ANNEX A

AUTHORITY 20

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-95-14/1-A

Date: 24 March 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

2. Prosecution's Response

67. The Prosecution responds that the Appellant has failed to identify a legal error, as he is challenging the existence of a superior-subordinate relationship and arguing that *de facto* authority is not sufficient.[164] It submits that both matters were argued and adjudicated at trial, and that the Trial Chamber applied the law correctly to the evidence before it.

3. Appellant's Reply

68. The Appellant replies that he indeed challenges the existence of a superior-subordinate relationship, which is the first of three principles for command responsibility under Article 7(3).[165] He repeats that he was not formally appointed as prison warden by the authority that controlled the guards, i.e. the Ministry of Defence, but by the Ministry of Justice, and that he could not have *de jure* or *de facto* command over the guards.[166]

B. Discussion

69. Article 7(3) 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 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.

70. In its Judgement, the Trial Chamber found that "the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police".[167] However, in its view, "anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the

[164] Prosecution's Response, paras. 3.6 and 3.7.
[165] Appellant's Reply, para. Ad.6.
[166] *Ibid.*
[167] Judgement, para. 103.

accused's ability to give them orders and to punish them in the event of violations".[168] It went on to find that the Appellant had effective authority over the guards, as shown by his issuing orders to them and the availability to him of the means to report to superiors the situation in the prison, including incidents of mistreatment of prisoners.[169] The Trial Chamber found, however, that the Appellant failed to report to the superior authority the offences committed by the guards and HVO soldiers within the prison, and that he even joined in certain incidents of assault.[170]

71. The Appeals Chamber, on the basis of the submissions of the parties and the findings of the Trial Chamber, reaches the following conclusions regarding this ground of appeal.

72. The Appeals Chamber notes that the Appellant has agreed with the Trial Chamber in respect of the constituent elements of liability under Article 7(3).[171] Three elements have been identified by the Trial Chamber: 1) the existence of a superior-subordinate relationship; 2) the fact that the superior "knew or had reason to know that a crime was about to be committed or had been committed"; and 3) his obligation to take all the necessary and reasonable measures to prevent or to punish the perpetrators.[172]

73. The Appellant claims to appeal against the way in which the Trial Chamber applied the law to his case, but this ground of appeal in essence questions the inferences drawn from facts found by the Trial Chamber regarding his authority within the Kaonik prison. The Appeals Chamber therefore considers this ground to be factual in nature.

74. The Appellant disputes two facts found by the Trial Chamber. The first fact is that he had authority over the prison guards who were HVO military police, as demonstrated by his powers to issue orders to them, his generally elevated status within the Kaonik prison, and his right to report to the Military Police command and the Travnik Military Tribunal within whose jurisdiction the prison was placed. The second fact is that he failed to report the offences by his subordinates to either of the superior authorities. Both facts

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[168] *Ibid.*
[169] *Ibid.*, paras. 104 and 117.
[170] *Ibid.*, para. 117.
[171] The Trial Chamber referred expressly to the Appellant's acceptance of the elements at first instance: *ibid.*, para. 71.
[172] *Ibid.*, para. 69.

were found to be proved by the Trial Chamber after examining evidence and arguments specific to them. Like the Trial Chamber, the Appellant also construes the authority of a superior to mean that he has the power to order and to enforce his orders in certain ways.[173] The Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence, it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber.[174] In this appeal, the Appellant has failed to convince this Chamber that unreasonable conclusions were drawn by the Trial Chamber in respect of the two facts.

75. The legal aspect of this ground of appeal consists of a single issue as to whether the Appellant was a commander of the guards, who were military police, for the purposes of Article 7(3) of the Statute.

76. Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision. In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden,[175] whereas the Trial Chamber finds that he was the superior to the guards by reason of his powers over them.[176] The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior,[177] if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus

[173] Appellant's Brief, para. 16.
[174] *Tadi}* Judgement, para. 64.
[175] Appellant's Brief, para. 22.
[176] Judgement, paras. 101-106.
[177] The Appellant relies in this regard on the 1998 ICC Statute in particular: Appellant's Brief, para. 17. Article 28 of the Statute clearly envisages responsibility for both military and civilian superiors.

its finding that the Appellant was a superior within the meaning of Article 7(3).[178]

C. Conclusion

77. The Appeals Chamber therefore finds that the fourth ground of appeal of the Appellant must fail for lack of merit, for the following reasons: a) the facts disputed by the Appellant have all been argued and adjudicated at the trial, with no good cause having been shown on appeal to justify a re-examination of the factual findings of the Trial Chamber; and b) the Appellant does not challenge the Trial Chamber's interpretation of the elements of command responsibility, the application of which by the Trial Chamber has not been shown to be unreasonable.

[178] *Ibid.*, para. 106.

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

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[288] *See* para. 168, *infra*.
[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.
[294] *Furund`ija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadic* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

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[296] *Ibid.*, para. 245.
[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundžija*, and of the Appeals Chamber in *Tadic*.
[298] *Tadi}* Judgement, para. 229.

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

Judge Richard May

Presiding

Dated this twenty-fourth day of March 2000
At The Hague,
The Netherlands.

Judge Hunt appends a Declaration to this Judgement.

[SEAL OF THE TRIBUNAL]

X. DECLARATION OF JUDGE DAVID HUNT

1. I agree with the disposition of these appeals as stated in the Judgement of the Appeals Chamber, and I am content to join in the reasons given therein for all but one of the issues determined during the course of the appeals. The exception is the issue of judicial precedent within the Tribunal. So important is that issue, which is being determined for the first time in the Appeals Chamber, that I prefer to state my own reasons for the conclusion which has been expressed in the Judgement. I should emphasise that the differences between us lie in emphasis rather than in substance.

2. Previous judicial decisions do not, in general, play an important part in international law. They rate no higher than the teaching of highly qualified publicists, as subsidiary means for determining what the international law is upon any issue.[1] Not even the International Court of Justice regards itself as bound by its previous decisions.

[1]Statute of the International Court of Justice, Article 38.1(d). Article 38 is generally regarded as a complete statement of the sources of international law. See also *Prosecutor v Kupreškic*, Case No.: IT-95-16-T, Judgement, 14 Jan. 2000, para 540.