsibility under Article 7(3) of the Statute, namely whether Halilović knew or had reason to know that a criminal act was about to be or had been committed and whether Halilović failed to prevent or punish the criminal conduct (Prosecution Notice of Appeal, paras 5-8). The fourth ground of appeal relates to the admission into evidence of a report by a military expert witness. The Prosecution Notice of Appeal, para. 9, argued under the fourth ground of appeal that the admission of the military expert's report and his proposed testimony would have affected the findings of the Trial Chamber on the existence of a superior-subordinate relationship (Trial Judgement, paras 363-372, 736-747 and 752) and on whether Halilović knew or had reason to know that the criminal act was about to be or had been committed (Trial Judgement, paras 485-525). These parts of the fourth ground of appeal were withdrawn in the Prosecution Appeal Brief, fn. 344. Consequently, according to the Prosecution, the admission of this evidence would only have affected the third element of superior responsibility under Article 7(3) of the Statute (Prosecution Notice of Appeal, para. 9, citing Trial Judgement, paras 97-100, 660-701 and 743-747).

V. 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 10 and 11 July 2007;

SITTING in open session;

DISMISSES the Prosecution's appeal; and

AFFIRMS Halilović's acquittal.

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

_____	_____	_____
Judge Mehmet Güney Presiding	Judge Mohamed Shahabuddeen	Judge Andrésia Vaz

_____	_____
Judge Theodor Meron	Judge Wolfgang Schomburg

Judge Theodor Meron appends a separate opinion.
Judge Wolfgang Schomburg appends a separate opinion.
Judge Mohamed Shahabuddeen appends a declaration.

Dated this 16th day of October 2007
At The Hague,
The Netherlands

[Seal of the International Tribunal]

VI. SEPARATE OPINION OF JUDGE MERON

1. I write separately on the issue of Sub-Ground 6. Although I agree with the majority that the Trial Chamber correctly excluded Halilović's 1996 Statement, I believe that such a conclusion necessarily derives from Rule 43 and is not, as the majority holds, a discretionary decision pursuant to Rule 89(D).

2. The majority holds that "[w]hether [Halilović's] statement would also be inadmissible due to a retroactive reading of Rule 43 of the Rules was not a decisive consideration in the Trial Chamber's reasoning."[1] I disagree. In reproducing the Trial Chamber's holding regarding the Statement, the majority omits a critical paragraph from the Trial Judgement:

> Rule 43 provides for audio and video-recording of the interview of suspects and aims at ensuring the integrity of the proceedings, *inter alia*, by providing for an instrument to ascertain the voluntariness of a statement and the adherence to other relevant safeguards as provided for in Rule 42 and Rule 95. The Trial Chamber finds that Rule 43 is a fundamental provision to protect the rights of a suspect and an accused. Moreover, it is a safeguard for a full and accurate reflection of the questions and answers during the interview and thus enables the parties and the Trial Chamber to verify the exact wording of what was said during the interview.[2]

The centrality of Rule 43 in the Trial Chamber's logic could hardly be more clear. Thus, the correct interpretation of Rule 43 is an issue that the Appeals Chamber should address.

3. Rule 43 provides:

> Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded . . . .

4. The Trial Chamber correctly recognized that two fundamental legal questions arise with respect to Rule 43 and Halilović's Statement: (1) What procedural safeguards applied to the Statement?; and (2) What is the remedy for violations of those safeguards?

5. The first legal question involves the scope of Rule 43, specifically whether it applies only when someone is already a suspect or whether it applies also to questioning that occurred before the person became a suspect. As the Trial Chamber correctly recognized, Rule 43 has a two-fold purpose—ensuring *voluntariness* and *reliability*. Precisely because of concerns about reliability, Rule 43 must apply to all statements by an accused to the Prosecutor. Notwithstanding that a Prosecutor might have acted in good faith by not applying Rule 43 when questioning someone who, at the time, was not a suspect, Rule 43 embodies a substantive policy judgment that only statements memorialized on a video or audio tape are sufficiently reliable to be admitted into evidence against

[1] Appeal Judgement, para. 38.
[2] Decision of 8 July 2005, para. 24 (footnote omitted).

an accused. Therefore, the Trial Chamber correctly determined that Rule 43 was among the procedural safeguards that applied to the Statement.

6. Since Rule 43 applied to the Statement, and given that there is no question that the Statement was not recorded in compliance with the rule, the second question concerns the appropriate remedy. Rule 43 reflects a substantive judgment that unrecorded statements by the accused are, by definition, insufficiently reliable. A Trial Chamber normally assesses reliability on a case-by-case basis under Rule 95 and excludes evidence when there is "substantial doubt" about its reliability. Similarly, it determines probativeness under Rule 89(D). The discretion that a Trial Chamber normally exercises pursuant to these rules is inapposite, though, because an unrecorded statement by an accused is per se unreliable under Rule 43. As an unrecorded statement by an accused is never sufficiently reliable, the only appropriate remedy is exclusion of that statement.

7. My conclusion about the appropriateness of exclusion for violations of Rule 43 is bolstered by the precedents of the Tribunal. The *Čelebići* Appeal Judgement noted that the Appeals Chamber must seek to ensure (1) that procedural safeguards are respected and (2) that the evidence is reliable.[3] The Appeals Chamber there clearly contemplated that, despite scrupulous adherence to all procedural safeguards, some evidence might still be unreliable. It did not indulge the converse (*i.e.*, that despite procedural violations, some evidence might still be sufficiently reliable). A violation of Rule 43 thus incurably taints the evidence.[4]

8. In light of the foregoing analysis, the majority's holding fails to appreciate that a Trial Chamber exercises discretion in assessing probativeness under Rule 89(D), and in determining reliability under Rule 95, only *after* the Trial Chamber has established that the Prosecution respected certain procedural safeguards, including Rule 43. Once it is established that Rule 43 applied, and that it was violated, there is no room for discretion—the statement must be excluded.

9. Finally, I note that Judge Schomburg and I are largely in agreement on this issue. Although we disagree slightly as to the precise scope of Rule 43, we both agree that it applied here, that it was violated, and that exclusion is the only appropriate remedy.

10. Except for these observations, I am in full agreement with the majority opinion.

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

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[3] *Čelebići* Appeal Judgement, para. 533.
[4] *Cf. Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized From the Accused Zejnil Delalić, 9 October 1996, para. 15; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motions for the Exclusion of Evidence by The Accused, Zejnil Delalić, 25

Dated this 16th day of October 2007
At The Hague,
The Netherlands

Judge Theodor Meron

[Seal of the International Tribunal]

September 1997, paras 44-46 (holding that the defendant carries the burden of demonstrating that a statement recorded in compliance with Rule 43 is otherwise unreliable).

VII. SEPARATE OPINION OF JUDGE SCHOMBURG

1. I agree with the majority that the Trial Chamber could decide not to admit Sefer Halilović's 1996 statement to the Prosecution into evidence. However, I concur with Judge Meron that the reasoning in the Judgement, solely based on Rule 89(D), is not sufficient. Indeed, Rule 89(D) can only be seen together with Rules 42 and 43, both of which work in tandem to protect fundamental rights of a suspect *de jure* and *de facto* when he later becomes an accused. Furthermore, a distinction has to be made between the admission of evidence and making use of this evidence at the end of the trial in the judgement. Only the later point in time is decisive because the assessment of evidence might vary in light of the entirety of the evidence before the Trial Chamber. The admission of evidence does not necessarily mean that it will be used as evidence at the end of the day.

2. Rule 42 and Rule 43 of the Rules aim at safeguarding fundamental rights of a suspect in the best possible way. Rule 42 protects a suspect against giving uninformed statements and in particular against involuntary self-incrimination. The rationale of Rule 43 is to translate these guarantees into reality using contemporary technical standards and at the same time to assure the precision and reliability of a suspect's statement in the language he used when answering the questions put to him by an interrogator.[1] It is a general observation in criminal proceedings that summaries, replacing the question/answer standard, and even the best translation or interpretation are among the most significant sources of error in the fact-finding process. This is of particular importance before international tribunals, which by their nature have to rely heavily on precise translation and interpretation. An accused must always be entitled to challenge the precision of the translation or interpretation of a statement he gave as a suspect, which is later used as evidence in a case against him. The only safeguard can be an audio recording or, even better, a video recording, which also shows the environment in which the statement was taken and other details like, *inter alia*, the body language of all the participants.

3. In the case at hand, of particular relevance, as the Trial Chamber appreciated, is Rule 43, which provides, in its relevant part:

[1] In the jurisprudence of the International Tribunal, a distinction has been drawn between, on the one hand, the questioning or taking of statements by the Prosecution (specifically regulated in Rule 43 of the Rules), or persons or authorities mandated by the Prosecution, and the questioning, on the other hand, by authorities "who have no relevant connection with the ICTY Prosecutor" (*Prosecutor v. Mrkšić et al.* Case No. IT-95-13/1-T, Decision Concerning the Use of Statements Given by the Accused, 9 October 2006, paras 21-22 and 27). *See* also *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 51. This also applies to statements taken in response to requests made within the framework of international cooperation in criminal matters pursuant to Article 29(2)(b) of the Statute.

> Whenever the Prosecutor questions a suspect, the questioning *shall*[2] be audio-recorded or video-recorded . . . .

What has to be established in general is the rationale and precise scope of Rule 43, specifically whether *in concreto* it applies to Sefer Halilović's 1996 statement to the Prosecution.

4. At domestic level, different approaches are followed regarding the qualification of someone as a "suspect," in particular in determining at what point in time a person's status changes to being a suspect. Some legal systems rely on objective criteria.[3] Others follow a subjective approach mixed with objective criteria.[4] However, there is no need to enter into a comparative legal analysis as the International Tribunal's Rules contain a statutory definition of the term "suspect." Rule 2(A) prescribes that a suspect is a

> person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction.

This definition is unequivocally objective in nature. It is insignificant whether the Prosecution, or another authorized person, believes that the person is a suspect or not. Rather, as soon as there is reliable information which tends to show that the person may have committed a crime under the International Tribunal's Statute, the person automatically becomes a suspect. Whether this objective criterion was fulfilled has to be assessed by the Trial Chamber from an *ex post* perspective. In any event before *making use* of such a statement in the judgement, a Trial Chamber must be satisfied that, objectively, the accused before it was not a suspect at the time he gave the statement.

5. It could be argued that this requirement places an unduly harsh burden on the Prosecution. However, bearing in mind the aforementioned purpose of Rule 43, the use of audio or video recordings best reveals the circumstances in which a statement was given by a suspect, thus facilitating the assessment by a Trial Chamber of whether or not there were any obstacles that would impede the use of the statement as evidence and the reliability of its content. The difference between Judge Meron's opinion and mine is that under his approach the Prosecution would *de facto* feel obliged in its own interest to make audio or video recordings of all statements by all witnesses who could potentially become suspects. This would go beyond the ambit of Rule 43 and its clear wording. However, our joint strong opinion is that the very moment the Prosecution is in the

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[2] Italics added for emphasis.

[3] *E.g.* Switzerland, *see* ROBERT HAUSER & ERHARD SCHWERI, SCHWEIZERISCHES STRAFPROZESSRECHT 140 (4th ed. 1999).

[4] *E.g.* France, *see* GASTON STEFANI ET AL, PROCÉDURE PÉNALE 325 (16th ed. 1996); Germany, *see* Bundesgerichtshof [BGH] [Federal Supreme Court of Justice] 3 July 2007, 1 StR 3/07 (Germany), yet unpublished, *see* www.bundesgerichtshof.de, following Bundesgerichtshof [BGH] [Federal Supreme Court of Justice] 27 February 1992, Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 38, 214 (218); *See also* in this context, however in relation to the right against self-incrimination alone: *Serves v. France*, ECtHR, App.No. 82/1996/671/893, 20 October

possession of reliable information which tends to show that a witness may have committed a crime, the technical guarantees of Rule 43 have to be implemented immediately.

6. On the question of whether Sefer Halilović was objectively a suspect, the incriminatory nature of the statement is self-evident. Halilović candidly acknowledged that the investigation "may subsequently bring out facts which might involve [his] own responsibility."[5] I note that the Prosecution gave warnings to Halilović similar to those that it has to give to suspects pursuant to Rule 42. However, today the Prosecution submits only that it did not regard Halilović as a suspect at the time.[6] This submission does not respond to the objective criterion set by the Rules for ascertaining as of when Halilović became a suspect.

7. The appropriateness of exclusion of evidence for violations of Rule 43 is already sufficiently discussed by Judge Meron in his Separate Opinion, based on the case-law of the International Tribunal.[7] Indeed, once it is established that the statement was not recorded in compliance with Rule 43, the appropriate remedy following non-compliance with Rule 43 must be determined. This question has never been squarely presented in a previous case. However, it is uncontested that statements of a suspect that were gained in violation of the requirements of Rule 42 cannot be used against him at trial. The same applies to Rule 43, which reflects the decision of the legislator that unrecorded statements by a suspect who later becomes an accused are, in principle, insufficiently reliable. Consequently, if a statement is taken in violation of Rule 43, there is no discretion vested in the Trial Chamber to assess its probative value pursuant to Rule 89(D) or its reliability pursuant to Rule 95. Thus, the only appropriate remedy is the exclusion of such an unrecorded statement. However, again slightly differing from the views expressed in Judge Meron's Separate Opinion, I interpret Rule 43 in such a way that these considerations only apply in cases like this one where use of the statement is sought in proceedings against the former suspect himself and against his will. Rule 43 does not apply in relation to the use of the statement in proceedings against other persons or if the accused irrevocably consents to the use of this statement because it might be in his favour.

8. In sum, with respect, I disagree with Judge Meron solely on the point where he interprets the scope of Rule 43 in such a way that it would also apply retroactively, so that the statement made by a witness at a point in time when he was objectively not a suspect could not be used at all if that witness *later* found himself in the role of an accused. In my view, such an interpretation of Rule 43 is not only too expansive but is also unpractical as it would effectively require the Prosecution to

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1997, paras 38, 42, on "the first complaint, based on Art. 6(1) [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] alone."

[5] 1996 Statement.

[6] *See, e.g.*, Prosecution Response to Motion for Exclusion of Statement, paras 20, 24.

[7] Separate Opinion of Judge Meron, para. 7.

record each and every witness statement. Thus, Rule 43 can only apply if the interrogated person objectively was a suspect pursuant to Rule 2 *at the time the statement was made*.

9. In passing, I note that the Prosecution did not seek to call the Appellant's interrogator(s)[8] or the person(s) who provided interpretation at the time[9] as witnesses during the trial. The Prosecution did not attempt to do so on appeal either. The question of whether a violation of Rule 43 would still allow for the testimony of the person(s) involved in the interrogation at that time[10] therefore does not need to be addressed. However, if, as endorsed by the majority, the rejection of Halilović's statement is based solely on its lack of reliability and probative value pursuant to Rules 89 and 95, then it would have been mandatory to discuss whether the Trial Chamber erred when it did not exercise its discretion pursuant to Rule 98 at all and omitted to consider whether to summon these persons involved in the interrogation as they were obviously available.[11] Indeed, hearing these witnesses might have assisted the Trial Chamber in its determination of whether to exclude the statement pursuant to Rules 89 and 95.

10. In sum, the Trial Chamber correctly concluded that the exclusion of the statement is the proper remedy. I concur with the Appeals Chamber upholding that decision but with all due respect suggest that it should have done so with a complete reasoning.

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

Dated this sixteenth day of October 2007,
At The Hague, The Netherlands.

Judge Wolfgang Schomburg

[Seal of the International Tribunal]

[8] *See* Annex II to the Prosecution Response to Defence Motion to Exclude the Statement of the Accused, 17 June 2005.
[9] *See* Annex I to the Prosecution Response to Defence Motion to Exclude the Statement of the Accused, 17 June 2005.
[10] This could be a substitute only; its probative value would have to be assessed with greatest caution.
[11] *See supra* notes 8 and 9.

VIII. DECLARATION OF JUDGE SHAHABUDDEEN

1. All members of the Appeals Chamber support its judgement, including its finding that the Trial Chamber was correct in holding that Halilović's written statement was inadmissible. There is however a difference of opinion as to the basis on which the statement was inadmissible. Before dealing with the matter, there is a preliminary question to be considered as to whether it is open to the Appeals Chamber to pronounce on the point.

2. The preliminary question turns on what the Trial Chamber did. One view is that the Trial Chamber held that the statement was inadmissible for simple non-compliance with the recording procedure prescribed by Rule 43 of the Rules of Procedure and Evidence of the Tribunal, which involved but foreclosed the issue of reliability (the first route). Another view is that the Trial Chamber took the position that, in the absence of a recording made under that Rule, it was not possible to remove from the statement an appearance of unreliability; the exclusion therefore rested on unreliability (the second route). I believe that all members of the Appeals Chamber are agreed that it was only if the Trial Chamber took the first route that the Appeals Chamber would be entitled to express its opinion as to whether the statement was inadmissible for simple non-compliance with the Rule.

3. As to which route was taken, opinion is divided, but, on balance, my interpretation of the Trial Chamber's reasoning leads me to conclude that it took the second route. While the Trial Chamber indeed referred to Rule 43, it really relied on the general concept of reliability; it used the unavailability of a recording as required by that Rule, not as an automatic bar, but merely to show that it had not the means of testing whether the *ex facie* unreliability of the statement was confirmed or removed by what in fact happened at the interview in the course of which the statement was given.

4. In other words, the Trial Chamber opted for the second route. It follows that the Trial Chamber's reference to Rule 43 is not a sufficient basis for entitling the Appeals Chamber to pronounce on the question whether simple non-compliance with the recording procedure of that Rule grounds inadmissibility of a statement made by a suspect to the Prosecutor.

5. However, if it becomes necessary to deal with the question, what is the position? The basic problem which I have with an affirmative answer is that such an answer assumes the answer – it assumes but does not prove that the statement is inadmissible for simple non-compliance with the recording procedure prescribed by Rule 43. It is hard not to admire the liberal underpinnings of that assumption. But, with respect, I do not think that the assumption is founded.

6. I accept that whether the person giving the statement is referred to as a 'witness' is not decisive. The test is whether the person was objectively a suspect,[1] even though he may be called a witness. If objectively he was a suspect, his statement comes within Rule 43 operating on a current basis, without there being any need for the Appeals Chamber to trouble over the vexed question of retroactivity. Still that leaves open the question what is the effect of non-compliance with the recording procedure prescribed by the Rule: is the statement inadmissible simply because of the non-compliance?

7. I recognise that in the majority of cases non-compliance with the recording procedure prescribed by Rule 43 will contribute to exclusion, but the question is whether it is correct to proceed on the footing that exclusion is the simple result of such non-compliance. Rule 43 does not command any particular sanction of enforcement. As correctly observed by Jones and Powles,[2] speaking of the companion Rule 42, '[t]he Rules do not explicitly state what the remedy should be when a suspect's rights are violated'. The circumstances of *HMA v. Swift*[3] were slightly different, but the disposition read: 'Tape and oral evidence were equally primary evidence; Oral evidence admitted'. That case seems to be in keeping with what is mentioned below concerning confessions in the practice of the Tribunal. In this respect, there are various domestic models, but it is of course the Tribunal's model which is determinative.

8. In the case of a 'confession by an accused given during questioning by the Prosecutor', as referred to in Rule 92, non-compliance with the requirement of Rule 63 for audio-recording or video-recording in accordance with the procedure prescribed by Rule 43 does not lead to automatic exclusion of the confession. Rule 92 does say that the confession shall be presumed 'free and voluntary' if 'the requirements of Rule 63 were *strictly*[4] complied with', but Rule 92 goes on to make the sage addition, 'unless the contrary is proved'. So, even a 'confession by the accused' can be admitted though there has been non-compliance with the recording procedure of Rule 43.

9. That conforms to the test of inadmissibility of evidence obtained by certain methods. Obviously, a written statement obtained in compliance with the recording procedure prescribed by Rule 43 is admissible. But it does not follow that evidence not obtained in accordance with the prescribed procedure is inadmissible simply for non-compliance with that procedure. Such evidence was obtained by a method of one kind or another. Rule 95 provides that '[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission

[1] *See Serves v. France*, ECtHR, 20 October 1997, para. 42, and *Heaney and Mc Guinness v Ireland*, ECtHR, 21 December 2000, para, 42.
[2] *International Criminal Practice*, (Oxford, 2003), page 502.
[3] [1983] SCCR, 204 at 207.

is antithetical to, and would seriously damage, the integrity of the proceedings'. Some judicial judgement has to be exercised on whether the method followed has cast 'substantial doubt' on the reliability of the evidence. Evidence is not excluded simply because it has been obtained in non-compliance with an authorised method.

10. I would mention two situations in which inadmissibility is stipulated by the law itself. The first is a case in which a witness gives self-incriminating evidence under compulsion of the court. Rule 90(E) provides that '[t]estimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony'. Exclusion of the testimony is automatic. The second has to do with cases of sexual assault. Rule 96(iv) provides that 'prior sexual conduct of the victim shall not be admitted in evidence'; thus, even a statement by the victim is excluded if it bears on his or her prior sexual conduct.

11. In these cases, the law itself mandates exclusion of the evidence; nothing is left to the judgement of the court, except to find that there has been the precipitating event – compulsion by the court, or prior sexual conduct. As previously noted, Rule 43 does not provide for mandatory exclusion as an enforcement sanction: if there is non-compliance with the prescribed recording procedure, the court still has to make a judgement as to whether the method chosen casts 'substantial doubt' on the reliability of the unrecorded statement.

12. It remains to examine two of the cases decided by this Tribunal and the ICTR, respectively. It is true that, in this Tribunal, the Trial Chamber in *Delalić* excluded the statement for having been taken in non-compliance with Rule 42. But it is not clear that the exclusion rested on simple non-compliance. The Trial Chamber said:

> However violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in the proceedings before us and to be excluded.[5]

Rule 5, to which reference was made, provides that the Chamber 'shall grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to' the complaining party. So the Chamber did have to go an extra mile.

13. In *Bagosora*, an ICTR Trial Chamber said:

> As stated by the ICTY Chamber in Delalić, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being 'antithetical to, and would seriously damage, the integrity of the proceedings'.[6]

[4] Emphasis added.
[5] IT-96-21, 2 September 1997, para. 55.
[6] ICTR-98-41-T, 14 October 2004. para. 21.

So, again, exclusion was not based simply on non-compliance with the prescribed procedure.

14. I concede, as recognised above, that the non-availability of a recording made under Rule 43 may lead to inadmissibility. But this is a far cry from saying that inadmissibility is the simple result of non-compliance with the Rule. That, I believe, is the proposition in issue; with respect, paragraph 9 of Judge Schomburg's separate opinion does not help to establish it. The Trial Chamber chose to found inadmissibility on the general concept of unreliability. On the basis of this concept, it reached the correct conclusion: the statement was inadmissible. All members of the Appeals Chamber agree that it was inadmissible.

15. In conclusion, I regret that I cannot agree that simple non-compliance with the recording procedure grounds inadmissibility.

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

Dated 16 October 2007
At The Hague
The Netherlands

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Mohamed Shahabuddeen

[Seal of the International Tribunal]

IX. ANNEX A – PROCEDURAL HISTORY

A. Trial proceedings

1. An initial indictment against Sefer Halilović was filed on 30 July 2001, modified by the Prosecution on 10 September 2001 and confirmed by Judge Patricia Wald on 12 September 2001. The Indictment charged Halilović with one count of murder, a violation of the laws or customs of war, under Articles 3 and 7(3) of the Statute.[1] In 2003, the Defence sought for particulars with respect to the Indictment and the charges filed against Halilović. Given that the particulars requested were contained in the Indictment, in the Pre-Trial Brief of the Prosecution or the discovery materials, or that the evidentiary matters for trial had not been affected, these motions were denied.[2]

2. Halilović voluntarily surrendered to the International Tribunal on 25 September 2001 and was transferred to the United Nations Detention Unit in The Hague ("UNDU"). His initial appearance before the Trial Chamber was held on 27 September 2001, when he entered a plea of not guilty to the charge against him. The trial commenced on 31 January 2005 and lasted 77 days. In the course of the proceedings, the Trial Chamber heard 41 live witnesses, two of whom testified by way of video-conference link and four of whom testified pursuant to Rule 89(F) of the Rules; one witness was heard by way of a deposition hearing supplemented by testimony received via video-conference link; 13 witness statements were admitted into evidence pursuant to Rule 92*bis* (B) of the Rules; and one statement of a deceased witness was admitted pursuant to Rule 92*bis* (C) of the Rules. The Trial Chamber additionally issued one subpoena and one order for safe conduct for two different witnesses, and one order for the temporary transfer of a detained witness. In all, the Trial Chamber admitted 287 Prosecution exhibits and 207 Defence exhibits into evidence.

3. The Trial Judgement was rendered on 16 November 2005. The Trial Chamber found Halilović not guilty, acquitting him of murder under Articles 3 and 7(3) of the Statute. As a result of the acquittal and pursuant to Rule 99(A) of the Rules, the Trial Chamber ordered Halilović's immediate release from the UNDU.[3]

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[1] Indictment, para. 34.

[2] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Defence Motion Pursuant to Rule 65*ter* (K) Requesting the Pre-Trial Judge to Grant Relief from Waiver and to Grant Relief Pursuant to Rule 72, 13 March 2003; Decision on Defence Motion Pursuant to Rule 65*ter* (K) Requesting the Pre-Trial Judge to Grant Relief from Waiver and to Grant Relief Pursuant to Rule 72, 1 April 2003; Decision on Defence Motion for Particulars, 16 December 2003; Motion for Certification, 23 December 2003; Decision on Motion for Certification, 28 January 2004.

[3] Trial Judgement, paras 753-754 (Disposition).

B. Appeal proceedings

1. Notice of Appeal

4. On 16 December 2005, in accordance with Article 25 of the Statute and Rule 108 of the Rules, the Prosecution filed its Notice of Appeal against the Trial Judgement.[4]

2. Composition of Appeals Chamber

5. On 11 January 2006, Judge Fausto Pocar, President of the International Tribunal, assigned the following judges to hear the present appeal: Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Andrésia Vaz, Judge Theodor Meron and Judge Wolfgang Schomburg.[5] On 3 February 2006, having been elected as Presiding Judge in the present appeal pursuant to Rule 22(B) of the Rules, Judge Mehmet Güney issued an order designating himself as the Pre-Appeal Judge, with responsibility for all pre-appeal proceedings in this case.[6]

3. Appeal Briefs

6. The Prosecution filed its Appeal Brief on 1 March 2006. The Appeal Brief was provided to Halilović in his language on 27 June 2006 and Halilović filed a draft of his Respondent's Brief on 12 July 2006.[7] The Appeals Chamber issued its decision on 14 July 2006, granting the motion in part.[8]

7. On 1 August 2006, the Prosecution filed its Brief in Reply and a motion to strike the annexes to the Respondent's Brief.[9] Pursuant to Rule 109 of the Rules and paragraph (C) of the Practice Direction on the Length of Briefs and Motions, the Appeals Chamber granted the motion in part, ordered Halilović to re-file his Respondent's Brief, and further ordered the Prosecution to re-file its Reply Brief, if necessary.[10]

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[4] Prosecution Notice of Appeal, para. 1.
[5] Order Assigning Judges to a Case before the Appeals Chamber, 11 January 2006.
[6] Order Designating a Pre-Appeal Judge, 3 February 2006.
[7] On 21 March 2006, Halilović had filed a motion for an extension of time for the filing of his Response Brief (Motion for Extension of Time to File Respondent's Brief, 21 March 2006). This motion was granted on 23 March 2006 and the Appeals Chamber allowed Halilović an additional 20 days after the Trial Judgement was made available to him in his language to file his Respondent's Brief (Decision on Motion for Extension of Time to File Respondent's Brief, 23 March 2006).
[8] Decision on Motion for Extension of Number of Words for Respondent's Brief, 14 July 2006.
[9] Prosecution's Brief in Reply and Motion to Strike, 1 August 2006; Response to Motion to Strike, 11 August 2006.
[10] Decision on Prosecution's Motion to Strike Annexes to the Respondent's Brief, 6 September 2006, p. 5. *See* also Decision on Prosecution's Motion for Clarification of the Appeals Chambers Decision of 6 September 2006, 22 September 2006.

8. Halilović re-filed his Respondent's Brief on 20 September 2006. The Prosecution then re-filed its Brief in Reply on 22 September 2006.

4. Motion for Prompt Scheduling of Appeal Hearing

9. On 21 September 2006, Halilović filed a motion for prompt scheduling of the appeal hearing.[11] The Prosecution opposed this motion on 2 October 2006.[12] On 6 October 2006, Halilović filed his reply.[13] The Appeals Chamber dismissed the motion on 27 October 2006, on the basis that Article 21(4)(c) of the Statute provides for a right to be tried without undue delay and does not protect against *any* delay in the proceedings.[14]

5. Appeal Hearing

10. Pursuant to the Scheduling Order of 4 June 2007, the Appeal Hearing took place on 10 and 11 July 2007.[15]

[11] Motion for Prompt Scheduling of Appeals Hearing, 21 September 2006.
[12] Prosecution's Response to Halilović's Motion for Prompt Scheduling of Appeal Hearing, 2 October 2006.
[13] Halilović's Reply *Re* Motion for Prompt Scheduling of Appeals Hearing – *Confidential Annexes,* 6 October 2006.
[14] Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, paras 17-19 and p. 8 (Disposition).
[15] Scheduling Order for Appeal Hearing, 4 June 2007.

X. ANNEX B – TABLES OF AUTHORITIES AND DEFINED TERMS

A. Judgements and decisions

1. International Tribunal

ALEKSOVSKI

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

BLAGOJEVIĆ & JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, 18 September 2003 ("*Blagojević* and *Jokić* Decision Concerning Clarification of Oral Decision")

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

BLAŠKIĆ

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

BRĐANIN

Prosecutor v. Brđanin and Talic, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Indictment, 20 February 2001

Prosecutor v. Brđanin and Talic, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Order to File Table, 24 July 2006

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

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Dravko Mucić a/k/a "Pavo", Hazim Delić, Esad Landžo a/k/a "Zenga", Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997

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")

DELIĆ

Prosecutor v. Rasim Delić, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005

FURUNDŽIJA

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

GALIĆ

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

HADZIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović et al., Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001

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* Interlocutory Decision")

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

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

HALILOVIĆ

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

Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("Decision of 17 December 2004")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 ("Decision of 8 July 2005")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Motion for Exclusion of Statement of Accused', 25 July 2005 ("Certification Decision of 25 July 2005")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 ("Decision on Appeal Concerning Admission of Record of Interview")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Addendum to Scheduling Order for Appeal Hearing (Questions to the Parties), 19 June 2007

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement")

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000

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Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRNOJELAC

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

KUNARAC, KOVAČ AND VUKOVIĆ

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ

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, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ

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

LIMAJ, BALA AND MUSLIU

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

MILOŠEVIĆ

Prosecutor v. Slobodan Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002

Prosecutor v. Slobodan Milošević, Case No. IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004

MRKŠIĆ

Prosecutor v. Mile Mrkšić, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003

NALETILIĆ AND MARTINOVIĆ

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

PRLIĆ, STOJIĆ, PRALJAK, PETKOVIĆ, ĆORIĆ AND PUŠIĆ

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić, Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, 22 July 2005

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić, Case No. IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, 18 October 2005

RASEVIĆ

Prosecutor v. Mitar Rasević, Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004

SIMIĆ

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

STAKIĆ

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

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, dated 15 October 1998, filed 16 October 1998

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

Prosecutor v. Duško Tadić, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999 ("*Tadić* 1999 Sentencing Judgement")

VASILJEVIĆ

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

2. ICTR

AKAYESU

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Decision on Defendant's Motion for Summonses and Protection of Witnesses called by the Defence, 17 February 1998

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement")

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

BAGILISHEMA

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

GACUMBITSI

Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

KAJELIJELI

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

KAMUHANDA

Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-1-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KAYISHEMA AND RUZINDANA

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

MUSEMA

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

NDINDABAHIZI

Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement")

NIYITEGEKA

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

NTAGERURA ET AL

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

NTAKIRUTIMANA

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

RUTAGANDA

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SEMANZA

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US v. Karl Brandt et al., reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (TWC), Voll I-II, Judgement of 19-20 August 1947

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4. Judgements of the European Court of Human Rights

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Saunders v. the United Kingdom, no. 19187/91, judgement of 17 December 1996, Reports 1996-VI

Shannon v. United Kingdom, no. 6563/03, judgement of 4 October 2005

Serves v. France, no. 20225/92, judgement of 20 October 1997, Reports 1997-VI

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Security Council Resolution 1534 (2004), 26 March 2004, S/RES/1534 (2004)

C. Defined terms

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 (*Armija Bosne i Hercegovine*)
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AT.	Transcript page from hearings on appeal in the present case.
BiH	Bosnia and Herzegovina (*Bosna i Herzegovina*)
Confidential Defence Final Trial Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Defence Final Brief (confidential), 25 August 2005
Defence Final Trial Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Defence Final Brief, public redacted version, 12 September 2005
Defence Pre-Trial Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Defence Pre-Trial Brief filed in Accordance with Rule 65*ter* F(i)(ii)(iii), 26 March 2003
ECtHR	European Court of Human Rights
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 2
HVO	Croatian Defence Council (*Hrvatsko Vijeće Odbrane*)
ICRC	International Committee of the Red Cross
ICRC Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987
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
IKM	Forward command post (*Istureno Komandno Mesto*)
ILC Commentary	ILC Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48th session, UN doc. A/51/10.
Indictment	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, dated 10 September 2001 (confirmed on 12 September 2001)
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav People's Army (*Jugoslovenska Narodna Armija*)
MUP	Ministry of Interior (*Ministarstvo Unutrašnjih Poslova*)
Prosecution	Office of the Prosecutor of the International Tribunal
Prosecution Appeal Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Prosecution Appellant's Brief, 1 March 2006

Prosecution Final Trial Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Prosecution's Final Trial Brief (with a confidential annex), 25 August 2005
Prosecution Notice of Appeal	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Prosecution's Notice of Appeal, 16 December 2005
Prosecution Pre-Trial Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Prosecutor's Pre-Trial Brief pursuant to Rule 65*ter* (E)(i), 13 October 2004
Prosecution Reply Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Re-filed Prosecution's Brief in Reply, 22 September 2006
Prosecution Supplementary Explanation	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Prosecution Supplementary Explanation to its Pre-trial Brief, 22 December 2004
Respondent's Brief	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Re-Filed Respon[d]ent's Brief on Appeal, Partly Confidential, 20 September 2006.
Rules	Rules of Procedure and Evidence of the International Tribunal
SDB	State Security Service (*Služba Državne Bezbjednosti*)
SJB	Public Security Station (*Stanica Javne Bezbjednosti*)
SVB	Military Security Service (*Služba Vojne Bezbjednosti*)
Statute	Statute of the International Tribunal (unless otherwise specified), as amended by S/RES 1166 (1998), S/RES 1329 (2000), S/RES 1411 (2002), S/RES 1431 (2002), S/RES 1481 (2003), S/RES 1597 (2005), S/RES 1660 (2006).
SUP	Secretariat of Internal Affairs (*Sekretarijat za Unutrašnje Poslove*)
T.	Transcript page from hearings at trial in the present case. Since in the Halilović trial proceedings the pagination restarted every day, the date of each specific transcript referred to is added in parentheses.
TO	Territorial Defence (*Teritorijalna Odbrana*)
Trial Judgement	*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005
UB	[Main Staff] Security Administration (*Uprava Bezbjednosti*)
UNDU	United Nations Detention Unit in The Hague
9th Brigade	9th Motorised Brigade
10th Brigade	10th Mountain Brigade