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**ANNEX A**

**AUTHORITY 53**

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**UNITED  
NATIONS**

International Tribunal for the Prosecution of  
Persons Responsible for Serious Violations of  
International Humanitarian Law Committed in  
the Territory of Former Yugoslavia since 1991

Case No. IT-01-42-T

Date: 31 January 2005

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Krister Thelin  
Judge Christine Van Den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 31 January 2005

**PROSECUTOR**

v.

**PAVLE STRUGAR**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Ms. Susan Somers  
Mr. Philip Weiner

**Counsel for the Accused:**

Mr. Goran Rodić  
Mr. Vladimir Petrović

further inquiry by the information, *i.e.* that it indicated the need for additional investigation in order to ascertain whether offences were being committed or were about to be committed.<sup>1083</sup>

370. The Appeals Chamber upheld this approach and held that a superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates,<sup>1084</sup> or about to be committed. It was further observed that even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient.<sup>1085</sup> A superior may be regarded as having “reason to know” if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, if the information available is sufficient to justify further inquiry.<sup>1086</sup>

371. This Chamber will approach its decision on the basis on this jurisprudence.

(c) Necessary and reasonable measures

372. The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior’s position of power. As the Tribunal’s definition of a “superior” requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.<sup>1087</sup>

373. Article 7(3) does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.<sup>1088</sup> The duty to prevent arises for a superior from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime.<sup>1089</sup> Therefore, if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards.

<sup>1083</sup> *Čelebići* Trial Judgement, para 393; *Kordić* Trial Judgement, para 437.

<sup>1084</sup> *Čelebići* Appeals Judgement, para 241; *Blaškić* Appeals Judgement, para 62.

<sup>1085</sup> *Čelebići* Appeals Judgement, para 238.

<sup>1086</sup> *Kordić* Trial Judgement, para 437.

<sup>1087</sup> *Čelebići* Trial Judgement, para 395 (footnotes omitted). *See also* *Kordić* Trial Judgement, para 443.

<sup>1088</sup> *Blaškić* Appeals Judgement, para 83.

<sup>1089</sup> *Blaškić* Appeals Judgement, para 83; *Kordić* Trial Judgement, paras 445-446.

374. What the duty to prevent will encompass will depend on the superior's material power 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,<sup>1090</sup> the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war,<sup>1091</sup> the failure to protest against or to criticize criminal action,<sup>1092</sup> the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command,<sup>1093</sup> and the failure to insist before a superior authority that immediate action be taken.<sup>1094</sup> The International Military Tribunal for the Far East has held that a superior's duty may not be discharged by the issuance of routine orders and that more active steps may be required:

The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders... His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out.<sup>1095</sup>

375. A superior's duty to prevent the commission of a crime is explicitly provided for by post World War II treaties. Additional Protocol I requires any commander who is aware that his subordinates are about to commit a crime "to initiate such steps as are necessary to prevent such violations."<sup>1096</sup> The ICRC commentary to the above text notes that this duty varies for each level of command, and by way of example, may imply that "a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander must ensure that an attack is

<sup>1090</sup> *Hostages Case*, 11 TWC 759, p 1290. The defendant Rendulic was held responsible for acts of his subordinates for reprisals against the population, in the light of, *inter alia*, the fact that he made no attempt to secure additional information (after receiving reports indicating that crimes have been committed). Similarly, in holding the defendant Dehner responsible, the military tribunal considered the fact that the defendant made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with international law. p 1298; 1271.

<sup>1091</sup> *Hostages Case*, 11 TWC 759, p 1311. With respect to the responsibility of the defendant Lanz for reprisal carried out by his subordinates the military tribunal held: "This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war... As commander of eth XXII Corps it was his duty to act and when he failed to do so and permitted these inhumane and unlawful killings to continue, he is criminally responsible." p 1311.

<sup>1092</sup> *High Command Case*, 11 TWC 1, p 623. In finding the defendant Hans von Salmuth responsible, the military tribunal held *inter alia* that "it appears that in none of the documents or the testimony herein that the defendant in anyway *protested against or criticized* the action of the SD or requested their removal or punishment." (emphasis added). Similarly, in the *Hostage Case* the military tribunal found the defendant Wilhelm List responsible *inter alia* in the light of the fact that "[n]ot once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts." *Hostage Case*, 11 TWC 759, p 1272.

<sup>1093</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 452. The International Military Tribunal for the Far East held with respect to the defendant Kimura that "[h]e took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command."

<sup>1094</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 448. The Tokyo judgment found that the defendant Hirota "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented..."

<sup>1095</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 452.

<sup>1096</sup> Additional Protocol I, Article 87(3).

interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks.”<sup>1097</sup>

376. A superior’s duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.<sup>1098</sup> Military tribunals established after World War II have interpreted the superiors’ duty to punish as implying an obligation for the superiors to conduct an effective investigation<sup>1099</sup> and to take active steps to secure that the perpetrators will be brought to justice.<sup>1100</sup> Relevant in this respect could also be whether the superior has called for a report on the incident and the thoroughness of the investigation.<sup>1101</sup>

377. Further guidance as to what the duty to punish may entail is provided by Additional Protocol I. Article 87(3) of AP I requires a commander who is aware that his subordinates have committed a breach of the Geneva Conventions or the Protocol “... where appropriate to initiate disciplinary or penal action” against them. The ICRC commentary suggests that this action may include informing their superior officers of the situation, “drawing up a report in the case of a breach, [...] proposing a sanction to a superior as disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence which is possible to find.”<sup>1102</sup>

<sup>1097</sup> ICRC Commentary on the Additional Protocols, paras 3560-3561, p 1022.

<sup>1098</sup> *Kordić* Trial Judgement, para 446.

<sup>1099</sup> The Trial of General Tomoyuki *Yamashita*, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume IV, p 35: “...where murder and rape and vicious, revengeful actions are widespread offences and there is *no effective attempt* by a commander to discover and control the criminal acts, such commander may be held responsible, even criminally liable, for the lawless acts of his troops...” (emphasis added) See also The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 458. The Tokyo judgment found that the defendant Shigemitsu “took *no adequate steps* to have the matter investigated... He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.” The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 458 (emphasis added).

<sup>1100</sup> *High Command Case*, p 623: When assessing Hans von Salmuth’s responsibility for actions by his subordinates, the military tribunal considered the fact that the only punishment inflicted was a 20-day confinement sentence against a member of his own staff for unauthorized participation in this action. *High Command Case*, p 623. In the Hostage Case, the military tribunal considered the defendant’s commitment to conduct an adequate investigation and to bring the perpetrators to justice: “The investigation was made, the battle report of the commanding officer was found to be false, and the action of the regimental commander found to be in excess of existing orders. Upon the discovery of these facts the defendant Felmy recommended that disciplinary action be taken against the officer in charge in consideration of the sacrifices of the regiment in the combat area at the time. The defendant testified that he never knew what punishment, if any was assessed against this guilty officer. He seems to have had no interest in bringing the guilty officer to justice.” *Hostage Case*, p 1309.

<sup>1101</sup> The International Military Tribunal for the Far East found the defendant Tojo responsible for not taking adequate steps “to punish the offenders and to prevent the commission of similar offences in the future. ... He did not call for a report on the incident. ... He made perfunctory inquiries about the march but took no action. No one was punished.” The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 462.

<sup>1102</sup> ICRC Commentary on the Additional Protocols, para 3562, p 1023.

378. In view of the above the question whether all necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators have been taken should be considered in light of the Accused's material powers at that time. Factors relevant to the Chamber's assessment include, but are not limited to, 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 secure 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.

## 2. Findings

### (a) Superior-subordinate relationship

#### (i) Command structure

379. The 2 OG was formed in mid September 1991<sup>1103</sup> by the General Staff of the JNA.<sup>1104</sup> It was a temporary formation at the level of an army<sup>1105</sup> and was in existence well into 1992.<sup>1106</sup> Its geographic area of responsibility included the territory from the Bay of Kotor in the south, to Neretva River in the north<sup>1107</sup> and to Mostar in the territory of current day Bosnia and Herzegovina,<sup>1108</sup> thus encompassing the city and surroundings of Dubrovnik. Its headquarters were initially located in Kifino Selo,<sup>1109</sup> but in October 1991 were relocated to the town of Trebinje in Bosnia and Herzegovina.<sup>1110</sup>

380. In September 1991 the commander of the 2 OG was General Jevrem Cokić.<sup>1111</sup> In late September or early October 1991 he was replaced by General Ruzinovski.<sup>1112</sup> On 12 October 1991

<sup>1103</sup> Admiral Jokić, T 3822; 4586.

<sup>1104</sup> Milovan Zorc, T 6564; Exhibit P204, p 26.

<sup>1105</sup> Admiral Jokić, T 3822; 4418; 4586.

<sup>1106</sup> Colonel Jovanović, T 7040-7041. Admiral Jokić testified that the 2 OG commanded all units involved in the Dubrovnik operation through May 1992 (Admiral Jokić T 4995).

<sup>1107</sup> Admiral Jokić testified that the area of responsibility of the 2 OG included ran to Neretva River, T 4418. Adrien Stringer however believed that it extended to Slano in the north, T 316.

<sup>1108</sup> Adrien Stringer testified that at a meeting held on 11 October 1991, General Ruzinovski, who spoke as the commander of the 2 OG outlined the area of command of the 2 OG as running from the Bay of Kotor in the south to Slano in the north and to Mostar in Bosnia and Herzegovina, T 316. See also Admiral Jokić, T 4418; Milovan Zorc, T 6565.

<sup>1109</sup> Admiral Jokić, T 3823.

<sup>1110</sup> Admiral Jokić, T 3860-3861; See also Exhibit P115, a letter of 7 November 1991 addressed to the Headquarters of the 2 OG in Trebinje; On 6 December 1991 Colm Doyle met with the Accused in the command post of the 2 OG in Trebinje, T 1708-1710.

<sup>1111</sup> Colonel Svičević, T 7057-7058; Exhibit D44, a document dated 29 September 1991 and signed by General Cokić, the commander of the 2 OG; Captain Nešić, T 8200.

<sup>1112</sup> Admiral Jokić, T 3824; See also Adrien Stringer, T 311; 315. At a meeting held on 11 October 1991 General Ruzinovski spoke as a commander of the 2 OG. Colonel Svičević, T 7058.

483. Pursuant to Rule 103(C) of the Rules, the Accused shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

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

Dated this thirty-first January 2005  
At The Hague  
The Netherlands

\_\_\_\_\_  
Judge Kevin Parker  
Presiding

\_\_\_\_\_  
Judge Krister Thelin

\_\_\_\_\_  
Judge Christine Van Den Wyngaert

[Seal of the Tribunal]