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APPEALS JUDGEMENT SUMMARY

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APPEALS CHAMBER

The Hague, 17 July 2008

Appeals Judgement Summary For Pavle Strugar

Please find below the summary of the appeals judgement today read out by Judge Vaz:

Today's hearing concerns the case of *The Prosecutor v. Pavle Strugar*. As indicated in the Scheduling Order of 18 June 2008, the Appeals Chamber is sitting today to pronounce its Judgement in this case, in accordance with Article 15 *bis* of the Statute and Rule 117(D) of the Rules of Procedure and Evidence of the Tribunal.

In accordance with Tribunal practice, I will not read out the text of the Judgement, with the exception of its Disposition. After recalling the principal issues raised in the context of these proceedings, I will present the conclusions of the Appeals Chamber. I should like to point out that the following summary is not an integral part of the Judgement. The only authoritative account of the Appeals Chamber's findings, and of its reasons for those findings, is to be found in the written Judgement, copies of which shall be made available to the Parties at the end of this hearing.

The events giving rise to these appeals took place during the military campaign conducted by the troops of the former Yugoslav People's Army (the "JNA") in the region of Dubrovnik (Croatia) in October, November, and December 1991. According to the Judgement rendered on 31 January 2005 by Trial Chamber II, in the context of an attack on Srđ ordered by Strugar, the 3rd Battalion of the 472nd Motorized Brigade shelled the Old Town of Dubrovnik. The Trial Chamber concluded that these units were subordinated to the 2nd Operational Group (the "2nd OG"), of which General Strugar assumed command on 12 October 1991. The Chamber considered that this shelling was deliberate, that it was not a response at Croatian or other military positions, actual or believed, and that it had caused considerable damage to the Old Town. It further found that the shelling of the Old Town killed two and injured two, and that none of the victims were actively taking part in the hostilities. On that basis, the Trial Chamber convicted Strugar to a single sentence of eight years imprisonment for the following counts:

- Count 3: attack on civilians under Articles 3 and 7 (3) of the Statute;
- Count 6: destruction or wilful damage done to cultural property under Articles 3 (d) and 7 (3) of the Statute.

Both Parties appealed the Trial Judgement. At the request of the Parties, the Appeals Chamber accepted the withdrawal of these appeals on 20 September 2006, and then the reopening of appeals proceedings on 7 June 2007. Mr Strugar requests the Appeals Chamber to acquit him of all counts against him or, in the alternative, to order a new trial or substantially reduce the sentence imposed upon him. He also requests the Appeals Chamber to stay the judicial proceedings concerning him as a result of the fact that he was, and remains, unfit to stand trial. The Prosecution requests the dismissal of all grounds of appeal put forth by Strugar and raises three grounds of appeal, in which it alleges errors of law and of fact concerning the scope of Strugar's duty to prevent the illegal shelling of the Old Town, and errors in relation to cumulative convictions and to sentencing.

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Before reviewing the grounds of appeal, it is appropriate to recall briefly the standards for appellate review. Appeals against judgements are of a “corrective nature” and are not trials *de novo*. Accordingly, Article 25 of the Statute provides that the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. As regards errors of fact, it is established jurisprudence that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. Consequently, the Appeals Chamber will overturn these findings only where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. As for the determination of the sentence, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in the exercise of its broad discretion or has failed to follow the applicable law.

The Appeals Chamber may immediately dismiss the arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised, and need not consider them on the merits. Finally, it is appropriate to recall that the Appeals Chamber has the inherent discretionary power to determine which arguments merit a reasoned opinion in writing and will thus dismiss, without detailed consideration, the arguments which are evidently unfounded.

I will now move to the review of the grounds of appeal raised by the Parties.

The Appeals Chamber first decided to review Strugar’s 5th ground of appeal, in which he alleges that he is unfit to stand trial, since allowing that ground could render the other grounds of appeal moot.

In its Decision of 26 May 2004, the Trial Chamber found that the issue of fitness to stand trial is one which, although undoubtedly connected with the physical and mental condition of the Accused, was not confined to establishing whether a given disorder was present, but was better approached by determining whether the Accused was able to exercise his rights effectively in the proceedings against him. After analyzing the arguments of the Parties in this respect and the numerous relevant legal authorities, the Appeals Chamber finds that the Trial Chamber did not err by defining the standard applicable to the determination of fitness to stand trial. In fact, the test for such a determination must be that of rational participation which allows the Accused to exercise his right to a fair trial such that he is able to participate effectively in his trial and have an understanding of the basic procedural matters.

Next, the Appeals Chamber also agrees with the Trial Chamber’s application of the legal standard to the facts in the present case. More specifically, and in light of the conclusions above, the Appeals Chamber shares the view of the Trial Chamber that the report prepared by the Defence expert wrongly set the level of understanding too high for assessing fitness to stand trial, by arguing in particular that the Accused must have the capacity to understand fully the conduct of the court proceedings and the evidence in order to mount a genuine defence. The Appeals Chamber notes that a distinction must be made between the fitness to stand trial and the capacity to conduct one’s own defence.

Regarding Strugar’s claims to the Trial Chamber that his overall health condition was not taken into account, the Appeals Chamber considers that the Trial Chamber correctly noted that a diagnosis was not sufficient in itself to determine whether or not a person was fit to stand trial. Consequently, rather than examine each suspected or ascertained illness afflicting the Accused at the time, it correctly focused its analysis on the conclusions and remarks concerning the Accused’s capacity in connection with the effective exercise of his rights.

In light of the evidence of the case as a whole, the Appeals Chamber upholds the findings of the Trial Chamber that Strugar understood the nature of the charges against him, the conduct of the court proceedings and the evidence in detail, and could testify and give instructions to his Counsel. Consequently, the Appeals Chamber finds that Strugar, admittedly suffering from a certain number of mental and somatic disorders, was fit to stand trial since he was assisted by qualified Counsel. As a result, the fifth ground of appeal raised by Strugar is dismissed in its entirety.

We will now examine the first and third grounds of appeal, in which Strugar argues that the Trial Chamber committed a certain number of factual errors.

Firstly, the Appeals Chamber dismisses without detailed consideration several of Strugar's arguments concerning the details of combat operations conducted by the JNA in the region of Dubrovnik in October and November 1991 because they are evidently unfounded. As regards the argument according to which the Trial Chamber erred in finding that the *mens rea* needed to establish his responsibility as a superior under Article 7(3) of the Statute was satisfied, the Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to find that Admiral Jokić had conducted an investigation into the events of November 1991 and that Strugar was aware of the shelling of the Old Town of Dubrovnik in October and November 1991. Consequently, this claim is rejected.

Secondly, as regards the alleged errors in connection with the events of 3 and 5 December 1991, the Appeals Chamber dismisses, without providing detailed reasons, Strugar's arguments concerning the conduct of negotiations with the Croatian ministers, the role played by Admiral Jokić in the events of 5 December 1991, the military realities of the JNA and the testimony of Lieutenant-Colonel Jovanović, because they are evidently unfounded. As regards the order to attack Srđ, the Appeals Chamber finds that Strugar failed to demonstrate that the Trial Chamber's findings were unreasonable. In particular, he failed to demonstrate how the Trial Chamber's failure to clarify the content of the order to attack Srđ affected his conviction or sentence. The exact content of this order does not affect the Trial Chamber's findings that Strugar ordered this attack, had the material ability to prevent and put an end to the shelling of the Old Town, and had the means to communicate with his subordinates during the attack. The Appeals Chamber also finds that Strugar has failed to demonstrate that the Trial Chamber's appreciation of the testimonies of Colm Doyle and Colonel Svičević was unreasonable. Consequently, this claim is rejected.

Thirdly, considering the alleged errors with respect to the events of 6 December 1991, the Appeals Chamber dismisses, without detailed consideration, Strugar's arguments concerning the testimony of Frigate Captain Handžijev and the owners of the buildings damaged in the Old Town, because they are evidently unfounded. The Appeals Chamber further considers that Strugar has failed to demonstrate that the Trial Chamber's findings concerning the reports prepared by Admiral Jokić and Captain Nešić, the Croatian firing positions or the presence of Croatian heavy weapons in the Old Town on 6 December 1991 and the report of Expert Witness Janko Viličić were unreasonable. As regards Strugar's conversation with General Kadijević, the Appeals Chamber finds that Strugar has failed to demonstrate that no reasonable trier of fact could have reached the same findings as the Trial Chamber, in particular that he was aware of the clear and strong risk that the artillery was repeating its previous conduct and committing similar offences. As regards the Trial Chamber's finding that it is highly unlikely that he did not receive reports on the attack on the Old Town, the Appeals Chamber is of the opinion that the Trial Chamber reasonably established that the 2nd OG had the fundamental organizational structure needed to control combat operations and that it received combat reports from the units directly subordinated to it. Moreover, the Trial Chamber established with reason and support the numerous ways in which Strugar could have obtained information about the attack on Srđ. Finally, as regards the status of Mato Valjalo and Ivo Vlačića, the Appeals Chamber considers that a reasonable trier of fact could have found beyond a reasonable doubt that, in his capacity as a driver for the Dubrovnik Municipal Crisis Staff, Mato Valjalo was not actively taking part in the hostilities when he was injured. Furthermore, although it would have been preferable for the Trial Chamber to have done so more explicitly, the Appeals Chamber is of the opinion that the Trial Chamber has established beyond a reasonable doubt that, at that time, Mato Valjalo and Ivo Vlačića were civilians. Consequently, this claim is rejected.

Fourthly, with respect to the allegations of errors concerning Strugar's failure in his duty to prevent the crimes, the Appeals Chamber dismisses, without detailed consideration, the arguments related to the command structure of the 2nd OG, because they are evidently unfounded. As regards the material ability to prevent the crimes, contrary to Strugar's assertion, the Trial Chamber did not identify it with the position he held within the

command structure. For each of the findings it made concerning the *de jure* authority that Strugar exercised over the forces that participated in the shelling of the Old Town, the Trial Chamber relied on examples showing that the *de jure* authority he exercised within the 2nd OG command structure also materialized in his *de facto* position of authority. Moreover, in the light of its other findings, in particular those related to the 2nd OG structure and the means that Strugar had at his disposal to obtain additional information about the attack on Srđ, the Appeals Chamber considers that the Trial Chamber's findings that Strugar failed to take the necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped, were reasonable. Consequently, this claim is rejected.

Fifthly, concerning the alleged errors in respect of the events of 6 December 1991, the Appeals Chamber dismisses, without detailed consideration, Strugar's arguments with respect to his material ability to punish the crimes and to the promotions and decorations of persons involved in the shelling of the Old Town because they are evidently unfounded. As regards his failure in his duty to take measures following the events of 6 December 1991, the Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to find that General Kadijević accepted Admiral Jokić's suggestion to conduct an investigation into the events of 6 December 1991 and that the investigation conducted by Jokić turned out to be a sham. A majority of the Appeals Chamber, *with Judges Meron and Kwon dissenting*, is also of the opinion that Strugar knew that this investigation was a sham and that he was not in fact excluded from the process of investigation conducted by Admiral Jokić. Accordingly, this majority finds that it was reasonable for the Trial Chamber to find that Strugar was, at the least, prepared to accept a situation in which he would not become directly involved, leaving all effective investigation, action and decisions concerning disciplinary or other action to his immediate subordinate, Admiral Jokić. Consequently, this claim is rejected.

In view of the foregoing, the Appeals Chamber dismisses, by a majority, Strugar's first and third grounds of appeal.

In his second ground of appeal, Strugar first submits that the Trial Chamber wrongly found that a superior-subordinate relationship existed. The Appeals Chamber recalls that the power of a superior to give orders does not *automatically* establish that this superior exercised effective control over his subordinates, but it is a relevant element to establish effective control. As the Appeals Chamber held in *Halilović*, the orders in question must be considered carefully while taking into account the evidence as a whole, in order to determine the degree of effective control wielded over the perpetrators of the crimes. The nature of the orders that the superior may issue, the nature of his position of power and whether or not his orders are followed are elements which must be taken into account when determining whether he had the material ability to prevent the crimes or punish the perpetrators thereof. In this regard, considering the nature of the orders that Strugar had the power to issue, the nature of the negotiations in which he was authorized to represent the JNA, those of his functions as commander of the 2nd OG, the fact that his orders were effectively followed, and that the military justice system was still functioning at the material time, the Appeals Chamber finds that the Trial Chamber reasonably held that Strugar had the material ability to prevent the illegal shelling of the Old Town and to punish his subordinates. Consequently, the Trial Chamber correctly applied the requirement of the existence of a superior-subordinate relationship to the facts of the case. This claim is therefore rejected.

In the second prong of this ground of appeal, Strugar submits that the Trial Chamber made erroneous findings with respect to the *mens rea* of the crime of attacks on civilians and destruction or wilful damage to cultural property, in particular as regards the findings on direct intent. The Appeals Chamber recalls that, to be held criminally responsible, the perpetrator of an attack on civilians must have acted intentionally. In other words, the *mens rea* requisite of this crime is established when the acts of violence constituting the crime were perpetrated intentionally on civilians, that these civilians were targeted deliberately or that the perpetrator of the acts was entirely indifferent to their consequences. As a result, this definition encompasses the concepts of direct intent and indirect intent referred to by the Trial Chamber and Strugar. As regards the *mens rea* for the crime of destruction or wilful damage to cultural property, it is established if the

destruction or damage targeted cultural property *intentionally* (that is to say either deliberately or recklessly). In this case, in light of the evidence as a whole, the Trial Chamber was convinced that the perpetrators of the attack of 6 December 1991 acted knowingly, with the awareness of the consequences of their acts and wishing those consequences to occur. Strugar has failed to show how these findings are unreasonable. Accordingly, the claim is rejected.

In view of the foregoing, the Appeals Chamber dismisses Strugar's second ground of appeal in its entirety.

As regards the Prosecution's first ground of appeal, the Appeals Chamber considers that the Trial Chamber erred in law by not applying the correct test for the requisite *mens rea* under Article 7 (3) of the Statute by finding that, prior to the attack on Srđ launched in the early hours of 6 December 1991, Strugar did not know or have reason to know that his subordinates were about to commit a crime. More specifically, the Trial Chamber erred by considering that the fact that Strugar knew that there was a risk that his forces would illegally shell the Old Town was not sufficient to conclude that he possessed the requisite *mens rea* under Article 7 (3) of the Statute, and that for this, he had to know that there was a "substantial likelihood" or a "clear and strong risk" that his forces would shell the Old Town. The Trial Chamber wrongly considered that the requisite *mens rea* under Article 7 (3) required proof that the superior knew that his subordinates would very likely commit crimes. In this connection, the Appeals Chamber recalls that in order to hold a superior responsible under Article 7 (3) of the Statute, it is sufficient to prove that he knew that his subordinates could commit crimes. Having found that the Trial Chamber erred in law by applying the wrong legal test, the Appeals Chamber must apply the test that is appropriate to the facts found by the Trial Chamber and determine whether it is itself convinced beyond a reasonable doubt that Strugar had, prior to the beginning of the attack on Srđ, a sufficiently alarming body of information within the meaning understood by the standard of "had reason to know". According to the Appeals Chamber, the only conclusion that could reasonably be drawn in light of the Trial Chamber's findings is that, having been put on notice of the risk of an attack and alerted to the need to open an investigation, Strugar had reason to know, within the meaning of Article 7 (3) of the Statute, that his subordinates were about to commit crimes, but did nothing to prevent them. In view of the foregoing, the Appeals Chamber allows the Prosecution's first ground of appeal.

In its second ground of appeal, the Prosecution submits that the Trial Chamber erred by refusing to enter cumulative convictions in respect of Counts 4 (devastation not justified by military necessity), 5 (unlawful attacks on civilian objects) and 6 (destruction or wilful damage of cultural property). The Appeals Chamber notes that after finding that each of the offences theoretically contained materially distinct elements from each other, the Trial Chamber held that Counts 4 and 5 really added no materially distinct element, given the circumstances in which these crimes were committed. The Appeals Chamber considers that by applying the *Čelebići* test to the "particular circumstances" of the case, the Trial Chamber thus committed an error in law. Consequently, the Appeals Chamber revises the Judgement and enters a finding of guilt for Count 4 and 5. In view of the foregoing, the Appeals Chamber allows the Prosecution's second ground of appeal.

Finally, let us examine the grounds of appeal on sentence raised by both Parties: Strugar's fourth ground of appeal and the Prosecution's third ground of appeal. Strugar claims that the Trial Chamber erred by comparing his conviction with that of Miodrag Jokić, by failing to give the due weight to his apologies and by failing to attach sufficient weight to certain mitigating factors. The Prosecution submits that the Trial Chamber erred by comparing Mr Strugar's conviction with that of Miodrag Jokić and by considering that the apologies presented by Mr Strugar constituted a mitigating factor. As regards the comparison of Strugar's sentence with that imposed on Miodrag Jokić, the Appeals Chamber notes that, in accordance with its established jurisprudence, the comparison between the *Strugar* case and the *Jokić* case is merely one of the elements the Trial Chamber took into account in determining the sentence. The Appeals Chamber considers that the Trial Chamber was correct to attach limited weight to the sentence imposed on Jokić. In fact, for the Appeals Chamber, there are significant differences between the *Strugar* case and

the *Jokić* case. The Appeals Chamber thus finds that the Parties have failed to show that the Trial Chamber committed a discernable error by referring briefly to the *Jokić* case. As regards Strugar's statement at the end of his trial, the Appeals Chamber understands that the Trial Chamber considered that, in his statement, Strugar had expressed the pain that he felt for the victims and not the remorse he experienced. In fact, the Trial Chamber simply stated that it was convinced that the Accused was sincere, expressly noting that it did not accept what was said in his last sentence. The Appeals Chamber considers that the Trial Chamber's finding on this point was entirely reasonable, on the understanding that at no time did Strugar acknowledge the moral blameworthiness of his acts. Finally, the Appeals Chamber considers that Strugar failed to demonstrate that the Trial Chamber did not take into account all of the evidence brought before it when weighing these mitigating factors, or that it erred in its discretion with respect to the weight to attach to the mitigating factors. In light of the foregoing, the Appeals Chamber dismisses Strugar's fourth ground of appeal and the Prosecution's third ground of appeal.

This concludes the Appeals Chamber's examination of the grounds of appeal raised by the Parties, and I will now move to the analysis of how the Appeals Chamber's findings affect the sentence imposed by the Trial Chamber.

Firstly, the Appeals Chamber found that the Trial Chamber erred with regard to the scope of Strugar's criminal responsibility in failing to prevent the shelling of the Old Town of Dubrovnik. Although the Appeals Chamber in effect extended this responsibility from 7 o'clock in the morning to midnight on 6 December 1991, it considers, for the reasons set out in its Judgement, that the Trial Chamber took into account the damage caused during this additional period. The Appeals Chamber therefore considers that this error has no impact on Strugar's sentence.

Secondly, as regards the convictions entered for Counts 4 and 5, the Appeals Chamber agrees, as the Prosecution submits, that these convictions are based on the same criminal conduct and add nothing to gravity of the crimes committed by Strugar.

Finally, the Appeals Chamber notes that during the appeal hearing, the Defence submitted that Strugar's health had deteriorated considerably since the trial Judgement was rendered. The Appeals Chamber considers that it has the competence to factor in evidence in this regard, given the fact that it must determine the sentence in connection with the errors found in the trial Judgement. After examining the relevant evidence, the Appeals Chamber considers that Strugar's deteriorating health since the trial judgement was rendered must be considered as a mitigating factor. Consequently, the Appeals Chamber imposes on Strugar a new sentence of seven and a half years imprisonment.

Disposition

I will now read the Disposition of the Judgement rendered by the Appeals Chamber.

Mr Strugar, please stand up.

Here is the Disposition of the Judgement:

For the foregoing reasons, THE APPEALS CHAMBER,

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

NOTING the respective written submissions of the parties and the arguments they presented at the hearing on 23 April 2008;

SITTING in open session;

DISMISSES all the grounds of appeal submitted by Strugar, Judges Meron and Kwon dissenting with regard to the third ground of appeal concerning the failure to take measures for the events of 6 December 1991;

ALLOWS the Prosecution's first ground of appeal regarding the scope of Strugar's duty to prevent the shelling of the Old Town;

ALLOWS the Prosecution's second ground of appeal and ENTERS convictions under Counts 4 (devastation not justified by military necessity, a violation of the laws or customs of war, under Article 3 of the Statute) and 5 (unlawful attacks on civilian objects, a violation of the laws or customs of war, under Article 3 of the Statute) pursuant to Article 7(3) of the Statute;

DISMISSES the Prosecution's third ground of appeal;

REPLACES the sentence of 8 years of imprisonment imposed by the Trial Chamber by a sentence of seven and a half years, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS that, in accordance with Rules 101(C) and Rule 107 of the Rules, Strugar is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Judge Shahabuddeen appends a separate opinion.

Judges Meron and Kwon append a joint dissenting opinion

Mr Strugar, you may be seated.

Mr Registrar, kindly hand out copies of the Judgement to the Parties.

Before concluding, I would take this brief opportunity to thank all of those who have contributed to the efficient conduct of this case and thank them for their constructive efforts.

These proceedings are adjourned.
