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# JUDGEMENT SUMMARY

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APPEALS CHAMBER

The Hague, 16 October 2007

MOW/1192a

## SUMMARY OF THE APPEALS JUDGEMENT PROSECUTOR V. SEFER HALILOVIĆ

*Please find below the summary of the judgement today read out by Judge Güney:*

As the Registrar announced, the case on our agenda today is Prosecutor versus Sefer Halilović. In accordance with the Order Scheduling the Hearing issued on 25 September 2007, the Appeals Chamber will deliver its Judgement today.

Following the practice of the International Tribunal, I will not read out the text of the judgement except for the disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. This summary is not part of the written judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written judgement will be made available to the parties at the conclusion of this hearing.

The events underlying this appeal took place in 1993 in Bosnia and Herzegovina, in the village of Grabovica, about 30 kilometres North of Mostar. The Trial Chamber found that thirteen persons of Croatian descent taking no active part in hostilities were killed in this village between 8 and 9 September 1993 by troops billeted in the village. There is no disagreement among the parties that these crimes occurred.

At the time of these events, Sefer Halilović was Chief of the Main Staff of the Army of the Republic of Bosnia and Herzegovina. According to the Prosecution, Sefer Halilović was the commander of a military operation called Neretva-93.

The Trial Chamber, in its judgement of 16 November 2005, found that the Prosecution had not proven beyond reasonable doubt that Sefer Halilović was either *de jure* or *de facto* commander of Operation Neretva, nor that he had effective control over the troops who committed the crimes in Grabovica. As a result, the Trial Chamber acquitted him of the only charge, murder as violation of the laws or customs of war, punishable under Article 3 and Article 7(3) of the Statute.

The Prosecution appealed the judgement, seeking the reversal of the acquittal for the charge of murder with respect to the killings perpetrated in Grabovica. The parties made oral submissions before the Appeals Chamber in the appeal hearings on 10 and 11 July 2007.

The Prosecution's appeal consists of four grounds. The first ground of appeal, composed of six sub-grounds, hinges upon the issue of whether Sefer Halilović had effective control over the offending troops. The second and third grounds concern the other two requirements of superior responsibility under Article 7(3) of the Statute (the knowledge of the criminal conduct of the subordinates and the failure to prevent or punish). The fourth ground of appeal concerns the admission into evidence of the report and proposed testimony of an expert witness relating to Sefer Halilović's alleged failure to prevent or punish.

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Media Office/Communications Service

Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands

Tel.: +31-70-512-5343; 512-5356 Fax: +31-70-512-5355

Sefer Halilović has submitted that the entire appeal of the Prosecution should be summarily dismissed. The Appeals Chamber has denied this request as unfounded and has therefore examined the Prosecution's appeal on its merits.

I will now briefly summarize the conclusions of the Appeal Chamber with respect to the First Ground of Appeal.

The Prosecution submits that the Trial Chamber erred in law and in fact in concluding that the Prosecution failed to prove that Sefer Halilović was the superior of the troops who committed the murders in Grabovica and in consequently entering an acquittal. The Prosecution requests 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 Sefer Halilović and the perpetrators.

The six sub-grounds of appeal advanced under the Prosecution's first ground of appeal are deeply intertwined: they all go to the issue of whether Sefer Halilović was the superior of the troops who committed the crimes in Grabovica. I note that, for reasons explained in the Judgement, the Appeals Chamber has not followed the order proposed by the Prosecution in the presentation of its six sub-grounds.

The Appeals Chamber has first addressed **sub-ground 6**, which seeks the admission into evidence of a statement given by Sefer Halilović to the Prosecution in 1996. The Prosecution submits that the Trial Chamber erred in law in refusing to admit into evidence the 1996 Statement. The Appeals Chamber unanimously found that the Trial Chamber was correct when it rejected the statement. All judges agree, Judge Meron and Judge Schomburg on different grounds than the majority, that the Trial Chamber enforced the procedural safeguards of the Rules of Procedure and Evidence in order to protect the due process rights of the accused also before the International Tribunal.

The Appeals Chamber has then addressed on the merits **sub-ground 1**, under which the Prosecution claims that the Trial Chamber erred in law in applying the legal standard required to demonstrate effective control.

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. It claims that, as a consequence, the Trial Chamber erroneously focused on Sefer Halilović's role as commander of Operation Neretva and on his control of combat operations to determine his effective control over the offending troops. The Appeals Chamber has considered carefully the way the Prosecution pleaded its case at trial and the fact that a trier of fact is necessarily bound by the theories of the case advanced by the Prosecution. It concluded that the Prosecution clearly pleaded that Sefer Halilović exercised effective control by virtue of his command of Operation Neretva. The Appeals Chamber has therefore dismissed the Prosecution's allegation that the Trial Chamber erred in failing to consider whether Sefer 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. As a result, the Appeals Chamber limited its analysis to the Prosecution's submissions regarding Sefer Halilović's effective control as commander of Operation Neretva. In so doing, the Appeals Chamber focused its assessment specifically on the allegation that he was a *de facto* commander, since the Prosecution acknowledged that it failed to prove *de jure* command.

The Appeals Chamber notes that the Trial Chamber correctly set out the elements that must be satisfied to hold a superior responsible under Article 7(3) of the Statute. However, the Appeals Chamber has found that the Trial Chamber erred when it appeared to create a new requirement to the third element of superior responsibility (failure to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof) by unhelpfully adding an artificial distinction between "general"

and “specific” obligations to prevent crimes. In any event, for the reasons I will discuss, this particular error does not have an impact on Sefer Halilović’s acquittal.

Under **sub-ground 5**, the Prosecution submits that the Trial Chamber erred in misapplying the standard of proof throughout the Judgement. Under **sub-ground 2 and 3**, the Prosecution raises two specific allegations of errors related to the same alleged mistake.

First, the Appeals Chamber considered that the Prosecution misinterprets the holding by the Trial Chamber that (and I quote) “any ambiguity or doubt” (end of quote) was to be resolved in favour of the Accused. The Trial Chamber in this case simply reworded the beyond reasonable doubt standard in a manner consistent with the jurisprudence.

The Prosecution also alleges that the Trial Chamber erroneously applied the beyond reasonable doubt standard to all exhibits and findings and not only to the ultimate issue of Sefer Halilović’s guilt. While not every factual finding must be established beyond reasonable doubt, every fact which is *indispensable for a conviction* must be. Our case-law has made it clear that, apart from the elements of the crime and the requirements for criminal responsibility, there may be other facts indispensable for a conviction depending on the specific circumstances of the case and on the way the case was pleaded.

In any event, since the Prosecution has only identified a handful of findings that were erroneously reached, the Appeals Chamber has limited itself to consider these. The Appeals Chamber has, in this respect, found that the Trial Chamber did not require proof of the name Operation Neretva as a necessary precondition for a finding of effective control. The same can be said of the discussions and decisions taken at a meeting in Zenica to which Halilović is said to have participated.

Similarly, despite having found that the Trial Chamber did err in focusing on whether a formal “forward command post” had been established in the town of Jablanica, the Appeals Chamber has concluded that the Prosecution failed to substantiate its claim that, had the existence of this post been established at trial, the Trial Chamber would have concluded that Sefer Halilović was *de facto* commander of the perpetrators of the crimes.

The Appeals Chamber has further considered **sub-ground 4** of the first ground of appeal, under which the Prosecution submits that the Trial Chamber erred in concluding that, since Sefer Halilović did not initiate or carry forward investigations, he did not have the material ability to punish the perpetrators of the crimes in Grabovica.

In this regard, the Appeals Chamber first considered that the wording used by the Trial Chamber might be confusing, since the failure to initiate investigations is not, as such, an indication of a lack of power to investigate. However, the Trial Chamber did not base its conclusion that Sefer Halilović lacked the material ability to punish solely on the evidence that Sefer Halilović did not initiate investigations. On the contrary, it carefully analysed the evidence before it, notably the specific rules and the evidence regarding the authority to conduct such criminal investigations, before concluding that Sefer Halilović did not have not the material ability to punish the perpetrators of these crimes. The Appeals Chamber has found that it was not an unreasonable conclusion given the evidence in the record.

In any event, even assuming that Sefer 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 Sefer Halilović and these perpetrators. The Prosecution failed to show how Sefer Halilović’s alleged position as *de facto* commander of Operation Neretva or his position as Team

Leader of the Inspection Team established a chain of command or a hierarchical relationship between him and the perpetrators amounting to such a superior-subordinate relationship.

Therefore, the Prosecution failed to show that no reasonable trier of fact could have reached the conclusion that Sefer Halilović did not have the required degree of “effective control” over the perpetrators, as a commander of Operation Neretva, to establish his superior responsibility under Article 7(3) of the Statute.

As a result, the first ground of appeal is dismissed.

The Appeals Chamber having concluded that the Prosecution has failed to show that the Trial Chamber erred in finding that a superior-subordinate relationship between Sefer Halilović and the offending troops had not been established, the Prosecution’s remaining grounds of appeal became moot.

I will now read out the disposition of the appeal judgement. Sefer Halilović, will you please rise.

#### DISPOSITION

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

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

**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** Sefer Halilović’s acquittal.

Judge Meron appends a separate opinion.

Judge Schomburg appends a separate opinion.

Judge Shahabuddeen appends a declaration.

Sefer Halilović, you may be seated. Registrar, would you please distribute copies of the judgement to the parties.

Thank you. This concludes the hearing. The Appeals Chamber stands adjourned.

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