Command Responsibility in International Criminal Tribunals

By
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INTRODUCTION

International criminal tribunals have the authority to hold natural persons individually responsible for their involvement in international crimes such as genocide, crimes against humanity, and war crimes. These crimes, however, are often physically committed by a large number of individual perpetrators, many of whom remain unidentified. As a result, in view of their limited investigative resources, it may prove impracticable for international criminal tribunals to prosecute all persons who physically carried out the crimes on the ground. In cases where unidentified perpetrators are members of organized groups, such as military, paramilitary, or police units, the doctrine of command responsibility allows international criminal tribunals to hold superiors responsible for the crimes of their subordinates, whether or not the latter are identified by name.[1]

In essence, command responsibility imposes criminal responsibility for a superior's "failure to act when under a duty to do so."[2] A superior will incur command responsibility if he or she

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1. It is sufficient that the perpetrators are identified as belonging to a unit or group controlled by the superior. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 217 (Jul. 29, 2004) ("*Blaškić* Appeal Judgment") ¶ 217; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶ 790 (Jun. 20, 2007) ("*Brima et al.* Judgment"), ¶ 790.

2. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 38 (Nov. 16, 2005) ("*Halilović*

knows or has reason to know that his or her subordinates are about to commit or have committed crimes, unless the superior prevents the subordinates' crimes or punishes the perpetrators after the crimes are committed. This legal design places a criminally sanctioned burden on superiors to ensure that their subordinates comply with international law. Thus, the purpose of command responsibility is to ensure a broad compliance with international humanitarian law.

Responsibility of commanders for the conduct of their troops has long been recognized in domestic jurisdictions, as well as in the earliest modern codifications of the law of war, such as the 1899 and 1907 Hague Conventions. The notion of command responsibility as a form of individual criminal responsibility emerged in the post World War II era in national war crimes legislation and in some post-World War II case law.[3] It was later codified in Articles 86 and 87 of Additional Protocol I to the Geneva Conventions. Today, the concept of command responsibility is enshrined in the statutes of all major international tribunals.[4]

For example, Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal") provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does

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Judgment") ¶ 38.

3. *See*, *e.g.*, Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century—A Century of Evolution*, 10 MURDOCH UNIV. ELEC. J. L. 1, ¶¶ 6-8 (2003) (citing Order of Charles VII of France of 1439 and Massachusetts Provisional Congress statement of 1775).

4. Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993), Annex, Art. 7(3); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), Annex, Art. 6(3); Statute of the Special Court for Sierra Leone, *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Annex, Art. 6(3) (Jan. 16, 2002); Statute of the "Khmer Rouge Tribunal," Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 29; Rome Statute of the International Criminal Court, circulated as Doc. A/CONF.183/9 of 17 July 1998 and corrected by *process-verbaux* of Nov. 10, 1998, Jul. 12, 1999, Nov. 30, 1999, May 8, 2000, Jan. 17, 2001 and Jan. 16, 2002, Art. 28; Statute of the Special Tribunal for Lebanon, U.N. Doc. S/RES/1757 (2007), Art. 3(2).

> not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Since the landmark *Čelebići* case,[5] the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") have established a rich jurisprudence on command responsibility, which essentially has been followed by the Special Court for Sierra Leone ("SCSL" or "Special Court").[6] In short, the principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary international law.[7]

This essay will discuss the legal elements of command responsibility and its practical application in international criminal tribunals. My remarks will be based primarily on the ICTY case law, because that Tribunal has taken the lead in the legal development of command responsibility. While the other international criminal tribunals have generally followed the ICTY jurisprudence in this area, some aspects will be highlighted where the ICC has adopted a different stance.

NATURE OF COMMAND RESPONSIBILITY

A fundamental question as to the nature of command responsibility is whether it is a means of indirectly holding superiors responsible for criminal acts of their subordinates or whether it is a form of liability for a superior's own misconduct.

While acknowledging that command responsibility can be a useful tool for holding high-ranking officers criminally responsi-

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5. Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001) ("*Čelebići* Appeal Judgment").

6. *Brima et al.* Judgment, ¶¶ 779–800.

7. *Čelebići* Appeal Judgment, ¶¶ 195.

ble,[8] post-World War II tribunals did not uniformly apply this form of liability,[9] and it was not until recently that the ICTY explicitly addressed this issue. In the 2005 *Halilović* case, the Trial Chamber clarified that "a commander is not responsible as though he had committed the crime himself." Instead, the superior incurs criminal liability for his or her failure to comply with the duty that international law imposes on superiors to prevent or punish crimes committed by their subordinates.[10] The Special Court has also adopted this reasoning.[11] Thus, as the law presently stands, at least in the ICTY and the Special Court, command responsibility holds superiors liable for their failure to act. It is worth noting, however, that the statutory language of the ICC and the Special Tribunal for Lebanon appears to take a different view, stipulating that superiors may be held "responsible for crimes . . . committed by subordinates."[12]

ELEMENTS OF COMMAND RESPONSIBILITY

To hold a person criminally responsible under the doctrine of command responsibility for an international crime, the prosecution must prove three legal elements:

1. The existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate;

2. That the superior knew or had reason to know that the crime was about to be or had been committed; and

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8. *See*, *e.g.*, U.S. Military Commission, Manila, In re Yamashita, Judgment of Dec. 7, 1945, ILR, Vol.13, at 255; Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, J. OF INT'L CRIM. JUST., 1-20, at 3 (2007).

9. *Halilović* Judgment, ¶¶ 48.

10. *Halilović* Judgment, ¶¶ 54.

11. *Brima et al.* Judgment, ¶¶ 783.

12. ICC Statute, Art. 28; Statute of the Special Tribunal for Lebanon, Art. 3(2) (emphasis added).

3. That the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.[13]

A. Superior-subordinate relationship

The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his or her subordinates.[14] In this respect, a military hierarchy is not required: the ICTY, the ICTR, and the Special Court have all held that the doctrine of command responsibility applies not only to military commanders, but also to political leaders and other civilian superiors in possession of authority.[15] It is also not necessary that a formal, *de jure* subordination exist. A superior position for purposes of command responsibility can be based on *de facto* powers of control.[16] Furthermore, the perpetrator does not need to be *directly* subordinated to the superior, but can be several steps down the chain of command.[17] At least in the military context, command responsibility applies to every commander at every level of command, even if the troops were only temporarily commanded by the superior.[18]

What matters is whether the superior has actual powers to control the actions of his or her subordinates. To determine this, all three aforementioned tribunals apply the "effective control" test, which aims to determine whether the superior has "the material

13. *See*, *e.g.*, *Blaškić* Appeal Judgment, ¶ 484; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, Mar. 24, 2000 ("*Aleksovski* Appeal Judgment").

14. *Halilović* Judgment, ¶ 57 (citing Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, Nov. 16, 1998, ¶ 377).

15. *Čelebići* Appeal Judgment, ¶¶ 195–196; *Aleksovski* Appeal Judgment, ¶ 76; Prosecutor v. Baglishema, Case No. ICTR-95-1A-A, Judgment (Reasons), Jul. 3, 2002, ¶ 51; Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, 23 May 2005 ("*Kajelijeli* Appeal Judgment"), ¶ 85; *Brima et al.* Judgment, ¶ 782.

16. *Čelebići* Appeal Judgment, ¶ 195; *Kajelijeli* Appeal Judgment, ¶ 85; *Brima et al.* Judgment, ¶ 784.

17. *Čelebići* Appeal Judgment, ¶ 303; *Halilović* Judgment, ¶¶ 60, 63.

18. *Halilović* Judgment, ¶ 61 (citing International Committee of the Red Cross Commentary to Art. 87(1) of Additional Protocol I to the Geneva Conventions).

ability to prevent and punish criminal conduct."[19] If a superior has this ability, then there is a legal basis for command responsibility. Lesser degrees of control, however, for example "substantial influence," do not incur command responsibility.[20]

In determining whether the "effective control" test has been satisfied, a tribunal must consider the evidence of each particular case. There are, however, factors that may be generally indicative of an accused's position of authority. Some indicia of authority include: the accused's official position, his or her capacity to issue orders, the procedure for appointment, the accused's position in the military or political structure, and the actual tasks that he or she performed.[21] In cases of irregular armed groups with less formal structures, it becomes more important to focus on the superior's *de facto* authority.[22]

B. Mental element: "Knew or had reason to know"

Command responsibility is not a form of strict liability. In order to incur liability under a theory of command responsibility, the superior must have had actual knowledge or a reason to know that his or her subordinates were committing or about to commit crimes.

A superior's actual knowledge cannot be presumed, but it may be established through circumstantial evidence.[23] Factors which may be considered in this respect include: the number, type, and scope of illegal acts committed by the subordinates; the time during which they occurred; the number and type of troops involved; the geographical location; whether the acts were widespread; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location

19. *Čelebići* Appeal Judgment, ¶ 256; *Kajelijeli* Appeal Judgment, ¶ 86; *Brima et al.* Judgment, ¶ 784.

20. *Čelebići* Appeal Judgment, ¶ 266; *Halilović* Judgment, ¶ 59.

21. *Čelebići* Appeal Judgment, ¶ 197.

22. *See Brima et al.* Judgment, ¶ 788.

23. *Halilović* Judgment, ¶ 66; *Brima et al.* Judgment, ¶ 792.

of the accused at the time of the crimes. The more physically distant the superior was from the scene of the crimes, the more evidence may be necessary to prove his or her knowledge. Similarly, the evidence required may vary depending upon the superior's position in the level of command, and upon what reporting and monitoring mechanisms were in place.

Tribunals have interpreted quite broadly the legal standard of when a superior "had reason to know" of his subordinates' crimes. The central question here is whether information was available to the superior that would have put him on notice of crimes committed by his subordinates.[24] This information does not need to provide specific facts about the unlawful acts committed or about to be committed. If a military commander, for example, has received information that some of the soldiers under his command have a violent or unstable character, have a criminal reputation, or have been drinking prior to being sent on a mission, he may be found to have the requisite knowledge.[25] The Tribunal will also consider further reports addressed to the superior, the tactical situation, the level of training and instruction of subordinates, as well as their character traits.[26] The information itself need not compel the conclusion that the subordinates committed crimes or were about to do so. Rather, a superior may be regarded as having "reason to know" if the information justifies further inquiry; that is, if it puts him or her on notice of a "present and real risk" of criminal activity among his or her subordinates.

It must be noted that knowledge cannot be presumed if the superior fails in his duty to obtain information about a crime. But where the superior had the means to obtain such information and deliberately refrained from doing so, then knowledge can be presumed.[27] This being said, the assessment of a superior's actual or

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24. *Čelebići* Appeal Judgment, ¶ 241; *Blaškić* Appeal Judgment, ¶ 62; *Brima et al.* Judgment, ¶ 794.

25. *Čelebići* Appeal Judgment, ¶ 238; *Halilović* Judgment, ¶ 68.

26. *Čelebići* Appeal Judgment, ¶ 238 (citing International Committee of the Red Cross Commentary to Art. 86(2) of Additional Protocol I to the Geneva Conventions).

27. *Čelebići* Appeal Judgment, ¶ 226; *Halilović* Judgment, ¶ 69.

imputed knowledge remains, of course, a question of fact to be determined on a case-by-case basis.

It should be noted that the mental element of command responsibility under the ICC Statute differs somewhat from the other international criminal tribunals. Article 28 of the ICC Statute distinguishes between military commanders on the one hand, and other superiors on the other. With respect to military commanders, the normal "knew or should have known" standard applies.[28] Other superiors, however, may only incur command responsibility if they knew "or consciously disregarded information which clearly indicated" that the subordinates were committing or about to commit crimes.[29] Under the ICC Statute, the concept of command responsibility is thus less stringent for superiors who are not military commanders.

C. Failure to prevent or punish

The doctrine of command responsibility comprises two distinct legal duties for superiors: to prevent future crimes and to punish perpetrators of past crimes. Both compel subordinates' compliance with the law by forcing their superior to take action. The duty to prevent arises as soon as the commander acquires actual knowledge or has reason to know that a crime is being or is about to be committed, whereas the duty to punish arises once the crime has been committed. If a superior fails to fulfill his or her duty to prevent, this failure cannot be cured simply by punishing the subordinates afterwards.[30]

The statutes of all international criminal tribunals stipulate that the superior must take the "necessary and reasonable measures" to fulfill these two duties. What constitutes such measures

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28. ICC Statute, Art. 28(a)(i).

29. ICC Statute, Art. 28(b)(i).

30. *Halilović* Judgment, ¶ 72. *See also Blaškić* Appeal Judgment, ¶ 83 ("The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.").

cannot be determined in the abstract, but is a question of evidence.[31] Nevertheless, some general guidelines can be gleaned from the jurisprudence. Most importantly, the circumstances may be such that it is irrelevant whether the superior had the explicit legal capacity to take the required measures. Instead, what matters is whether he or she had the "material ability to act."[32] In other words, the question is whether the superior took such necessary and reasonable measures as could be taken given the superior's degree of effective control over his or her subordinates.[33] The kind and extent of these measures depend upon the degree of effective control exercised by the superior at the relevant time, and on the severity and imminence of the crimes that are about to be committed. Relevant factors to consider may include: whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to ensure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.

As to the duty to prevent, a superior must prevent not only the execution and completion of a subordinate's crimes, but also crimes that "are about to be" committed. Arguably, then, the superior must intervene as soon as he becomes aware of his subordinates' plans or preparations to commit crimes as long as he has the effective ability to prevent them from starting or continuing.[34]

With regard to the duty to punish, it includes at least an obligation to investigate possible crimes, to establish the facts, and, if

31. *Blaškić* Appeal Judgment, ¶ 72.
32. *Halilović* Judgment, ¶ 73; *Brima et al.* Judgment, ¶ 798.
33. *See Blaškić* Appeal Judgment, ¶ 72.
34. *Brima et al.* Judgment, ¶ 798.

the superior lacks the power to sanction, to report them to the competent authorities.[35]

Finally, a note is warranted on whether a nexus of causation between the superior's failure to prevent crimes and the commission of those crimes is required. The ICTY has held that such causality is not generally required.[36] This conclusion is buttressed by the fact that none of the ICTY, ICTR, or Special Court Statutes includes any causality requirement in the provisions on command responsibility. Article 28 of the ICC Statute, however, does require that the subordinates' crimes occur "as a result of" the superior's failure to exercise control properly.[37] Perhaps in the future we will have the opportunity to see how the ICC applies this added element of causation.

PRACTICAL APPLICATION OF COMMAND RESPONSIBILITY

There are several issues regarding the practical application of the doctrine of command responsibility at the ICTY, including the difficulty of proving that a superior has failed to comply with the duty to punish.

A. Investigation

Any criminal case begins with an investigation. In the context of the ICTY, much of the basis for the evidence was gathered in the former Yugoslavia in the Tribunal's early years, in the form of written statements by victims collected by investigators on behalf of the Office of the Prosecutor. The Prosecutor possesses full investigative powers, and states are under an obligation to cooperate with the Tribunal.[38]

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35. *Halilović* Judgment, ¶ 97.

36. *Blaškić* Appeal Judgment, ¶ 77.

37. *See* Kai Ambos, *Superior Responsibility*, *in* THE ROME STATUTE: A COMMENTARY, Vol. I, 848, at 860 (Cassese, Gaeta & Jones, eds., 2002)..

38. ICTY Statute, Art. 29.

B. Prosecution, arrest, and pre-trial

On the basis of its investigation, the Prosecution drafts an indictment, containing a concise statement of facts and the crimes with which the accused is charged under the Statute. The indictment, as the primary instrument of accusation, must be sufficiently detailed to allow the accused to prepare a meaningful defense. When relying upon command responsibility, the indictment should therefore contain facts that "the accused is the superior of subordinates sufficiently identified," over whom he had effective control and for whose acts he is alleged to be responsible. The indictment should further set out "the conduct of the accused by which he may be found" to possess the necessary mental element (knew or had reason to know). The facts relevant to the actions of the accused's subordinates will usually be stated with less precision, because the details of those acts are often unknown, and the acts themselves are not in issue. Finally, the indictment should set out the conduct of the accused by which he or she may be found to have failed to take the necessary and reasonable measures to prevent the crimes or to punish the persons who committed them.[39]

The indictment is then submitted to a Judge for review and confirmation. Once the indictment has been confirmed, it is served on the accused. If the accused does not surrender to the ICTY voluntarily, the Judge can issue a warrant for his or her arrest. After arrest, the accused is transferred to the ICTY's detention facility in The Hague. Shortly after his or her transfer, the accused makes an initial appearance before the Tribunal, at which time the accused pleads guilty or not guilty to charges against him or her.

If the accused pleads not guilty, the pre-trial phase ensues. It serves to a large extent to facilitate the impending trial and flesh out the important issues. For example, the accused may agree that he was a superior as alleged in the indictment, but dispute the alle-

39. *Blaškić* Appeal Judgment, ¶ 218; Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-A, Judgment, May 3, 2006 ("*Naletilić and Martinović* Appeal Judgment"), ¶ 67.

gation that he had reason to know that his troops committed the crimes charged.

C. Trial

The Prosecution carries the burden of proving beyond a reasonable doubt the accused's command responsibility. As mentioned above, the Prosecution may rely upon circumstantial evidence in this regard, and any evidence, including hearsay, is admissible before the ICTY, provided that it is relevant and has probative value. An example of how and what kind of evidence has been used to establish command responsibility may be found in the *Naletilić and Martinović* case.

The *Naletilić and Martinović* case concerned the Croat-Muslim conflict in Mostar in Bosnia-Herzegovina in 1993 and 1994. Bosniaks were being imprisoned in large numbers in detention camps, to which paramilitaries had unfettered access and often arrived to mistreat the prisoners, or to take them out to perform life-threatening labor on the frontlines. The Prosecution had alleged that the accused Naletilić, a.k.a., "Tuta," bore command responsibility in relation to his subordinates' commission of the crime of willfully causing great suffering in these camps. The Prosecution called former detainees to testify about the beatings and the identity of the perpetrators. The perpetrators had sometimes identified themselves as "Tuta's men," and other witnesses had recognized the patches on the perpetrators' shoulders. This evidence, however, was often inconclusive, and so the Prosecution had to look elsewhere for corroborating evidence. It found such evidence in a salary list that included names in Naletilić's paramilitary group. In the view of the Appeals Chamber, this and other documentary evidence, including a soldier's war diary, sufficiently established Naletilić's "effective control" over his subordinates.

The Prosecution also relied extensively on logbooks of the detention camps. These books kept a detailed record of which prisoners were taken out for labor, by which military or paramilitary unit, and what time they were returned (*if* they ever returned). This

evidence helped establish that prisoners were mistreated or killed while in the accused's unit.

While the Prosecution successfully proved the elements of Naletilić's command responsibility as to many of the crimes charged, it failed to prove that he had the requisite knowledge to be found guilty on all counts. For instance, the Tribunal found that Naletilić did not "know or have reason to know" that two of his men, whom he found beating a prisoner outside of a bus during a transport of prisoners to the Ljubuški detention camp, would enter the Ljubuški camp and continue their mistreatment of prisoners there. There was evidence that the same two men regularly went to the Ljubuški camp to mistreat prisoners, and there was no doubt that they were Naletilić's subordinates. Yet, the Appeals Court found that this evidence, and the fact that Naletilić had seen his two men beating the prisoner outside the bus was insufficient to prove that Naletilić "had reason to know" that the men abused prisoners in the Ljubuški camp. The Appeals Chamber therefore set aside Naletilić's convictions for the incidents of mistreatment of prisoners in Ljubuški prison.[40]

The *Hadžihasanović* case illustrates the difficulty of establishing that a superior "failed to punish." In *Hadžihasanović*, the Prosecution faced the issue of how to prove beyond a reasonable doubt that the accused *did not* act when he should have, *i.e.*, that he failed to punish his subordinates for their crimes. The Prosecution's solution was to send an investigator to research the archives of the district military prosecutors charged with investigating the crimes in the indictment. The investigator conducted his investigation from June 2 to 5 2004, but found no case linked to the indictment. The Prosecution argued that, since it had shown "due diligence" in its investigation and had seen that no measures had been taken by the accused, it was up to the accused to present the measures he had taken and to refute the Prosecution's findings. The Defense objected to this reversal of the burden of proof as contrary to basic principles of international criminal law. The Trial Chamber

40. *Naletilić and Martinović* Appeal Judgment, ¶¶ 301–307.

considered, however, that "the conclusions drawn from an investigation noting the absence of open cases dealing with the crimes underlying the Indictment may have probative value if the methodology used during the investigation . . . was sufficiently reliable to satisfy the requirements of a fair trial."[41] It found that, in respect to some crimes, the methodology used was sufficient and in other cases it was not. However, the Trial Chamber emphasized that, where the methodology was found lacking, the Prosecution could not rely on "the weaknesses" of the accused's defense to fill the gaps in its own investigation, because this would indeed shift the burden of proof to the accused.[42]

CONCLUSION

The doctrine of command responsibility is not just an academic construct, but a real and vital means by which commanders can be held responsible for failing to prevent or punish the misdeeds of their subordinates. The ICTY has advanced the law, and its application to actual cases, so that military and civilians superiors cannot simply bury their heads in the sand or delegate the "dirty work" to the men on the ground, while they escape responsibility for serious violations of international humanitarian law.

41. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, Mar. 15, 2006 ("*Hadžihasanović* Judgment"), ¶ 973.

42. *Hadžihasanović* Judgment, ¶¶ 974, 998. *See also* Prosecutor v. Hadžihasanović, Case No. IT-01-47-A, Judgment, Apr. 22, 2008, ¶¶ 73–76 (rejecting appellant's argument that the Trial Chamber erred in law and in fact in finding that Witness Hackshaw's evidence had probative value).