

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

CASE NO: IT-01-47-A

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Guney
Judge Andresia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Date filed: 22 January 2007

THE PROSECUTOR
v.
ENVER HADŽIHASANOVIĆ
AMIR KUBURA

APPEAL BRIEF ON BEHALF OF MR. AMIR KUBURA

The Office of the Prosecutor

Mr. Peter Kremer QC

Mr. Arthur Buck

Ms. Antoinette Issa

Counsel for the Accused

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović

Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

Introduction

1. The Defence for Mr. Amir Kubura (the Appellant) file this Appeal Brief pursuant to Rule 111 of the Rules of Procedure and Evidence.
2. On 15 March 2006, Mr. Kubura was found guilty of two counts of plunder under Article 7(3) of the Statute (Count 6), and he was consequently sentenced to two and a half years of imprisonment. He was acquitted of all of the other counts in the Indictment, including murder, cruel treatment, and alleged offences in detention facilities.
3. As set out in the Appellants' Notice of Appeal of 13 April 2006, Mr. Kubura raises three grounds of appeal in respect of the findings of the Trial Chamber in its Judgement of 15 March 2006, namely:
 - The Trial Chamber erred in law and fact in convicting Mr. Kubura under Count 6 for failing to take necessary and reasonable measures to punish plundering in the villages of Susanj/ Ovnak/ Brajkovici/ Grahovcici in June 1993;
 - The Trial Chamber erred in law and fact in convicting Mr. Kubura under Count 6 for failing to take necessary and reasonable measures to prevent and punish plundering in the village of Vares in November 1993; and
 - The Trial Chamber erred in the exercise of its discretion in imposing a sentence of a term of imprisonment of two and a half years for these two offences under Article 7(3).
4. Each of these three grounds of appeal will be considered in turn.

A. **GROUND 1**

The Trial Chamber erred in law and fact in convicting Mr. Kubura under Count 6 for failing to take necessary and reasonable measures to punish plundering in the villages of Susanj/ Ovnak/ Brajkovici/ Grahovcici in June 1993

5. In the Appellant's submission, the Trial Chamber erred in paragraphs 1955 - 1962 of the Judgment in finding beyond reasonable doubt that members of the 7th Brigade committed plunder in the Ovnak area in June 1993 and/or that Mr. Kubura knew of these acts, as there is a lack of clear evidence on the record in support of these elements of the offence, sufficient to establish the offence beyond reasonable doubt.
6. There are other reasonable conclusions open to the Trial Chamber on the evidence on the record that are consistent with the innocence of the Appellant. As set out below, other reasonable inferences could be drawn on the evidence relied upon by the Trial Chamber. An Accused may only be convicted on the basis of inferences from proven facts when there are no other reasonable inferences to be drawn that are inconsistent with guilt (see para. 309 of the Judgment: "if there is another rational explanation or other inferences that are consistent with the innocence of an Accused, then the inference 'has not been established beyond reasonable doubt'").

Knowledge

7. It is evident that the Trial Chamber's conclusion that Mr. Kubura knew or had reason to know of acts of plunder in the Ovnak area is based purely on the testimony of one witness, Witness BA.¹ At para. 1957 of the Judgment the Trial Chamber held that his testimony that plundered property was distributed among members of the 7th Brigade showed that a decision from the command was required on this matter, and that therefore Mr. Kubura must have known of the plundered property.

¹ The record of this witness' testimony is at pp. 651-896 of the trial transcript. (All "pp." references in this Brief refer to the trial transcripts.)

8. The Trial Chamber accepted that it was not established beyond reasonable doubt that Mr. Kubura was ever present at the Bilimiste Headquarters at the time that Witness BA claimed that plundered goods had been stored there (para. 1956).
9. Most importantly, Witness BA never stated that Mr. Kubura gave any order for the distribution of plundered property or was involved in any way with any plundered property. Indeed, he states in his testimony that he did not know by whom and how any distribution was performed (pp. 808-809). When asked "how was it divided amongst the various components in the brigade", he answered: "*I don't know exactly*" (p. 809).
10. There were no other witnesses to the alleged distribution or relevant documents, and no other testimony or documents which indicated that Mr. Kubura was involved in any way whatsoever in any distribution of plundered property.
11. The Trial Chamber erred in basing its conviction solely on this one witness, who did not even mention Mr. Kubura. Even if plundered goods had been distributed, this could have been decided upon and implemented by various other members of the 7th Brigade, without Mr. Kubura's knowledge. In other words, other reasonable inferences were open to the Trial Chamber that were inconsistent with guilt.
12. As the Appeals Chamber and Trial Chambers have held in previous cases, knowledge cannot be "presumed".² The Prosecution must prove the superior's knowledge by reference to the information in fact available to the superior.³ Furthermore, a superior cannot be held criminally responsible for neglecting to acquire knowledge of the acts of subordinates.⁴
13. Furthermore, it is significant that Witness BA was not relied upon by the Trial Chamber in respect of any other counts in the Indictment. His credibility was not discussed by the Trial Chamber. It is evident from examining his testimony as a whole that he was a witness whose reliability was placed in issue. For instance, this witness testified that Mr. Kubura may have been abroad during 1993 (p. 815).

² Celebici Trial Judgement, para. 386.

³ Celebici Appeal Judgement, paras. 238-239, 241; and Blaskic Appeal Judgement, paras. 62-64.

⁴ Celebici Appeal Judgement, para. 226. Also see Blaskic Appeal Judgement, para. 406 and Bagilishema Appeal Judgement, paras. 34-35.

14. In any event, the essential point is that his testimony, however it is regarded, on its own was not sufficient to prove Mr. Kubura's knowledge of any plunder beyond reasonable doubt. The Accused must receive the benefit of any doubt or uncertainty on the evidence. No reasonable tribunal could have come to the same conclusion as the Trial Chamber on the evidence presented.

Subordinates

15. As an additional submission, it was not established beyond reasonable doubt that members of the 7th Brigade were even involved in the commission of any plunder in the Ovnak area in June 1993.

16. Even if the Appellant's arguments are not accepted in this regard, the submissions on Mr. Kubura's lack of knowledge, outlined above, are sufficient to dismiss his liability under Article 7(3) and overturn his conviction.

17. In the Appellant's submission, the evidence referenced by the Trial Chamber on the involvement of the 7th Brigade in plunder in the Ovnak area and the Trial Chamber's findings are contradictory, and are therefore incapable of establishing beyond reasonable doubt that members of the 7th Brigade committed acts of plunder. The Trial Chamber should have at least given the Appellant the benefit of the doubt created by such conflicting evidence.

18. First, the Trial Chamber found on the evidence that "the 7th Brigade units did not enter the villages of Brajkovici, Grahovcici and Susanj", and that "the 7th Brigade units left the Ovnak sector on 9 June 1993" (para. 1931).

19. These findings contradict the finding that these villages were plundered by members of the 7th Brigade, and in particular that 7th Brigade members were taking plundered goods to the church in Brajkovici on 9 June 1993 (based on the testimonies of Witness BA and Witness Z18) (see para. 1935). Similarly, the testimonies of the witnesses listed in paras. 1936-1938 who refer to incidents after 9 June 1993 contradict the Trial Chamber's finding that the 7th Brigade had left the area by then.

20. The undisputed evidence was that units of the 7th Brigade withdrew from the area on 8 June 1993, as they were ordered and required to move to the area of Kakanj to conduct military operations in that area (pp. 18516-18517; pp. 18599-18600; p. 18628; p. 18643; p. 18701; DK23, Reconnaissance plan of 10 June 1993 for Kakanj; and, DK24, Order for attack in Kakanj dated 11 June 1993).
21. Members of the 7th Brigade who testified confirmed that they had to leave the area rapidly, and were immediately transported by bus to Kakanj (pp. 18600-18601, and pp. 18644-18645). The soldiers were not granted any leave, and could not return home before commencing operations in Kakanj. They arrived in Kakanj on the afternoon of 9 June 1993 (pp. 18601, pp. 18645-18646, and pp. 18701-18702).
22. Second, the report of the Zenica OpSO (P898) relied upon by the Trial Chamber does not refer to members of the military police of the 7th Brigade being involved in plunder (para. 1943). It does not mention the 7th Brigade at all.
23. Third, the Trial Chamber noted the evidence of the Defence witnesses who were involved in the military operations, without finding them unreliable. They testified that members of the 7th Brigade had not been involved in plundering any goods (para. 1934).
24. The evidence concerning who precisely was responsible for acts of plunder in the Ovnak area and the findings of the Trial Chamber are thus contradictory. Another example is that the ECMM noted on 10 June 1993 that the church in Brajkovici had not been plundered (para. 1936 of the Judgement). The Trial Chamber also accepted that civilians committed acts of plunder (para. 1943).
25. Accordingly, the Appellant submits that the Trial Chamber erred in finding that it was established beyond reasonable doubt that Mr. Kubura's subordinates in the 7th Brigade committed any acts of plunder in the villages of Susanj/ Ovnak/ Brajkovici/ Grahovcici and/or that he knew or had reason to know about such acts. As a result the Trial Chamber should have, with respect, acquitted the Appellant of this charge.

26. There was no proper basis for the Trial Chamber to consider whether Mr. Kubura could have prevented or punished these acts, as the foundational elements of Article 7(3), namely the commission of unlawful acts by subordinates and knowledge of these acts, were not proven to the required criminal standard.

B. GROUND 2

The Trial Chamber erred in law and fact in convicting Mr. Kubura under Count 6 for failing to take necessary and reasonable measures to prevent or punish plundering in the village of Vares in November 1993

27. In the Appellant's submission, the Trial Chamber erred in paragraphs 1966 - 1994 of the Judgment in finding that members of the 7th Brigade committed plunder in Vares in November 1993 and/or that Mr. Kubura knew or had reason to know about these acts of plundering in Vares as there is a lack of clear evidence on the record in support of these elements of the offence, sufficient to establish the offence beyond reasonable doubt.
28. There were other reasonable conclusions open to the Trial Chamber on the evidence on the record that are consistent with the innocence of the Appellant. As set out below, other reasonable inferences could be drawn on the evidence relied upon by the Trial Chamber. An Accused may only be convicted on the basis of inferences from proven facts when there are no other reasonable inferences to be drawn that are inconsistent with guilt (see para. 309 of the Judgment).

Knowledge

29. It is evident that the Trial Chamber's finding that Mr. Kubura knew or had reason to know of any plunder in Vares by members of the 7th Brigade is based on only three documents, namely P675, P468, and P446 (para. 1986). The finding is not based on any witness testimony.
30. It is significant that the Trial Chamber noted in the prior section of the Judgment entitled "General Remarks on Evidence" that "more weight" should only be attached to documents that "witnesses explained in convincing fashion than documents admitted in isolation, and therefore without a witness's comments or observations" (para. 297).

31. Furthermore, as emphasised in the Judgement, "the theory of command responsibility does not impose strict responsibility on a superior who failed to prevent his subordinates from committing crimes or punish them for having done so" (para. 92).⁵

32. In the Appellant's submission, these three documents (P675, P468 and P446) taken on their own and together do not prove beyond reasonable doubt that Mr. Kubura knew or had reason to know of the commission of any plunder by his subordinates, as required by Article 7(3). In particular:

- None of these documents state that members of the 7th Brigade have committed any unlawful acts of plunder.
- P675 - there is nothing on the face of this document which establishes that it was sent to and received by the command of the 7th Brigade, or Mr. Kubura in particular. There was no other evidence on the record regarding this document and whether it was received by the command of the 7th Brigade or Mr. Kubura.
- In any event, the terms of the order are to "stop anything being removed from the town" and for the 7th Brigade to "execute" this order. The order does not state that this Brigade is removing items from the town. It cannot be inferred that merely because the 7th Brigade is to implement the order that its members must have been committing acts of plunder. Another reasonable inference to be drawn is that the 7th Brigade could have been ordered to ensure that no looting took place on the part of all of the various units involved in this operation under the auspices of the OG East, Tactical Group Vares.
- P446 - the report from the command of the 3rd Corps is addressed to the OG East, and not the command of the 7th Brigade. The report notes that in response to reports of looting "we issued orders to *brigades* to engage all available VP /military police/ members in preventing chaos" (emphasis

⁵ Celebici Appeal Judgement, paras 223 and 241.

added). There is no evidence that any report was made to Mr. Kubura that his subordinates were involved in looting or that Mr. Kubura was aware of any order mentioned in P446. In addition, on the evidence and as found by the Trial Chamber, other ABiH units were involved in the Vares operation in November 1993. The order mentioned in P446 could thus be referring to any of these units (para. 1966).

- P448 - although this report from the 2nd Battalion of the 7th Brigade of 11 November 1993 mentions the collection of war booty, it also states that “looting and theft of property was prevented very efficiently”. There was also no evidence presented to prove that Mr. Kubura received this report.

33. Furthermore, in the Appellant’s submission the Trial Chamber’s finding that Mr. Kubura’s failure to punish plundering in the Ovnak area in June 1993 “encouraged the subsequent commission of such acts” does not establish that Mr. Kubura knew or had reason to know of plunder that the Trial Chamber found occurred in Vares some 5 months later. First, as set out above, it was not established beyond reasonable doubt that Mr. Kubura knew or had reason to know of any plunder in the Ovnak area in June 1993.

34. Second, under Article 7(3) the Prosecution is required to prove that the superior knew or had reason to know about the actual offence alleged i.e. plunder in Vares in November 1993. As the Trial Chamber itself noted, Mr. Kubura could only know that the members of the 7th Brigade “were likely to repeat such acts” (p. 1982 of the Judgement). Whether they did or not, and whether Mr. Kubura knew or had reason to know of any unlawful acts in Vares in November 1993 is a matter to be established beyond reasonable doubt for the specific events that occurred in Vares, given the particular circumstances of these events.

35. As the ICTY's jurisprudence makes clear, knowledge of the offences charged cannot be presumed.⁶ The Prosecution must prove an awareness that the "relevant crimes" were committed or were about to be committed, or that the superior had reason to know about

⁶ Celebici Trial Judgement, para. 386; and Kordic and Cerkez Trial Judgement, para. 427.

the commission of the relevant crimes.⁷ The Prosecution must prove the superior's knowledge of the crimes charged by reference to the information in fact available to the superior about these crimes.⁸

Subordinates

36. As an additional submission, it was not established beyond reasonable doubt that members of the 7th Brigade were even involved in the commission of any plunder in Vares, or any serious acts that could be regarded as unlawful.
37. Even if the Appellant's arguments are not accepted in this regard, the submissions on Mr. Kubura's lack of knowledge, outlined above, are sufficient to dismiss his liability under Article 7(3) and overturn his conviction for plunder in Vares.
38. As shown above, none of the documents mentioned above and referenced by the Trial Chamber state that the 7th Brigade was involved in any looting in the town of Vares. It is significant that the Trial Chamber found that the units of the 7th Brigade left the town of Vares on 4 November 1993, the same day of the military operation in the town (para. 1980).
39. The report from the Command of the 6th Corps OG East (P676) which stated that the 7th Brigade entered Vares on 4 November 1993, and that "everything is being looted", was not supported by any of the witness testimony, as explained below.
40. It is again significant that the Trial Chamber noted in the prior section of the Judgement entitled "General Remarks on Evidence" that "more weight" should only be attached to documents that "witnesses explained in convincing fashion than documents admitted in isolation, and therefore without a witness's comments or observations" (para. 297).
41. None of the witnesses for Vares commented on the documents relied upon by the Trial Chamber in reaching its findings. Moreover, the Trial Chamber's reference to the testimony of Hakan Birger and Ulf Henricsson at footnote 4648 does not in fact support

⁷ Kordic and Cerkez Trial Judgement, para. 427; and Blaskic Appeal Judgement, paras. 62-64.

⁸ Celebici Appeal Judgement, paras. 238-239, 241; and Blaskic Appeal Judgement, paras. 62-64.

the Chamber's finding that members of the 7th Brigade took part in any looting in the town of Vares.

42. There is no mention of the 7th Brigade at the pages in Birger's testimony referred to by the Chamber, namely pp. 5386 and 5422. Birger did state in his testimony that he saw some soldiers, who appeared very hungry, taking food - bread and chocolate, and ladies shoes. He told them to stop and they did (see pp. 5384-5385, and footnote 4650 of the Judgement). He also testified that the UNHCR food storage centre in Vares was not looted (p. 5415).
43. In respect of Henricsson, the reference at footnote 4648 of the Judgement, that is p. 7670 of his testimony, does mention the 7th Brigade, but the witness did not provide any clear basis for making this observation. Henricsson noted that he did not see any insignia and that he spoke to the "operational group" (not anyone from the 7th Brigade) and "told them to take control of the situation".
44. In addition, the Trial Chamber heard evidence from commanders and members of the 7th Brigade who were present in Vares on 4 November 1993, and who confirmed that members of the 7th Brigade had not been involved in looting other than taking some food as they were very hungry. The testimonies of Safet Junuzovic, Dzemail Ibranovic, Kasim Podzic, and Halil Brzina were summarised by the Trial Chamber at para. 1967.
45. Accordingly, the Appellant submits that the Trial Chamber erred in finding that it was established beyond reasonable doubt that Mr. Kubura's subordinates in the 7th Brigade committed any acts of plunder in Vares and/or that he knew or had reason to know about such acts. As a result the Trial Chamber should have, with respect, acquitted the Appellant of this charge.
46. There was no proper basis for the Trial Chamber to consider whether Mr. Kubura could have prevented or punished these acts, as the foundational elements of Article 7(3), namely the commission of unlawful acts by subordinates and knowledge of these acts, were not proven to the required criminal standard.

C. GROUND 3

The Trial Chamber erred in the exercise of its discretion in imposing a sentence of a term of imprisonment of two and a half years for these two offences under Article 7(3)

47. Mr. Kubura was granted early release on 11 April 2006 by the President of the ICTY pursuant to Rules 124 and 125, having already served by then over 90% of his sentence.
48. As set out above, Mr. Kubura appeals against his only two convictions for plunder under Article 7(3). The Appellant's primary submission is that these convictions should be set aside and removed from his record as there was insufficient evidence at trial to establish these crimes beyond reasonable doubt.
49. In the event that the Appellant's arguments are accepted by the Appeals Chamber, there is no need to consider the Appellant's ground of appeal in respect of sentence.
50. The Appellant's submission in respect of his sentence is that it is manifestly excessive in the circumstances, given the nature of the offences of plunder. The Trial Chamber erred in respect of its consideration of the gravity of the offence, and in respect of the weight given to aggravating features.

Gravity of the offence

51. It cannot be disputed that the offences for which Mr. Kubura was convicted, although serious, are at the very lowest end of the scale of seriousness for offences before the ICTY. The Trial Chamber did not record this point in its reasons for passing the sentence for Mr. Kubura.
52. As stated by the President of the ICTY in the Decision of the President on Amir Kubura's Request for Early Release, 11 April 2006, at para. 8: "*Crimes against property, while serious, may be considered less serious than crimes against the person*".

53. Accordingly, the proper sentence to be imposed must appropriately reflect the seriousness of the offence and be proportional to the conduct involved and the sentences imposed for more serious offences at the ICTY.
54. The Trial Chamber erred in not giving due weight to the fact that the offences of plunder are the least serious offences to be tried before the ICTY. Mr. Kubura is the only accused before the ICTY only to be found guilty of failing to prevent or punish looting under Article 7(3) and to be acquitted of all offences against persons.

Aggravating features

55. The aggravating features mentioned by the Trial Chamber were wrongly assigned weight by the Chamber in sentencing Mr. Kubura. In the Appellant's submission, the organisational framework established within the 7th Brigade for dealing with "war booty" cannot be an aggravating circumstance. As the order of 20 June 1993 (P426, referred to by the Trial Chamber at para. 2091) confirms, this system was implemented in order to prevent looting.
56. The Trial Chamber was obliged to focus on the unlawful conduct involved, which on the findings of the Trial Chamber could not correctly be described as "systematic". The instances of looting involved only two areas, for about a day in each case (8 June 1993 and 4 November 1993, respectively), and were some 5 months apart with numerous other operations conducted by the 7th Brigade before and after the operations in the Ovnak area and in Vares.
57. In addition, the Chamber found in respect of both the Ovnak area and Vares that various brigades and units and civilians had been involved in looting (para. 1943 and para. 1978) For Vares, soldiers had been in a celebratory mood, and their activities would thus have been spontaneous and unorganised. In addition, amongst the goods appropriated were foodstuffs by hungry soldiers and in one case, women's shoes (see pp. 5384-5385 of the trial transcript, and footnote 4650 of the Judgement).

Conclusion

58. Accordingly, the Appellant submits that his two guilty verdicts are not supported by the evidence on the record to the requisite criminal standard of beyond reasonable doubt.
59. As uncertainty exists on the evidence, as reflected in the Judgement of the Trial Chamber itself, it is the Appellant's submission that the Trial Chamber erred in entering findings of guilt beyond reasonable doubt.
60. The Appeals Chamber is respectfully requested to enter verdicts of not guilty for Mr. Kubura for each of the two counts of plunder under Article 7(3).

Respectfully submitted on 22 January 2007,

Counsel for Amir Kubura,

Mr. Fahrudin Ibrisimović and Mr. Rodney Dixon for Amir Kubura

A handwritten signature in black ink, appearing to read 'F. Ibrisimovic', written over the typed name of the signatory.