**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-94-2-A

Date: 4 February 2005

Original: English

**IN THE APPEALS CHAMBER**

**Before:** **Judge Theodor Meron, Presiding**
**Judge Fausto Pocar**
**Judge Mohamed Shahabuddeen**
**Judge Mehmet Güney**
**Judge Inés Mónica Weinberg de Roca**

**Registrar:** **Mr. Hans Holthuis**

**Judgement of:** **4 February 2005**

**PROSECUTOR**

**v.**

**DRAGAN NIKOLIĆ**

# JUDGEMENT ON SENTENCING APPEAL

**The Office of the Prosecutor:**

Mr. Mark McKeon
Ms. Susan Lamb
Mr. Steffen Wirth

**Counsel for the Accused:**

Mr. Howard Morrison QC
Ms. Tanja Radosavljević

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# I. INTRODUCTION

1. The Appeals Chamber of the 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 (hereinafter "International Tribunal") is seised of an appeal from the Judgement rendered by Trial Chamber II on 18 December 2003 in the case of *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S (hereinafter "Sentencing Judgement").

2. The events giving rise to this appeal took place in the Sušica Camp near the town of Vlasenica, in the Municipality of the same name, eastern Bosnia and Herzegovina. This camp was established by Serb forces in June 1992 and served as the main detention facility in the Vlasenica area. Between late May and October 1992, as many as 8,000 Muslims or other non-Serbs from Vlasenica and the surrounding villages were detained there. The Appellant, Dragan Nikolić, was a commander of the Sušica Camp from at least early June 1992 until about 30 September 1992.

3. The Trial Chamber convicted Dragan Nikolić on the basis of a Confidential Joint Plea Agreement Submission (hereinafter "Plea Agreement") filed by the parties on 2 September 2003 and accepted by the Trial Chamber during the hearing of 4 September 2003 (hereinafter "Plea Hearing").[1] The factual basis of the Plea Agreement was the one contained in the Third Amended Indictment (hereinafter "Indictment")[2] to which Dragan Nikolić pleaded guilty at the Plea Hearing.[3] The Trial Chamber entered a finding of guilt to Counts 1 through 4 of the Indictment.[4] The Sentencing Hearing commenced on 3 November 2003 and concluded on 6 November 2003.

4. The Trial Chamber entered a single conviction against Dragan Nikolić for Count 1 of the Indictment (Persecutions as a Crime against Humanity) incorporating Count 2 (Murder as a Crime against Humanity), Count 3 (Rape as a Crime against Humanity), and Count 4 (Torture as a Crime against Humanity).[5] It sentenced Dragan Nikolić to 23 years of imprisonment.

5. The Appellant filed his Notice of Appeal of the Sentencing Judgement on 16 January 2004[6] and filed his Appellant's Brief on 30 June 2004[7]. The Prosecution filed its Respondent's Brief on 9

[1] Plea Hearing, T. 176.
[2] The modifications to the Third Amended Indictment forming the factual basis of the Plea Agreement were accepted by the Trial Chamber during the Plea Hearing (T. 184).
[3] Plea Hearing, T. 186, 191, 192, 195-196.
[4] *Ibid*., T. 196.
[5] The Appeals Chamber interprets the Appellant's conviction as also including convictions for murder, rape, and torture as crimes against humanity. See *Kordić* Appeal Judgement, paras 1039-1043.
[6] Notice of Appeal under Rule 108, 16 January 2004 (hereinafter "Notice of Appeal").
[7] Appellant's Brief in Support of Appeal against Sentence, 30 June 2004 (hereinafter "Appellant's Brief").

August 2004[8] and the Appellant filed his Brief in Reply on 25 August 2004[9]. The hearing on appeal (hereinafter "Appeal Hearing") took place on 29 November 2004.

[8] Prosecution Respondent's Brief (hereinafter "Respondent's Brief"), 9 August 2004.
[9] Appellant's Brief in Reply to the Prosecution Respondent's Brief (hereinafter "Brief in Reply"), 25 August 2004.

## II. STANDARD OF REVIEW

6. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules of Procedure and Evidence (hereinafter "Rules"). Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber to take into account in sentencing:

> Article 24 (Penalties)
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.
>
> Rule 101 (Penalties)
>
> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
>
> (i) any aggravating circumstances;
>
> (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
>
> (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
>
> (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
>
> (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

7. Those general guidelines amount to an obligation on the Trial Chambers to take into account the following factors in sentencing: the gravity of the offence and the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.[10]

[10] *Čelebići* Appeal Judgement, para. 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv).

8. Sentencing appeals, as with all appeals to the Appeals Chamber from a judgement of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*. This is clear from the terms of Article 25 of the Statute.[11] 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. The standards to be applied in both cases are well established in the jurisprudence of the International Tribunal[12] and the International Criminal Tribunal for Rwanda (ICTR).[13]

9. Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the individual circumstances of the accused and the gravity of the crime.[14] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion.[15] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing a sentence as it did.[16] A Trial Chamber's decision may therefore be disturbed on appeal if the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account.[17]

[11] *Mucić et al.* Judgement on Sentence Appeal, para. 11. See also, *Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203.
[12] See *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, para. 434.
[13] See *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.
[14] *Čelebići* Appeal Judgement, para. 717.
[15] *Tadić* Judgement in Sentencing Appeals, para. 22. See also *Blaskić* Appeal Jugdement, para. 680.
[16] *Čelebići* Appeal Judgement, para. 725.
[17] *Ibid*., para. 780.

## III. FIRST GROUND OF APPEAL: THE TRIAL CHAMBER SET AN EXCESSIVELY HIGH STARTING POINT FOR IMPRISONMENT

10. The Appellant submits that the Trial Chamber set an excessively high starting point for imprisonment and by doing so both erred as to the facts and as to the law when it concluded, at paragraph 214 of the Sentencing Judgement, that "[…] taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life."

11. The Appellant contends that the sentence rendered by the Trial Chamber was excessive in comparison with other sentences rendered by the ICTY and the ICTR, and undertakes a comparative review of those practices.[18] He further contends that the Trial Chamber has equated his "offences and the position in which he was placed at the time to that of the likes of the ICTR Defendants", and by doing so violated the principle of proportionality.[19] In response, the Prosecution submits that a starting point of life imprisonment was not inappropriate under the circumstances of the case and that the Trial Chamber was not obliged to undertake a comparison of sentencing outcomes.[20] It concludes that the Appellant failed to show that the Trial Chamber erred by not imposing the same sentence as other differently and similarly positioned accused.[21] The Appellant, in its Brief in Reply, asserts that while there may not be an obligation to conduct a comparative review of cases, doing so is still one method by which one may evaluate whether or not the Trial Chamber erroneously exercised its discretion to impose a sentence.[22]

12. In support of this first ground of appeal, the Appellant only develops arguments to the effect that some valid comparisons could be made between cases decided before the ICTY and the ICTR and the instant case. While the heading used by the Appellant with regard to this ground of appeal focuses on the alleged erroneous starting point for imprisonment, the Appeals Chamber notes that the wording of paragraph 214 of the Sentencing Judgement excludes the view that the Trial Chamber considered life imprisonment as a "starting point". The Trial Chamber actually determined that no other punishment could be imposed after having considered the gravity of the

[18] Appellant's Brief, paras 32-117. At the Appeal Hearing, Counsel for the Appellant further relied, in addition to the cases referred to in the Appellant's Brief, on the *Banović* Sentencing Judgement, as a further consideration in support of the "excessively high starting point and the commensurate nature of other sentences" (AT 15-16).
[19] Appellant's Brief, para. 117.
[20] Respondent's Brief, para. 25. At the Appeal Hearing, the Prosecution reiterated that "the crimes for which the Appellant was sentenced are self-evidently those for which a life sentence would have been appropriate" (AT 35).
[21] Respondent's Brief, para. 36.

crimes and all the accepted aggravating circumstances. The Appellant is cognisant of that and indeed submits that the Trial Chamber's consideration of the aggravating factors played a significant role in the Trial Chamber's conclusion.[23] He addresses the alleged errors of fact and law with regard to the Trial Chamber's assessment of the aggravating factors in his second ground of appeal. The Appeals Chamber will accordingly address the Appellant's arguments with regard to those alleged errors in section IV of this Judgement.

### A. Previous case-law

13. The issue as to whether assistance can be provided by reference to sentences in previous cases has already been dealt with by the Appeals Chamber in several cases.

14. In the *Furundžija* Appeal Judgement, the Appellant contended that his sentence should have been reduced to a length of time consistent with the emerging penal regime of the International Tribunal. The Appeals Chamber held that it was at the time "premature to speak of an emerging penal regime"[24] and concluded that it was "inappropriate to establish a definitive list of sentencing guidelines for future reference".[25]

15. Further, in the *Čelebići* Appeal Judgement, the Prosecution submitted that the Appeals Chamber should determine "basic sentencing principles which should be applied to Trial Chambers."[26] The Appeals Chamber found that the "[t]he benefits of such a definitive list are in any event questionable" and that both the Statute (Article 24) and the Rules (Rule 101) already contain general guidelines for a Trial Chamber to take into account in sentencing: aggravating and mitigating circumstances (including substantial co-operation with the Prosecution), gravity of the offence, individual circumstances of the convicted person, and the general practice regarding prison sentence in the courts of the former Yugoslavia".[27] It also found that Trial Chambers exercise a

[22] Brief in Reply, para. 4.
[23] Appellant's Brief, para. 33.
[24] *Furundžija* Appeal Judgement, para. 237 (footnote omitted).
[25] *Ibid*., para. 238. In the same Appeal Judgement, the Appeals Chamber, answering arguments made by the parties so as to classify the crimes listed in the Statute, confirmed its previous finding in the *Tadić* Judgement in Sentencing Appeals that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime" and that "the level in any particular case [is] fixed by reference to the circumstances of the case" (*Furundžija* Appeal Judgement, para. 242-243, referring to paragraph 69 of the *Tadić* Judgement in Sentencing Appeals). It also considered that using the "loss of life" as a key element would be "too rigid and mechanistic" (para. 246) and disagreed with "the imposition of a restriction on sentencing which does not have any basis in the Statute or the Rules" (para. 248). The Appeals Chamber rather adhered to its previous finding in the *Aleksovski* Appeal Judgement, in which it endorsed the finding of the Trial Chamber at paragraph 852 of the *Kupreškic et al.* Trial Judgement: "The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime" (*Furundžija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182) and noted in that respect that "an individual convicted of a war crime could be sentenced to imprisonment for a term up to and including the remainder of his life, depending on the circumstances" (para. 250).
[26] *Čelebići* Appeal Judgement, para. 715.
[27] *Ibid*., para. 716.

considerable amount of discretion in determining an appropriate sentence "largely because of the overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime."[28] While both parties urged the Appeals Chamber to compare their case with other cases that had been the object of final consideration, the Appeals Chamber held the following:

> [A]s a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.[29]

In the same case, the Appeals Chamber decided to apply the criteria set out at paragraph 250 of the *Furundžija* Appeal Judgement, namely, that "[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances […]."[30] It nevertheless held that when a range or pattern of sentences has emerged, a Trial Chamber "would be obliged to *consider* that range or pattern of sentences, without being *bound* by it".[31]

16. In the *Jelisić* case, the Appeals Chamber recognised that a sentence "may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences."[32] It confirmed, however, that similar cases do not provide "a legally binding tariff of sentence but a pattern which emerges from individual cases" and that "[w]here there is such a disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and the Rules."[33]

17. In the *Krstić* Appeal Judgement, the Appeals Chamber confirmed that Trial Chambers are not bound by the sentencing practice of the International Tribunal[34] and that such practice is only one of several factors Trial Chambers must consider in determining a sentence.[35] The Appeals Chamber held that the decision of Trial Chambers to consider this factor in its determination of the sentence "is a discretionary one, turning on the circumstances of the particular case" and cited its previous statement at paragraph 444 of the *Kupreskić* Appeal Judgement that "[w]hat is important is

[28] *Ibid*., para. 717.
[29] *Ibid*., para. 719.
[30] *Ibid*., para. 720 (emphasis added).
[31] *Ibid*., para. 757 (emphasis in the original).
[32] *Jelisić* Appeal Judgement, para. 96.
[33] *Ibid.* (emphasis added).
[34] *Krstić* Appeal Judgement, para. 247.
[35] *Ibid*., para. 248.

that due regard is given to the relevant provision of the Statute and the Rules, [the] jurisprudence of the Tribunal and the ICTR, and the circumstances of the case".[36]

## B. Discussion

18. The Appeals Chamber reiterates that the inherent gravity of a crime must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime.[37] As correctly noted by the Trial Chamber at paragraph 144 of the Sentencing Judgement, the gravity of the offence may be regarded as "the litmus test" in the imposition of an appropriate sentence.[38]

19. The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only "very limited"[39] but is also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances,[40] when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime,[41] with due regard to the entirety of the case, as the triers of fact. The Appeals Chamber recalls that it does not operate as a second Trial Chamber conducting a trial *de novo*,[42] and that it will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion.[43]

20. In the present case, the Appellant merely submits that his review of previous sentences reveals a "clear and unambiguous" pattern of sentencing and submits that the Appeals Chamber should determine whether his case "so obviously falls without that pattern such that one may properly conclude that there has in fact been an error in the exercise of the Trial Chamber's discretion".[44] The Appellant did not attempt to compare his case with one or more cases comprising

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[36] *Ibid*., para. 248.
[37] *Blaskić* Appeal Judgement, para. 680; *Krstić* Appeal Judgement, para. 241; *Jelisić* Appeal Judgement, para. 101; *Čelebići* Appeal Judgement, para. 731; *Aleksovski* Appeal Judgement, para. 182.
[38] Quoting *Čelebići* Trial Judgement, para. 1225; *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101.
[39] *Čelebići* Appeal Judgement, para. 821.
[40] *Ibid*., para. 720.
[41] *Ibid*., para. 717.
[42] *Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203.
[43] *Tadić* Judgement in Sentencing Appeals, para. 22. See also *Blaskić* Appeal Jugdement, para. 680. See *supra* para. 9.
[44] Appellant's Brief, para. 38.

the same offence and substantially similar circumstances.[45] In any event, notwithstanding the fact that the Trial Chamber was not bound by previous sentencing practices, its finding at paragraph 174 of the Sentencing Judgement shows that it did consider such practices. It found that "[t]he scale of sentences has been very broad as each case has its own merits and deserves to be considered individually".[46] A review of the Appellant's arguments does not show that the Trial Chamber committed a discernible error in the exercise of its sentencing discretion by wrongly assessing the particular circumstances of his case.

21. With regard to the Appellant's submission that the Trial Chamber violated the principle of proportionality, the Appellant's argument is that the Trial Chamber did so by equating his offences and the position in which he was placed "to that of the likes of the ICTR Defendants".[47] The Appellant referred to paragraph 126 of the Sentencing Judgement, whereby the Trial Chamber indeed made clear that it would adhere to this principle. The Appeals Chamber finds that the principle of proportionality, in the Trial Chamber's consideration, means that the punishment must be "proportionate to the moral blameworthiness of the offender"[48] and requires that "other considerations such as deterrence and societal condemnation of the acts of the offender" be taken into account.[49] The principle of proportionality referred to by the Trial Chamber by no means encompasses proportionality between one's sentence and the sentence of other accused. As correctly noted by the Trial Chamber, the principle of proportionality implies that "[a] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender".[50] It appears that the Appellant misunderstands what the principle of proportionality encompasses.[51]

22. For the foregoing reasons, the Appellant's first ground of appeal is dismissed.

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[45] The Appellant admits that "it is not always possible to draw exact parallels between one case and another" (Appellant's Brief, para. 37). At paragraph 6 of his Brief in Reply, he recognises that comparing his case with others "may be an exercise of limited value" and further clarifies that his purpose was merely to take the totality of the ICTY and ICTR cases as a "legitimate exercise to see where [his] case might fit into that totality". The *Banović* case the Appellant further referred to at the Appeal Hearing is of no further assistance to the Appeals Chamber as the circumstances of this case and that of the Appellant contain too many differences pertaining *inter alia*, as correctly pointed out by the Prosecution, to the "obvious features and aggravation with regard to the sadism and gratuitousness of the Appellant's conduct" and to the "extremely low rank" of Predrag Banović in the hierarchical structure of the camp, as compared to the position of a commander of Dragan Nikolić (AT 38).

[46] Sentencing Judgement, para. 174.

[47] Appellant's Brief, para. 117.

[48] Canadian Supreme Court decision in *R. v. Martineau* (*R. v. Martineau*, [1990] 2 S.C.R. 633, p. 645), cited at footnote 161 of the Sentencing Judgement.

[49] Canadian Supreme Court decision in *R. v. Arkell* (*R. v. Arkell*, [1990] 2 S.C.R. 695, p. 704), cited at footnote 161 of the Sentencing Judgement.

[50] Sentencing Judgement, para. 144, referring to para. 414 of the *Akayesu* Appeal Judgement.

[51] Asked by the Presiding Judge, at the Appeal Hearing, whether his reference to the principle of proportionality involved proportionality with sentences in other cases and proportionality between the circumstances of the crimes and the sentence rendered, Counsel for the Appellant replied that the principle encompasses both. However, he made no submission in respect of the latter.

# IV. SECOND GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN ITS ASSESSMENT OF THE AGGRAVATING FACTORS

23. The Appellant submits that the Trial Chamber erred in its assessment of the aggravating factors. He raises three arguments related to the Trial Chamber's findings that (1) he "apparently enjoyed his criminal acts"; (2) his conduct amounted to "the highest level of torture, which has all of the making of *de facto* attempted murder"; and (3) all the aggravating circumstances were "accepted". The Appeals Chamber will examine them in turn.

## A. Enjoyment the Appellant derived from his criminal acts

24. The Appellant alleges that the Trial Chamber erroneously took into account as an aggravating factor at paragraph 213(i) of the Sentencing Judgement that he "apparently enjoyed his criminal acts", a fact, he argues, that was not supported by the evidence.[52] The Prosecution responds that the Trial Chamber neither acted unreasonably nor was wholly erroneous in this determination.[53] In reply, the Appellant submits that the Prosecution, in its assessment of the facts, went beyond those actually taken into account by the Trial Chamber.[54]

25. Paragraph 192 of the Sentencing Judgement reads as follows:

> One of the most chilling aspects of the Accused's behaviour was the enjoyment he derived from his acts. Witness SU-032 stated that the Accused "enjoyed himself while he was beating people. I know firsthand that he enjoyed beating Arnaut Fikret. He used to beat him five times a day."[55] When two of the victims passed out due to a beating, the Accused and other guards had buckets of water thrown on them to revive them.[56] When detainees who were being beaten begged to be shot, the Accused would reply: *"A bullet is too expensive to be spent on a Muslim*."[57] (emphasis in the original).

26. With regard to the testimony of Witness SU-202,[58] the Appellant contends that the Prosecutor did not elicit any evidence showing that the throwing of water demonstrated an "enjoyment" of his criminal acts and that the Prosecutor did not seek any explanation as to why the

[52] Notice of Appeal, para. 4.
[53] Respondent's Brief, paras 39-44.
[54] Brief in Reply, para. 8.
[55] Witness SU-032, T. 279.
[56] Witness SU-202, T. 270.
[57] Witness SU-032, T. 279.
[58] Witness SU-202, T. 270, lines 10-17: "Q. Who was, so far as you saw as an eyewitness, responsible for the killing of Durmo Handzic and Asim Zildzic? A. Dragan was there, and Tesic -- Goce, nicknamed Goce. Then there was Djuro; I don't know his real name. I know they called him Djuro. He worked at the Finale company. There were some other soldiers there. That's where they beat them, and then we carried them from there into the hangar. They were wet because they were throwing water on them, and they had all passed out."

water was thrown at the victims.[59] He submits that in the absence of such explanation the Trial Chamber could not conclude, either expressly or by implication, that he enjoyed his acts.[60] With regard to the testimony of Witness SU-032,[61] the Appellant contends that it does not demonstrate that he enjoyed the physical act of beating, and that the question was in any case directed at whether he enjoyed the "power" he had over the detainees, which is a different issue.[62] The Appellant considers that the testimony of Witness SU-032 is "the only suggestion in the evidence as a whole of any element of enjoyment" and is a "wholly insufficient and unreasonable basis" to characterise his conduct as "especially aggravating".[63]

27. The Appeals Chamber emphasises that while the Statute and the Rules do oblige Trial Chambers to take into account both the aggravating and the mitigating circumstances of a case, the determination of what can constitute an aggravating or a mitigating factor and what weight has to be attached to those is within their discretion.[64] A Trial Chamber's decision may therefore only be disturbed on appeal if the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account.[65]

28. The apparent enjoyment an accused may derive from his criminal act has already been considered as an aggravating factor by the International Tribunal. In the *Čelebići* Trial Judgement, the Trial Chamber found the following:

> Hazim Delić is also guilty of inhuman and cruel treatment through his use of an electrical shock device on detainees. The shocks emitted by this device caused pain, burns, convulsions and scaring and frightened the victims and other prisoners. The most disturbing, serious and thus, an aggravating aspect of these acts, is that Mr. Delić apparently enjoyed using this device upon his helpless victims. He treated the device like a toy. He found its use funny and laughed when his victims begged him to stop. There is little this Trial Chamber can add by way of comment to this attitude, as its depravity speaks for itself.[66]

29. Contrary to the Appellant's submission, there was clear evidence before the Trial Chamber that he did enjoy exercising his power over detainees through the depraved acts already described. Accordingly, The Appeals Chamber does not agree with the Appellant that the testimony of

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[59] Appellant's Brief, para. 120.
[60] *Ibid*., para. 121.
[61] Witness SU-032, T. 279, lines 10-20: "Q. Did it appear to you that Dragan Nikolić enjoyed the power that he had over the detainees? A. He did. He enjoyed himself while he was beating people. I know firsthand that he enjoyed beating Arnaut Fikret. He used to beat him up to five times a day. We were all watching, the children and grown-ups saw him, and we thought the same might happen to us. Q. Sometime did detainees ask or beg for him to stop beating them – him? A. Yes, they did. They implored, and they begged, 'Shoot me. Don't let me suffer any more', and he used to reply that 'A bullet is too expensive to be spent on a Muslim.'"
[62] Appellant's Brief, para. 122.
[63] *Ibid*., para. 123.
[64] *Čelebići* Appeal Judgement, paras 716-717.
[65] *Ibid*., para. 780.
[66] *Čelebići* Trial Judgement, para. 1264 (emphasis added).

Witness SU-032 is a "wholly insufficient and unreasonable basis" to characterise his conduct as "especially aggravating".[67] It notes that the Trial Chamber's conclusion at paragraph 192 of the Sentencing Judgement that the Appellant derived enjoyment from his acts is based on the testimony of Witness SU-032 that he "enjoyed himself while he was beating people".[68] As noted by the Appellant, the evidence in question was given by Witness SU-032 in response to a question from the Prosecution as to whether it appeared to the witness that Dragan Nikolić enjoyed the power he had over the detainees. The Appeals Chamber notes that the witness is explicit as to what in the attitude and the words of the Appellant led him to such a conclusion. First, the Appellant beat one of the detainees, Arnaud Fikret, up to five times a day; second, the beating took place in the sight of the witness and other detainees who thought the same might happen to them; and third, the cynicism of the Appellant's response when detainees implored him to put an end to their suffering and kill them: "A bullet is too expensive to be spent on a Muslim".

30. The Trial Chamber took into account the apparent enjoyment the Appellant derived from his criminal acts in considering the depravity of the crime, and more specifically within the conditions in the camp.[69] The Appeals Chamber finds that the enjoyment the Appellant derived from his criminal acts was part of a more general context pertaining to that depravity. Paragraph 213(i) of the Sentencing Judgement reads:

> The acts of the Accused were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts. They expressed his systematic sadism. The Accused apparently enjoyed his criminal acts.

Reliance by the Trial Chamber upon the testimony of Witness SU-032 would by itself suffice for the Trial Chamber to come to the conclusion it reached.[70] Even though the other evidence relied upon by the Trial Chamber at paragraph 192 of the Sentencing Judgement do not relate specifically to the enjoyment the Appellant derived from his acts, it is nevertheless illustrative of the context of depravity within which the crimes took place. The Appeals Chamber finds that the Trial Chamber did not commit any discernible error in concluding that the Appellant "apparently enjoyed his criminal acts". Therefore, this part of the Appellant's ground of appeal is dismissed.

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[67] Appellant's Brief, para. 123.
[68] *Ibid.*
[69] Sentencing Judgement, paras 186-199.
[70] The case-law of both the ICTY and the ICTR clearly shows that the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. See *Tadić* Appeal Judgement, para. 65. See also *Aleksovski* Appeal Judgement, para. 62; *Čelebiči* Appeal Judgement, paras 492 and 506; *Kayishema and Ruzindana* Appeal Judgement, para. 154; *Musema* Appeal Judgement, para. 36; *Rutaganda* Appeal Judgement, para. 29; *Niyitegeka* Appeal Judgement, para. 92.

## B. Beatings as amounting to the highest level of torture, with "all of the making of *de facto* attempted murder"

31. The Appellant alleges next that the Trial Chamber erred in law or, in the alternative, made an error of fact, when it found, at paragraph 213(v) of the Sentencing Judgement, that due to the seriousness and particular viciousness of the beatings underlying the charge of torture (Count 4 of the Indictment), his conduct amounted to "the highest level of torture, which has all of the making of *de facto* attempted murder".[71] The Prosecution responds that the Appellant misunderstood the "import" of the Trial Chamber's finding, which in its view amounted to a factual observation concerning the "quality and viciousness" of the beatings listed in the Indictment.[72] In reply, the Appellant reiterates that it was not merely a factual observation but rather a deliberate assessment of the acts of torture as attempted murder.[73]

32. The Trial Chamber held at paragraph 213(v) of the Sentencing Judgement that:

> "(v) Beatings were placed in the Indictment under the charge of torture. Due to the seriousness and particular viciousness of the beatings, the Trial Chamber considers this conduct as being at the highest level of torture, which has all of the making of *de facto* attempted murder."

While accepting that the offence of torture is a serious offence in itself, the Appellant contends that it is not as serious as attempting to kill and that the Trial Chamber erred in law by equating those offences.[74] Further, or in the alternative, he alleges that there was no factual basis for such a finding.[75]

### 1. Alleged error of law

33. The Appellant contends that the offences of torture and murder have a different *mens rea* and that the Trial Chamber erred in law by equating those.[76] Relying on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[77] he

[71] Appellant's Brief, paras 118-137.
[72] Respondent's Brief, paras 45-47. The Prosecution did not address the Appellant's alternative argument that there was no factual basis for a finding that his conduct had "all of the making of *de facto* attempted murder" as it considered that the Appellant did not make any submission in that regard (Respondent's Brief, para. 38).
[73] Brief in Reply, para. 11.
[74] Appellant's Brief, para. 125.
[75] *Ibid.*
[76] Appellant's Brief, para. 134.
[77] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, A/RES/39/46. Article 1(1) reads: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

argues that while attempted murder involves the deprivation of life, torture is aimed at obtaining information or a confession, which purpose would be defeated should the victim die.[78] He notes that the Prosecution, in the part of its Sentencing Brief describing the facts related to the charge of torture, did not seek to characterise those as amounting to attempted murder.[79] The Appellant also contends that the Trial Chamber fell into a further error of law by failing to put him and his Defence on notice that it intended to elevate the offence of torture to the level of "attempted murder".[80]

34. The Appeals Chamber notes that the Trial Chamber at paragraph 213(v) of the Sentencing Judgement first states that the beatings were placed in the Indictment "under the charge of torture"; but it then finds that it considers the beatings as being at the highest level of torture with all of the making of "*de facto*" attempted murder "due to [their] seriousness and particular viciousness" (emphasis added). Further, this paragraph is clearly under the section of the Sentencing Judgement dealing with the aggravating circumstances (Section VIII (A)) and not under the section dealing with the facts emanating from the Plea Agreement (Section V (A)).

35. As correctly noted by the Appellant, the Prosecution's Sentencing Brief does not contain any indication that the facts underlying the charge of torture were to be characterised as attempted murder,[81] and the Trial Chamber made no mention at the Sentencing Hearing that it would equate the offences of torture and attempted murder.[82] Further, and even more importantly, the Trial Chamber clearly stated throughout the Sentencing Judgement that it was limited to what was contained in or annexed to the plea agreement and that it could not go beyond those facts and their legal assessment.[83] The Trial Chamber specifically addressed the charge of torture separately from the charge of murder, and nothing in the Trial Chamber's assessment of the facts underlying the crime of torture indicates that it considered the underlying acts as amounting to acts of attempted murder. To the contrary, in considering the crime of torture, the Trial Chamber focused on the reasons why those acts were inflicted: obtaining information and, in the case of Arnaut Fikret, punishment.[84] This shows not only that the Trial Chamber did not attempt to equate the offences but

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acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[78] Appellant's Brief, para. 130.

[79] *Ibid*., para. 131.

[80] *Ibid*., para. 132.

[81] Prosecution's Sentencing Brief, paras 31-36. In those paragraphs, the Prosecution gives reasons for the beatings. See *inter alia* para. 32: "[…] because Arnaut [Fikret] allegedly organised Bosnian Muslim civilians in Vlasenica to resist the Serb Forces"; para. 33, beatings of Sead Ambesković and Hajrudin Osmanović: "[…] claiming that they [sic] hidden weapons and demanding to know the names of other Muslims with weapons." No mention is indeed made of evidence indicating attempts to kill.

[82] Appellant's Brief, para. 132.

[83] Sentencing Judgement, para. 48. See also paras 64 and 106.

[84] *Ibid*., paras 91-104. See *inter alia* paras 91, 93 (torture of Arnaut Fikret: "Fikret Arnaut was beaten both inside and outside the hangar and several times in a corner of the hangar known as the 'punishment' corner"); "Throughout this beating Dragan Nikolić accused Fikret Arnaut of organising Muslims."); para. 96 (torture of Sead Ambesković and

also that the Trial Chamber was aware of the specific *mens rea* required for the crime of torture.[85] The argument of the Appellant in that respect therefore fails.

36. In light of the above, the Appeals Chamber finds that the Appellant has not shown that the Trial Chamber equated the offence of torture with the offence of attempted murder; rather, the Trial Chamber only intended to reflect the gravity of the facts underlying the count of torture. Having found that, the Appeals Chamber must still determine whether the Trial Chamber erred in assessing the gravity of the offence of torture by taking into account what it ought not to have in the weighing process.

### 2. Alleged errors of fact

37. The Appellant submits that the finding of the Trial Chamber at paragraph 213(v) of the Sentencing Judgement was not supported by any evidence, in the form either of agreed facts or of evidence presented at the Sentencing Hearing.[86] He refers to paragraphs 91 to 104 of the Sentencing Judgement, in which the Trial Chamber considers the facts emanating from the Plea Agreement with respect to the charge of torture (Count 4), and asserts that the description of the acts surrounding this crime does not support the finding of the Appeals Chamber that he intended to kill the victims.[87]

38. The analysis of the section of the Sentencing Judgement dealing with the totality of the evidence relating to the charge of torture, as previously noted and as the Appellant correctly submitted, does not give any indication that the Trial Chamber found that he committed those crimes with the intention to kill, but shows that the purpose was to obtain information from the victims or to punish. Therefore, it is difficult to understand why the Trial Chamber found that the circumstances surrounding these acts of torture had "all of the making" of "*de facto*" attempted murder.

39. It is conceivable that death could result from the acts of torture committed by an accused only having the intention to torture the victim. It is also possible that an accused, with the original intention to torture a victim for purposes such as obtaining information or punishing, forms the intention to kill either directly or with the awareness of the substantial likelihood that the victim

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Hajrudin Osmanović: "The Accused asked them where their weapons were and to identify others who had weapons."; para. 101 (torture of Suad Mahmutović: "[The Accused] tried to force Suad Mahmutović to admit that his neighbour had a weapon."), (emphasis added).

[85] The International Tribunal has recognized that an intentional act or omission aimed at obtaining information or punishing meets the test for the required *mens rea* of the crime of torture (*Kunarac* Appeal Judgement, paras 144-156, endorsing the definition in *Kunarac* Trial Judgement, para. 497; *Furundžija* Appeal Judgement, para. 111).

[86] Appellant's Brief, para. 134.

[87] *Ibid.*

would be killed as a result of the acts of torture inflicted on the victim,[88] but that the victim is not in the end killed. Nevertheless it must be stressed, that attempted murder is not a crime within the International Tribunal's jurisdiction and cannot therefore be prosecuted as such.

40. In light of the above, the Appeals Chamber considers that, while the Trial Chamber erroneously qualified the beatings underlying the crime of torture as having "all of the making of *de facto* attempted murder", it was reasonable to conclude, on the basis of the evidence before it, that "due to [their] seriousness and particular viciousness", the beatings underlying the crime of torture amounted to the "highest level of torture" as an aggravating factor. The relief sought by the Appellant was that the conclusion of the Trial Chamber at paragraph 213(v) "should not have formed part of the aggravating factors and should be excised [and that] this excision goes to moderate the nature as a whole of the aggravating factors in the case."[89] Having determined that the Trial Chamber correctly concluded that the gravity of the beatings was to be taken into account as an aggravating factor in assessing the Appellant's criminality for acts of torture, the Appeals Chamber does not consider that the excision of the Trial Chamber's erroneous characterisation of the beatings as having all of the making of "*de facto* attempted murder" moderates the nature as a whole of the aggravating factors. Therefore, this part of the Appellant's ground of appeal is dismissed.

### C. Accepted aggravating circumstances

41. The Appellant further argues that the Trial Chamber's finding at paragraph 214 of the Sentencing Judgement, in which it referred to "all the accepted aggravating circumstances", implies that the Trial Chamber considered that all parties agreed as to what was to be considered as aggravating factors capable of enhancing the seriousness of the offences.[90] The Appellant bases his argument solely on the semantics of the Trial Chamber's finding and does not give any indication as to whether the Trial Chamber implied that the parties had agreed on those factors or whether it instead referred to the factors it itself accepted as aggravating. In fact, the wording of paragraph 213 of the Sentencing Judgement shows that the aggravating factors mentioned in that paragraph were those the Trial Chamber itself accepted after its evaluation of the circumstances of the case:

> In conclusion, evaluating the abovementioned circumstances, the Trial Chamber accepts the following factors as especially aggravating: […]. (emphasis added)

[88] *Cf. Blaskić* Appeal Judgement, paras 32-42 ; *Kordić* Appeal Judgement, para. 30.
[89] Appellant's Brief, para. 136.
[90] *Ibid*., para. 35.

Further, it should be noted that the Trial Chamber, when dealing with the aggravating circumstances, expressly noted that the Defence "made no submissions" in that respect[91] and, in any case, made no reference to any agreement between the parties as to the aggravating circumstances. As a result, this argument of the Appellant is dismissed.

[91] Sentencing Judgement, para. 178.

# V. THIRD GROUND OF APPEAL: THE TRIAL CHAMBER GAVE INSUFFICIENT WEIGHT TO THE MITIGATING FACTORS

42. The Appellant asserts that the Trial Chamber erred when it held at paragraph 135 that individual deterrence had "no relevance in this case".[92] He also asserts that the Trial Chamber, in assessing the mitigating factors, "gave insufficient weight to such factors as his guilty plea, his remorse, his character (in particular to matters revealed by the report of Dr. Nancy Grosselfinger) and his co-operation with the Prosecutor."[93] The Appellant contends that, as a result, the Trial Chamber imposed an excessive sentence.[94] The Appeals Chamber will address these arguments in turn, with the exception of the Appellant's argument pertaining to his character, for which he made no submission in his Appellant's Brief.

## A. Individual deterrence

43. The Appellant submits that it cannot be said that individual deterrence was not relevant to his case and that the Trial Chamber did not give any reason for its finding that it was not a relevant consideration.[95] He infers from this alleged lack of reasoning that the Trial Chamber was unable to justify its conclusion and that he was entitled to know why he could not benefit from the concept of individual deterrence.[96] The Prosecution concurs with the Appellant that the Trial Chamber did not give any reason for its finding that individual deterrence has no relevance[97] but submits that the Trial Chamber committed no error capable of resulting in a reduction of the sentence.[98] The Prosecution submits that individual deterrence is simply a general goal of sentencing and not a mitigating factor as such and that, therefore, the Trial Chamber was neither obliged to consider it in its determination of the sentence nor obliged expressly to set forth the basis for the conclusion it reached at paragraph 135 of the Sentencing Judgement.[99] In the alternative, the Prosecution submits that the Trial Chamber's finding with regard to individual deterrence can be supported by the evidence forming part of the trial record[100] and that in any event, should the Appeals Chamber find that the Trial Chamber erred in its finding, no detriment has been caused to the Appellant.[101] In his

[92] Sentencing Judgement, para. 178.
[93] Notice of Appeal, para. 9.
[94] Notice of Appeal, para. 11.
[95] Appellant's Brief, paras 138-139.
[96] *Ibid*., para. 139.
[97] Respondent's Brief, para. 51.
[98] *Ibid*., para. 50.
[99] *Ibid*., para. 52.
[100] *Ibid*., para. 53.
[101] *Ibid*., para. 54.

Brief in Reply, the Appellant reiterates that individual deterrence applies to his case and that the Trial Chamber should have given a proper basis for its finding.[102]

44. At paragraphs 134 and 135 of the Sentencing Judgement, the Trial Chamber held:

> 134. Individual and general deterrence has an important function in principle and serves as an important goal of sentencing.[103]
>
> 135. Individual deterrence refers to the specific effect of the sentence upon the accused which should be adequate to discourage him from re-offending once the sentence has been served and he has been released. The Trial Chamber finds, however, that individual deterrence has no relevance in this case.

45. The Appeals Chamber adheres to the definition of individual deterrence provided by the Trial Chamber.[104] The *rationale* behind individual deterrence is that the sentence should be adequate to discourage an accused from recidivism after the sentence has been served and he has been released. The *rationale* behind general deterrence is very similar: "the penalties imposed by the International Tribunal must […] have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so."[105]

46. The Appeals Chamber reiterates that the principle of deterrence is "a consideration that may legitimately be considered in sentencing"[106] but that, in any case, "this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal".[107] While it is undisputed that the element plays "an important role in the functioning of the Tribunal",[108] the Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.[109] By doing so, Trial Chambers contribute to the promotion of and respect for the rule of law and respond to the call from the international community to end impunity, while ensuring that the accused are punished solely on the basis of their wrongdoings and receive a fair trial.

47. The Appeals Chamber therefore does not see how the Trial Chamber erred in the exercise of its discretion in imposing the sentence in this case. The Trial Chamber did consider the principle of deterrence as a fundamental principle to take into consideration when imposing a sentence[110] and

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[102] Brief in Reply, paras 14-15.
[103] *Stakić* Trial Judgement, para. 900.
[104] This definition has also been adopted in the *Deronjić* Sentencing Judgement, para. 145.
[105] *Todorović* Sentencing Judgement, para. 30.
[106] *Tadić* Judgement in Sentencing Appeals, para. 48 (emphasis added).
[107] *Ibid*., cited with approval in the *Aleksovski* Appeal Judgement, para. 185.
[108] *Čelebići* Appeal Judgement, para. 800, citing with emphasis paragraph 72 of the *Tadić* Jurisdiction Decision, which reads: "In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, *thereby deterring future violations* and contributing to the re-establishment of peace and security in the region."
[109] *Čelebići* Appeal Judgement, para. 717.
[110] Sentencing Judgement, para. 132.

correctly understood the scope of individual deterrence.[111] The Appeals Chamber considers that the Trial Chamber, in finding that individual deterrence does not apply, could have briefly referred to the reasons why it does not, so as to inform the Appellant, but was under no obligation to do so. Furthermore, it seems that the Appellant misunderstood the effect of the principle of deterrence at sentencing. He alleges that he was entitled to "benefit" from individual deterrence and treats this argument under his ground of appeal related to the alleged error of the Trial Chamber in its consideration of the mitigating factors. As shown above, individual deterrence is not a mitigating factor; it instead is a sentencing factor which, when relevant, is considered in imposing a penalty to enhance, but not to reduce, a sentence. A finding of a Trial Chamber that individual deterrence does not apply cannot therefore prejudice an accused.

48. For the foregoing reasons, this part of the Appellant's ground of appeal is dismissed.

### B. Guilty plea

49. The Trial Chamber assessed the International Tribunal and the ICTR case law with respect to guilty pleas at paragraph 231 of the Sentencing Judgement, where it said:

> In the jurisprudence of the Tribunal and the ICTR, several reasons have been given for the mitigating effect of a guilty plea, such as the showing of remorse[112] and repentance,[113] the contribution to reconciliation[114] and establishing the truth,[115] the encouragement of other perpetrators to come forth,[116] and the fact that witnesses are relieved from giving evidence in court.[117] Furthermore, Trial Chambers took into account that a guilty plea saves the Tribunal the "effort of a lengthy investigation and trial",[118] and special importance was attached to the timing of the guilty plea.[119]

50. The Appellant contends that the Trial Chamber, in its consideration of the mitigating factors, focused on remorse and reconciliation and did not explicitly consider that his guilty plea: (1) avoided a lengthy trial and; (2) encouraged other perpetrators to come forth.[120] The Prosecution responds with regard to the first argument that, although the Trial Chamber did mention at paragraph 231 of the Sentencing Judgement that various Trial Chambers have taken into account the saving of the "effort of a lengthy investigation and trial", it appears that it "did not consider this factor to be of significant weight and did not specifically articulate the basis for not referring to

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[111] *Ibid*., para. 135.
[112] *Plavšić* Sentencing Judgement, para. 70.
[113] *Ruggiu* Judgement and Sentence, para. 55. See also *Jelisić* Trial Judgement, para. 127: "[A]lthough the Trial Chamber considered the accused's guilty plea out of principle, it must point out that the accused demonstrated no remorse before it for the crimes he committed."
[114] *Plavšić* Sentencing Judgement, para. 70; *Obrenović* Sentencing Judgement, para. 111.
[115] *Momir Nikolić* Sentencing Judgement, para. 149.
[116] *Erdemović* 1998 Sentencing Judgement, para. 16.
[117] *Momir Nikolić* Sentencing Judgement, para. 150; *Todorović* Sentencing Judgement, para. 80.
[118] *Erdemović* 1998 Sentencing Judgement, para. 16; *Todorović* Sentencing Judgement, para. 81.
[119] *Sikirica et al*. Sentencing Judgement, para. 150. In the *Simić* Sentencing Judgement, "some credit" was given for the guilty plea despite its lateness, para. 87.

it".[121] With regard to the second argument of the Appellant, the Prosecution submits that the Appellant has put forward no compelling argument as to why the Trial Chamber erred in its analysis.[122]

### 1. Avoidance of a lengthy trial

51. The avoidance of a lengthy trial has been commended, as correctly noted by the Trial Chamber, with the first admission of guilt before the International Tribunal, in the *Erdemović* Sentencing Judgement:

> [T]his voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.[123]

Judge Cassese, in his Separate and Dissenting Opinion to the *Erdemović* Appeal Judgement, addressed in detail some of the benefits of a guilty plea in terms of the International Tribunal's resources:

> It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties - it bears stressing - are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.[124]

Following *Erdemović*, other Trial Chambers have also noted that a guilty plea before the commencement of the trial contributes to saving International Tribunal resources.[125] Nevertheless, the Appeals Chamber emphasises that it considers that the avoidance of a lengthy trial, while an element to take into account in sentencing, should not be given undue weight.

52. In the present case, the Appellant wrongly submits that the Trial Chamber did not explicitly consider that his guilty plea avoided a lengthy trial. The Appeals Chamber is of the view that the Trial Chamber did give due consideration to this factor when noting at paragraph 231 of the Sentencing Judgement that the avoidance of a lengthy trial can be considered as an element of the

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[120] Appellant's Brief, para. 141.
[121] Respondent's Brief, para. 58.
[122] *Ibid*., para. 63.
[123] *Erdemović* 1998 Sentencing Judgement, para. 16.
[124] Separate and Dissenting Opinion of Judge Cassese to the *Erdemović* Appeal Judgement, para. 8, cited with approval at para. 80 of the *Todorović* Sentencing Judgement.
[125] *Todorović* Sentencing Judgement, para. 81. See also *Sikirica* Sentencing Judgement, para. 149; *Plavšić* Sentencing Judgement, para. 73; *Banović* Sentencing Judgement, para. 68; *Jokić* Sentencing Judgement, para. 77.

mitigating effect of a guilty plea. Further, its analysis of the timing of his guilty plea shows that it considered this factor. The Trial Chamber took into account the particular circumstances of the case and noted that Dragan Nikolić pleaded guilty rather late, as he pleaded guilty "only after three years of detention and just prior to the hearing of the testimonies by six deposition witnesses",[126] but found that this "lateness" could nevertheless not be considered to his detriment, as accused persons are under no obligation to plead guilty.[127] It rather considered that this late change was to be regarded "as a consequence of a thorough analysis and reflection […] of his criminal conduct, which reveals his genuine awareness of his guilt and a desire to assume responsibility for his acts".[128] The Appellant has not shown that the Trial Chamber failed to consider that his guilty plea avoided a lengthy trial.

53. With regard to the Appellant's further argument, in his Brief in Reply, that the Trial Chamber failed to consider that his plea not only saved resources but also "spare[d] many witnesses the ordeal to give evidence"[129], the Appeals Chamber notes that the Appellant seems to have ignored the finding of the Trial Chamber at paragraph 234 of the Sentencing Judgement, which reads:

> Moreover, by pleading guilty prior to the commencement of the trial the Accused relieved the victims of the need to open old wounds.

The Appellant's argument in that regard is manifestly unfounded and is therefore dismissed.

54. In light of the above, the Appeals Chamber dismisses the argument of the Appellant that the avoidance of a lengthy trial following his plea of guilt formed no part or at least no significant part of the Trial Chamber's consideration of the mitigating circumstances.[130]

### 2. Encouragement of others to come forth

55. The Appellant submits that the Trial Chamber, at paragraph 249 of the Sentencing Judgement, in acknowledging that he "expressed the hope that all three parties to the conflict would be encouraged by his confession to assume their part of the responsibility for the terrible crimes", only considered one part of the concept of others being encouraged to come forth.[131] He submits

[126] Sentencing Judgement, para. 234 (emphasis added).
[127] At the Appeal Hearing, Counsel for the Appellant raised a further argument in support of the present ground of appeal, namely that the lateness of the Appellant's guilty plea was due to the fact that "[m]atters of law had to be aired" (AT 17-18). As the Trial Chamber did not consider that the lateness of the Appellant's guilty plea was to his detriment and as Counsel for the Appellant only pointed out the reasons for the lateness of the guilty plea and did not raise any argument as to any prejudice that may have been occasioned to the Appellant, the Appeals Chamber need not address this argument.
[128] Sentencing Judgement, para. 234 (emphasis added).
[129] Brief in Reply, para. 17.
[130] Appellant's Brief, para. 142.
[131] *Ibid*., para. 145.

that an important part of the consideration to be given to a guilty plea is that a clear discount will be granted and that this would contribute to a clear culture of encouragement.[132]

56. The Appeals Chamber notes that the Trial Chamber, at paragraph 231 of the Sentencing Judgement, did note that the encouragement of others to come forth can be considered as an element of the mitigating effect of a guilty plea. The Appellant has not shown that the Trial Chamber erred in the exercise of its discretion, and in fact acknowledges that the Trial Chamber, at paragraph 249 of the Sentencing Judgement, took into account the hope of the Appellant that others will assume their responsibility for their crimes. The Appellant does not provide any authority in support of his arguments, which merely amount to challenging the fact that the Trial Chamber, by failing to "clearly or more clearly" elaborate on "the concept of a clear discount being given for a guilty plea", accorded insufficient weight to this factor and, as a result, failed to properly exercise its discretion in sentencing him.[133] The Appeals Chamber finds that the Trial Chamber was under no obligation to expand further on these incentives for guilty pleas and did not err in its discretion to impose a sentence.

### C. Remorse

57. The Appellant contends that the Trial Chamber, while acknowledging the particular importance of remorse as a mitigating factor at paragraph 237 of the Sentencing Judgement, only considered this factor "at best perfunctorily".[134] The Prosecution responds that "it is apparent that the Trial Chamber accepted this mitigating factor" but nevertheless notes that while the Trial Chamber is not obliged to "set forth at length" the basis for its conclusions, it did not address this factor in its "Discussion and Conclusion".[135]

58. The Appeals Chamber notes that the Trial Chamber, contrary to the Appellant's submission, did not consider this factor "at best perfunctorily", and in fact treated this factor as "specifically important".[136] In its discussion of Dragan Nikolić's remorse, it accepted that "remorse was shown during the sentencing hearing"[137] and recalled his following statement:

> I repent sincerely […]. I genuinely repent. I am not saying this *pro forma*, this repentance and contrition comes from deep inside me, because I knew most of those people from the earliest stage. […] I want to avail myself of this opportunity to say to all of those whom I hurt, either directly or indirectly, that I apologise to everyone who spent any time in Sušica, be it a month or several months. I would like, now that I have this opportunity to speak in public, to make even those victims feel the sincerity of my apology and my repentance, even those who were never at

[132] *Ibid*.
[133] *Ibid*.
[134] Appellant's Brief, para. 146.
[135] Respondent's Brief, para. 64.
[136] Sentencing Judgement, para. 237. See also para. 217.
[137] *Ibid*., para. 241.

> the Sušica camp and who are now scattered all over the world as a result of that conflict and the expulsions which made it impossible for them to return home.[138]

59. The Appeals Chamber finds that the Trial Chamber correctly assessed the Accused's foregoing statement at the Sentencing Hearing and was under no obligation to set forth at greater length the basis for its conclusion. The Appeals Chamber further considers that the Appellant's argument is unfounded, as the Trial Chamber clearly considered his remorse as one of the mitigating circumstances entailing a substantial reduction of sentence:

> Considering all the above-mentioned mitigating circumstances together and giving particular importance to such factors as the guilty plea, expression of remorse, reconciliation and the disclosing of additional information to the Prosecution, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted. [139]

60. For the foregoing reasons, this ground of appeal is dismissed.

## D. Cooperation with the Prosecutor

61. The Appellant contends that the Trial Chamber erred in two respects with regard to the issue of cooperation. First, he submits that the Trial Chamber was under a duty, in its assessment of this mitigating factor, to "evaluate how he had co-operated and to determine what value the Trial Chamber as opposed to the Prosecution placed on that cooperation".[140] He argues that instead of relying on the Prosecution's assessment of his cooperation, the Trial Chamber should have sought further submissions and assistance from the parties to come to its own conclusion[141], and that by neglecting to do so, the Trial Chamber failed to come to a valid conclusion on this issue.[142] Second, the Appellant contends that even if the Appeals Chamber finds that the Trial Chamber's consideration of the matter was appropriate, the Trial Chamber failed to ascribe sufficient weight to his cooperation, as it considered this factor as only having "some importance".[143] The Prosecution responds, with regard to the Trial Chamber's assessment of the Appellant's cooperation, that "[a]lthough the Trial Chamber expressed that it had difficulty evaluating the full extent to which this co-operation could in fact be regarded as substantial, the Chamber, after making express reference to the principle of *in dubio pro reo*, resolved any doubt in this regard in favour of the Appellant" and that "[n]otwithstanding its concern, the Chamber did not dismiss co-operation as a mitigating factor, but instead included it in its list of such factors considered in mitigation".[144] With regard to the Appellant's argument that the Trial Chamber gave insufficient weight to his

[138] *Ibid*., referring to the statement of the Accused, T. 501.
[139] Sentencing Judgement, para. 274 (emphasis added).
[140] Appellant's Brief, para. 148.
[141] *Ibid*., para. 151.
[142] *Ibid*., para. 152.
[143] *Ibid*., paras 153-154.
[144] Respondent's Brief, para. 66.

cooperation, the Prosecution recalls that its recommendation of a sentence of 15 years of imprisonment was contingent on the Appellant's full and substantial cooperation and that since the Appellant fulfilled this obligation, this factor "should have been given substantial weight in the Trial Chamber's balancing of sentencing factors".[145] In his Brief in Reply, the Appellant reiterates that the Trial Chamber did not properly consider the issue of his cooperation and thereby failed to accord it proper weight.[146]

### 1. The substantial nature of the Accused's cooperation

62. The Trial Chamber requested the Prosecution, at the Sentencing Hearing, to provide documents that "would enable [it] to review them *in camera* in order to assess if the Accused's co-operation could be regarded as substantial".[147] The Prosecution provided the transcripts of two days of interviews held with the Accused, which "would illustrate the type of co-operation the Accused offered".[148] After a review of those transcripts *in camera*, the Trial Chamber indeed admitted in its Sentencing Judgement that it was "not able to judge" whether or not the Accused's cooperation was substantial[149] but decided to resolve any doubt in favour of the Appellant and not to his detriment.[150] It found that "even this small portion of testimony shows that information provided by Dragan Nikolić will assist the Prosecutor of the ICTY and prosecutors of the yet to be established war crimes chambers in his home country".[151] The Trial Chamber then concluded:

> Therefore, the Trial Chamber accepts that the Prosecution is satisfied that the Accused's co-operation until now was substantial and considers this factor as being of some importance for mitigating the sentence, especially since the information about Sušica camp and Vlasenica municipality was heard for the first time before this Tribunal. Thus, the Accused has contributed and will contribute to the fact-finding mission of the Tribunal and the to be established war crimes chambers in his home country.[152]

63. In light of the above, the Appeals Chamber does not see how the Trial Chamber failed to fulfil its obligation, pursuant to Rule 101(B)(ii) of the Rules,[153] to consider co-operation with the

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[145] *Ibid*., para. 67. The Appeals Chamber notes that the Prosecution does not refer to any alleged error in the Trial Chamber's exercise of its discretion to impose a sentence. Rather, it challenges only the fact that the Trial Chamber did not follow the parties' recommendation. At paragraph 68 of its Respondent's Brief, the Prosecution similarly addresses what it considers to be the "ultimate question": whether the Trial Chamber's own assessment of the totality of the mitigating factors in the Appellant's favour was within the proper framework under the Statute and the Rules for discretion. In that respect, the Prosecution reiterates its position that while the Trial Chamber was not bound by the recommendations of the parties, it "should have indicated more clearly why it did not believe that these mitigating factors warranted a sentence lower than 23 years imprisonment". Those arguments will be addressed under the Appeals Chamber's review of the sixth ground of appeal.
[146] Appellant's Brief in Reply, para. 23.
[147] Sentencing Judgement, para. 258, referring to the Sentencing Hearing, T. 453-454.
[148] Sentencing Hearing, T. 481.
[149] Sentencing Judgement, para. 259.
[150] *Ibid*.
[151] *Ibid*.
[152] Sentencing Judgement, para. 260 (emphasis added).
[153] *Vasiljević* Appeal Judgement, para. 180: "Co-operation with the Prosecution is the only mitigating factor that Trial Chambers are specifically required to consider pursuant to Rule 101(B)(ii) of the Rules".

Prosecution as a mitigating factor. The Appeals Chamber need not decide whether it would have been more appropriate for the Trial Chamber to request additional material before deciding on the matter. It suffices for the purpose of the present appeal that the Trial Chamber accepted that the Prosecution is satisfied that "the Accused's co-operation until now was substantial".

64. The argument of the Appellant that the Trial Chamber should have sought further submissions and assistance from the parties so as to come to its own conclusion is therefore dismissed.

### 2. Weight given to the Accused's cooperation

65. In the present case, the Trial Chamber, in its "General Conclusion" pertaining to the mitigating circumstances, gave "particular importance" to the "disclosing of additional information to the Prosecution":

> Considering all the above-mentioned mitigating circumstances together and giving particular importance to such factors as the guilty plea, expression of remorse, reconciliation and the disclosing of additional information to the Prosecution, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted.[154]

The Appellant, in submitting that the Trial Chamber failed to ascribe sufficient weight to his co-operation as it allegedly considered this factor as having only "some importance", seems to have overlooked the above finding of the Trial Chamber. The Appeals Chamber notes in that respect that, although the above finding does not refer explicitly to "co-operation", the reference to the "disclosing of additional information" undoubtedly refers to such co-operation.

66. The weight to be attached to co-operation as a mitigating factor is within the discretion of Trial Chambers, which can decide, after assessing the importance to give to this factor, to give it no weight, to give it "substantial" weight within the meaning of Rule 101(B)(ii), or to give it more "modest" weight in mitigation.[155] The Appellant in the present case only argues that the evidence clearly and unambiguously showed that his cooperation was substantial, and that this, combined with the risk to which he exposed himself by co-operating, should have led the Trial Chamber to accord "greater weight than merely 'some importance'".[156] In the absence of a demonstration that

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[154] Sentencing Judgement, para. 274 (emphasis added).

[155] In the *Vasiljević* Appeal Judgement, at para. 180, the Appeals Chamber accepted the Trial Chamber's conclusion that Rule 101(B)(ii) shall not be interpreted as entailing that only "substantial" cooperation can be taken into account in mitigation and that, to the contrary, more "modest" cooperation can be given some weight in mitigation. Paragraph 299 of the *Vasiljević* Trial Judgement reads: "The Trial Chamber is not satisfied that the statement given by the Accused in the present case represented 'substantial' co-operation pursuant to Rule 101(B)(ii), but it does not interpret Rule 101(B)(ii) as excluding the fact that a statement was made from the matters which may be taken into account in mitigation unless such co-operation is 'substantial'. Nevertheless, the co-operation which was given by the Accused was indeed modest, and it has been given very little weight."

[156] Appellant's Brief, para. 155: "It is our respectful submission that if it was clear and unambiguous on the evidence and the submissions of the parties, as we submit it was, that the Appellant's co-operation was substantial, then given,

the Trial Chamber committed an error in assessing the importance of his cooperation, the Appeals Chamber dismisses the Appellant's argument in that regard.

for example, not just the substance of that assistance but also the risk to which any Defendant exposes himself by cooperating with the [Office of the Prosecutor] in this way (which, we say, in the context of the society from which the Appellant comes means exposing himself to the very real risk of serious personal harm or death), co-operation is a factor to be accorded considerably greater weight than merely 'some importance'".

# VI. FOURTH GROUND OF APPEAL: THE TRIAL CHAMBER ERRED BY GIVING NO OR INSUFFICIENT REGARD TO THE GENERAL PRACTICE REGARDING PRISON SENTENCES IN THE COURTS OF THE FORMER YUGOSLAVIA

67. The Appellant contends that the Trial Chamber gave no or insufficient weight to the sentencing practices in the former Yugoslavia and, as a result, failed in exercising its discretion to impose a proper sentence when it concluded that life imprisonment was the appropriate starting point for sentencing.[157] He also contends that the Trial Chamber erred by rather having recourse to the sentencing practices of countries other than the former Yugoslavia and that, by doing so, "ignored the very obvious, explicit and mandatory linkage set out in Article 24 (1) of the ICTY Statute to the sentencing practice of the former Yugoslavia".[158]

## A. The general practice regarding prison sentences in the courts of the former Yugoslavia

68. While conscious that the International Tribunal is not bound by those practices, the Appellant submits that the Trial Chamber departed so far from them that it fell into an error by setting the starting point at life imprisonment and thereby arrived at a sentence that was excessive.[159] In his view, the wording of Article 24(1) of the Statute ("[…] the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.") involves not only "a mandatory requirement on each occasion to consider that practice" but also "a principle of natural justice that demands that the sentence ultimately passed must bear some proportionate quality that reflects that sentencing practice and its norms."[160] Relying on the findings of the Trial Chamber at paragraphs 153 to 156 of the Sentencing Judgement, he considers that the maximum term of imprisonment for the offences for which he has been convicted would have been twenty years and therefore submits that a sentence of life imprisonment is so fundamental a departure that it demonstrates that the Trial Chamber chose to ignore the sentencing practices of the former Yugoslavia.[161] The Prosecution responds that the case law of the International Tribunal shows that Trial Chambers are under no obligation to follow such sentencing practices.[162] It submits that the "ceiling of 20 years" referred to by the Appellant

[157] Appellant's Brief, para. 157.
[158] *Ibid*., para. 162.
[159] *Ibid*., para. 158.
[160] *Ibid*., para. 159.
[161] *Ibid*., para. 161.
[162] Respondent's Brief, para. 71.

illustrates why the Trial Chamber could not have or should not have considered itself bound by this practice: "[s]uch a maximum sentence would be manifestly inappropriate for this Tribunal, given its mandate to punish crimes of the utmost gravity within international humanitarian law".[163]

69. Article 24(1) of the Statute provides that in determining a sentence, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". The question of whether such "recourse" should be of a binding nature has been consistently and uniformly interpreted by the International Tribunal: although a Trial Chamber should have "recourse to"[164] and should "take into account"[165] the general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[166] The approach of the International Tribunal regarding recourse to the sentencing practice of the former Yugoslavia pursuant to Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules is best expressed in the Judgement of the Trial Chamber in *Kunarac*, as affirmed in the *Krstić* Appeal Judgement:[167]

> Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.[168]

It follows that Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, must give reasons for such departure. The issue before the Appeals Chamber is therefore, as further expressed by the Appeals Chamber in the *Kunarac* Appeal Judgement, "whether the Trial Chamber, while considering the practice of the courts of the former Yugoslavia in relation to the sentencing aspect of the […] case, ventured outside its discretion by ignoring the sentencing limits set in that practice"[169] without providing reasons for its departure.

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[163] *Ibid*., para. 73 (footnote omitted). At the Appeal Hearing, the Prosecution further submitted that the Appellant's argument was wrongly based on the assumption that his conduct would in the former Yugoslavia now attract a sentence of 20 years of imprisonment. It noted to the contrary, *inter alia*, referring to paragraph 158 of the Sentencing Judgement, that under the Criminal Code of Republika Srpska adopted on 1 August 2003, aggravated murder would attract a sentence of 45 years (AT 46-47).
[164] Article 24 of the Statute.
[165] Rule 101(B) of the Rules.
[166] *Serushago* Sentencing Appeal Judgement, para. 30. See also *Tadić* Sentencing Appeal Judgement, para. 21.
[167] *Krstić* Appeal Judgement, para. 260.
[168] *Kunarac* Trial Judgement, para. 829. Recently confirmed in the *Blaskić* Appeal Judgement, para. 682.
[169] *Kunarac* Appeal Judgement, para. 349.

(a) Whether the Trial Chamber failed to take into account the sentencing practices in the former Yugoslavia with regard to the particular circumstances of the case

70. In the present case, the Trial Chamber requested on 25 September 2003 that Prof. Dr. Ulrich Sieber, Director of the "Max-Planck-Institut für ausländisches und internationales Strafrecht" in Freiburg, Germany (hereinafter "Max Planck Institute"), submit an expert report (hereinafter "Sentencing Report") providing information on "the range of sentences for the crimes, as laid down in the Indictment to which the Accused has pleaded guilty, applicable in (i) States on the territory of the former Yugoslavia, (ii) member States of the Council of Europe and (iii) other major legal systems; and the sentencing practice in relation to these crimes developed by (i) State courts in States on the territory of the former Yugoslavia, (ii) International or mixed courts and (iii) if available, the sentencing practice developed by other States mentioned above."[170] The Trial Chamber, on the basis of this Sentencing Report, first provided a "brief chronology of the applicable law in the territory of the former Yugoslavia, starting in 1992, when the crimes to which the Accused has pleaded guilty were committed, until the present day"[171] and then turned to "consider the range of sentences available under aforementioned laws in BiH when the crimes to which the Accused has pleaded guilty were committed".[172] The Appeals Chamber therefore finds that the Trial Chamber fulfilled its obligation to take into account the sentencing practices in the former Yugoslavia with regard to the particular circumstances of the case.

(b) Whether the Trial Chamber departed from the sentencing limits set in that practice

71. The conclusion of the Trial Chamber's analysis was that "on the territory of the former Yugoslavia in 1992, the maximum term of imprisonment was 15 years, except for offences punishable with the death penalty, committed under 'particularly aggravating circumstance', or causing 'especially grave consequences', in which cases the maximum term of imprisonment was 20 years".[173] The Appellant's argument, as explained above, is that a sentence of life imprisonment is "so fundamental a departure that it demonstrates that the Trial Chamber chose to ignore the sentencing practices of the former Yugoslavia".[174] The Appellant, in considering that the maximum sentence that could have been imposed on him was a sentence of 20 years, seems to assume that his acts only caused "especially grave consequences", and therefore seems to reject the view that his acts were committed in particularly aggravating circumstances, and would have been punishable at

[170] Scheduling Order, 25 September 2003, p. 2. See Sentencing Judgement, para. 38.
[171] Sentencing Judgement, paras 152-154.
[172] *Ibid*., paras 155-156.
[173] *Ibid*., para. 155.
[174] Appellant's Brief, para. 161.

the time of the commission with the death penalty. While the Appellant does not give any reason for his assumption, the Appeals Chamber notes that the Trial Chamber has assessed his crimes as committed under especially aggravating circumstances[175] and wishes to recall in that respect the conclusion it reached at paragraph 214 of the Sentencing Judgement:

> In conclusion, taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life.

The Appellant does not demonstrate that the Trial Chamber departed from the sentencing limits set in the practices of the former Yugoslavia. The reference by the Appellant to the "sentence ultimately passed" is not, as he notes, life imprisonment, but is the sentence of 23 years given by the Trial Chamber, which is clearly within the sentencing range in the former Yugoslavia at the time of the commission of the offences by the Appellant. There is accordingly no need to determine whether the Trial Chamber ventured outside its sentencing discretion.

72. For the foregoing reasons, this part of the Appellant's ground of appeal is dismissed.

### B. The sentencing practices in other countries

73. To support further his argument that the Trial Chamber ignored the sentencing practices in the former Yugoslavia, the Appellant submits that "[w]hilst it may be helpful to have some assistance about the sentencing practices of other countries around the world that one may view the general context in which the sentencing practice of the former Yugoslavia lay […] what the Trial Chamber did was to say that it was, in effect, going to have recourse to the sentencing practices of those other countries (which is neither required nor specifically permitted by the ICTY Statute) and to adopt those sentencing practices as the *raison d'être* of Article 24(1) of the ICTY Statute".[176] In response, the Prosecution argues that there is nothing in the Sentencing Judgement to suggest that the Trial Chamber gave undue weight to the sentencing practices of any particular State and that, to the contrary, the Trial Chamber did consider sentencing practices in the former Yugoslavia at paragraphs 147-156.[177]

74. The Appeals Chamber notes that the Trial Chamber, in the present case, had recourse to the part of the above mentioned Sentencing Report dealing with countries other than the former

[175] *Ibid*., para. 213.
[176] Appellant's Brief, para. 162. To reach that conclusion, the Appellant relies on the finding of the Trial Chamber at paragraph 172 of the Sentencing Judgement: "The overview shows that in most countries a single act of murder attracts life imprisonment or the death penalty, as either an optional or a mandatory sanction. When adopting the Statute in 1993, the Security Council was apparently cognisant of this practice and decided to vest broad discretion to the judges in determining sentences, instead of giving concrete sentencing ranges for specific offences. […]".
[177] Respondent's Brief, para. 75.

Yugoslavia, to "seek guidance based on comparative research in this terrain".[178] As clearly stated at paragraph 166 of the Sentencing Judgement, the Trial Chamber reviewed this part of the Sentencing Report "[i]n addition to the section relating to sentencing law and practice in the former Yugoslavia" (emphasis added).

75. With regard to the argument of the Appellant that the Trial Chamber's conclusion, at paragraph 172 of the Sentencing Judgement, that "[t]he overview shows that in most countries a single act of murder attracts life imprisonment or the death penalty, as either an optional or a mandatory sanction", shows that it adopted those practices as the *raison d'être* of Article 24(1) of the ICTY Statute, the Appeals Chamber finds that the Appellant has misunderstood the import of the Trial Chamber's finding. What the Trial Chamber did, in fact, was to underline that the range of sentences in national jurisdictions is so wide that the Security Council accordingly decided to vest broad discretion to the judges in determining a sentence. In fact, the Trial Chamber referred to "a similar broad range of applicable sentences" with regard to torture, rape and the issue of combined offences.[179]

76. In light of the above, the Appeals Chamber finds that the Appellant has not shown that the Trial Chamber gave undue weight to the sentencing practices in states other than the former Yugoslavia. The Trial Chamber was clearly aware that it was not bound to apply any maximum term of imprisonment in a national system,[180] and did not err in exercising its discretion to impose a sentence here. The Appeals Chamber further notes that the Trial Chamber, so as to "seek guidance" as it did, was perfectly entitled to undergo a review of the sentencing practices of other countries. The argument of the Appellant is therefore dismissed.

[178] Sentencing Judgement, para. 149.
[179] *Ibid*., para. 173.
[180] *Ibid*., para. 147, referring to para. 377 of the *Kunarac* Appeal Judgement.

## VII. FIFTH GROUND OF APPEAL: THE TRIAL CHAMBER ERRED BY CONCLUDING THAT IT WAS NOT BOUND BY THE PRINCIPLE OF *LEX MITIOR*

77. The Appellant submits that the Trial Chamber erred when it found that the principle of *lex mitior*[181] applies "only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction"[182] and that the principle does not apply in the International Tribunal because it exercises a different jurisdiction from that in which the crime was committed.[183] He submits that by virtue of Articles 1 and 8 of the Statute, the International Tribunal exercises its jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia after 1 January 1991 – that is, over the same crimes and same perpetrators as the courts of the former Yugoslavia in the 1990s and as the courts of the successor States currently, albeit with different powers, procedures and rules of procedure and evidence.[184] The Appellant further argues that cases actually within the ICTY's jurisdiction can be referred, pursuant to Article 11*bis* of the Rules (Referral of the Indictment to Another Court), to the territory where the crimes have been committed.[185] He submits in this respect that, should an accused sent to the courts of the former Yugoslavia be subjected to a more lenient system of penalties, there would be a breach of the principle of equality before the law as set out in Article 21(1) of the Statute.[186] The Appellant also argues that if, as the Trial Chamber notes at paragraph 160 of the Sentencing Judgement, the principle of *lex mitior* "is enshrined in international covenants and national legislations", the Trial Chamber's reasoning for not applying the principle of *lex mitior* was not substantive, as it focuses on the "formal jurisdictional point" and does not explain why the ICTY is not bound by the principle and why the ICTY can impose "a wholly different and more serious punishment regime than that which would obtain before national courts for the same crimes".[187] The Prosecution, in response, concurs with the finding of the Trial Chamber.[188] It

[181] See the definition in Article 24 (2) of the Rome Statute of the International Criminal Court ("In the event of a change in the law applicable to a given case prior to a final judgement, the law more favorable to the person being investigated, prosecuted or convicted shall be applied."). See further similar provisions enshrining the principle of *lex mitior*: Article 15 (1) ICCPR, Article 9 ACHR, Art. 7(1) ECHR (providing only that no heavier penalty be imposed than the one applicable a the time of offence); see also national jurisdictions: Article 4(2) of the Federal Criminal Code of 1976/77, Article 2 (3) of the German Penal Code, Chapter II, Article 112-1, para 3 of the French Penal Code, Art. 2 (2) of the Swiss Penal Code, Chapter 2 (2) (3) of the Swedish Criminal Code.
[182] Sentencing Judgement, para. 163.
[183] *Ibid*., para. 165.
[184] Appellant's Brief, paras 170-172.
[185] *Ibid*., para. 173.
[186] *Ibid*., para. 175. The Appellant wrongly referred to Article 22(1) of the Statute. It is assumed that the Appellant's intent was to refer to Article 21(1) of the Statute, which reads as follows: "1. All persons shall be equal before the International Tribunal."
[187] Appellant's Brief, para. 176.

submits that should the Appellant's position be accepted, it "could result in the Tribunal being bound by the law or sentencing practice in the former Yugoslavia".[189]

78. The Trial Chamber correctly summarised the criminal laws that are relevant to sentencing and applicable in the territory of the former Yugoslavia, in particular in the territory of Vlasenica where the crimes were committed.[190] The Trial Chamber noted further that the sentencing range in the former Yugoslavia would be restricted to a fixed term of imprisonment instead of a term up to and including the remainder of the convicted person's life as provided for in Rule 101(A) of the Rules.[191] These findings are uncontested between the parties. It is therefore of essential importance whether or not the principle of *lex mitior* is applicable in this case.

79. The Trial Chamber first considered whether the principle of *lex mitior* had been applicable in the former Yugoslavia and whether it was part of the law of the International Tribunal and then addressed the question of whether the *lex mitior* principle was applicable in the present case.

80. The contentious part of the Sentencing Judgement is the finding of the Trial Chamber that "the principle [of *lex mitior*] applies only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction",[192] and that, because this Tribunal exercises a different jurisdiction from the national jurisdiction in which the crimes were committed, the principle does not apply.[193] The Appeals Chamber notes that the question of the applicability of the principle is not one of jurisdiction, but rather one of whether differing criminal laws are relevant and applicable to the law governing the sentencing consideration of the International Tribunal.

81. The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.

82. The International Tribunal is clearly bound by its own Statute and Rules, and thus to the sentencing range of a term up to and including the remainder of the convicted person's life as

[188] Respondent's Brief, paras 81-82.
[189] *Ibid*., para. 83.
[190] Sentencing Judgement, para. 158.
[191] *Ibid*., para. 159.
[192] *Ibid*., para. 163.

provided for in Rule 101(A) of the Rules and Article 24(1) of the Statute. The Appeals Chamber notes that there has not been a change in the laws of the International Tribunal regarding sentencing ranges.

83. The sentencing range in the former Yugoslavia would be restricted to a fixed term of imprisonment. The Appeals Chamber notes that, since the establishment of the International Tribunal, an accused before it can receive a maximum sentence that is not limited to a fixed term of imprisonment.

84. The Appeals Chamber, however, reiterates its finding that the International Tribunal, having primacy, is not bound by the law or sentencing practice of the former Yugoslavia.[194] It has merely to take it into consideration. Allowing the principle of *lex mitior* to be applied to sentences of the International Tribunal on the basis of changes in the laws of the former Yugoslavia would mean that the States of the former Yugoslavia have the power to undermine the sentencing discretion of the International Tribunal's judges. In passing a national law setting low maximum penalties for the crimes mentioned in Articles 2 to 5 of the International Tribunal's statute, States could then prevent their citizens from being properly sentenced by this Tribunal. This is not compatible with the International Tribunal's primacy enshrined in Article 9(2) of the Statute and its overall mandate.

85. In sum, properly understood, *lex mitior* applies to the Statute of the International Tribunal. Accordingly, if ever the sentencing powers conferred by the Statute were to be amended, the International Tribunal would have to apply the less severe penalty. So far as concerns the requirement of Article 24(1) that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia", these words have to be construed in accordance with the principles of interpretation applicable to the Statute of which they form part. So construed, they refer to any pertinent laws of the former Yugoslavia which were in force at the time of commission of the crime in question; subsequent changes in those laws are not imported.

86. For the foregoing reasons, the fifth ground of appeal is dismissed.

[193] *Ibid*., paras 164-165.
[194] See *Tadić* Sentencing Appeal Judgement, para. 21. See *supra* para. 69.

# VIII. SIXTH GROUND OF APPEAL: THE TRIAL CHAMBER FAILED TO GIVE SUFFICIENT WEIGHT TO THE RECOMMENDATION OF THE PARTIES AS TO THE SENTENCE

87. The Appellant contends that the Trial Chamber failed to pay sufficient regard to the recommendation of the parties as to a sentence of 15 years. He alleges two errors in support of this ground of appeal, which the Appeals Chamber will examine in turn: (1) that the Trial Chamber failed adequately to explain why the sentence recommended by the parties was not appropriate, and (2) that it erroneously took into account the time he would actually serve in prison.

## A. Whether the Trial Chamber erred in failing to explain why the sentence recommended by the parties was not appropriate

88. According to the Appellant, the Trial Chamber "failed adequately to explain why such a sentence was not appropriate".[195] The Prosecution acknowledges that, pursuant to Rule 62*ter*(B), Trial Chambers are not bound by the recommendations of the parties, but nevertheless submits that they should give them "serious consideration" and, should they wish to depart from those, should indicate the basis for such departure.[196] It agrees with the Appellant that the Trial Chamber failed to explain adequately its reason for not following the parties' joint recommendation of a sentence of 15 years.[197]

89. As previously stated, in exercising their discretion to impose a sentence, Trial Chambers must take into account the following factors: the gravity of the offence and the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.[198] The special context of a plea agreement raises an additional factor that must be taken into account. A plea agreement is a matter of considerable importance as it involves an admission by the accused of his guilt. Furthermore, recommendation of a range of sentences or, as in the present case, a specific sentence,

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[195] Notice of Appeal, para. 16.

[196] Respondent's Brief, para. 97. At the Appeal Hearing, the Prosecution reiterated that, in its view, the Trial Chamber "did not sufficiently elaborate the basis for its departure from the joint submission" and further stated that this failure "makes it difficult to evaluate whether or not appropriate weight was given by the Trial Chamber to the various factors it considered in mitigation" (AT 34).

[197] The Prosecution, while acknowledging that the Trial Chamber, at paragraph 281 of the Sentencing Judgement, did give reasons why the aggravating factors made a sentence of 15 years unjust, more specifically submitted at the Appeal Hearing that the Trial Chamber "did not address at all why the mitigating factors did not outweigh that". It submitted that this failure was especially significant with respect to the Appellant's cooperation as the Trial Chamber "rejected the Prosecution's evaluation of what was meant in terms of it outweighing the gravity of the offence to get a sentence of 15 years, and didn't give reasons why it did that" (AT 48-49).

[198] *Čelebići* Appeal Judgement, para. 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv).

reflects an agreement between the parties as to what, in their view, would constitute a fair sentence. The Appeals Chamber notes that Rule 62*ter*(B) of the Rules unambiguously states that Trial Chambers shall not be bound by any agreement between the parties. Nevertheless, in the specific context of a sentencing judgement following a plea agreement, the Appeals Chamber emphasises that Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure. Those reasons, combined with the Trial Chamber's obligation pursuant to Article 23(2) of the Statute to render a Judgement "accompanied by a reasoned opinion in writing", will facilitate a meaningful exercise of the convicted person's right to appeal and allow the Appeals Chamber "to understand and review the findings of the Trial Chamber".[199]

90. In the present case, the Trial Chamber made clear to the parties, in open court, that it was not bound by the recommendation of the parties. It asked Dragan Nikolić whether he understood that the final arbiter for the sentence is without any doubt the Trial Chamber, to which he replied that he fully did.[200] Further, contrary to the parties' submissions, the Trial Chamber clearly stated why it could not follow such a recommendation:

> Balancing the gravity of the crimes and aggravating factors against mitigating factors and taking into account the aforementioned goals of sentencing, the Trial Chamber is not able to follow the recommendation given by the Prosecution. The brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that recommended unjust. The Trial Chamber believes that it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties.[201]

The Appeals Chamber finds that the above reasons are sufficient to reject the proposition that the Trial Chamber abused its discretion in departing from the parties' recommendation. This part of the Appellant's ground of appeal is therefore dismissed.

91. The Appeals Chamber now turns to the Appellant's argument that the Trial Chamber unduly took into account the time he will actually serve in detention.

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[199] *Kunarac* Appeal Judgement, para. 41.

[200] T. 175-176: "JUDGE SCHOMBURG: […] according to Rule 62 ter (B), the Trial Chamber -- I quote from our Rules: 'The Trial Chamber shall not be bound by any agreement specified in paragraph A.' And as it was already verbatim read out by your counsel, it is your understanding that the maximum sentence that could be imposed by the Trial Chamber for a guilty plea to the crimes in the third amended indictment is a term of imprisonment up to and including the remainder of your life, as described in Rule 101(A) of our Rules. Of course, it's today not the time to discuss sentence when we don't have the necessary facts. Of course, we have to take into account and into consideration all the facts, such as the gravity, aggravating, mitigating circumstances, and whether or not you're ready for substantial cooperation with the Prosecutor. But it has to be absolutely clear that a recommendation by the Prosecution is nothing more but a recommendation, and the final arbiter for the sentence is no doubt the Bench, this Trial Chamber. Did you understand this? THE ACCUSED: [Interpretation] Yes, in full." (emphasis added).

[201] Sentencing Judgement, para. 281.

## B. Whether the Trial Chamber unduly took into account the time the Appellant will serve in detention

92. The Appellant argues next that the Trial Chamber erred in determining his sentence by taking into account the time he would actually serve in prison.[202] The Prosecution responds that the Appellant cited no authority to support his proposition and submits that it is not itself aware of anything in the Rules which precludes a Trial Chamber from doing so.[203]

93. At paragraph 282 of the Sentencing Judgement, the Trial Chamber acknowledges that provided that certain conditions are fulfilled, a convicted person who has served the "necessary part of his sentence" ought to have a chance to benefit from an early release aimed at his reintegration into society. The authority provided in support of the Trial Chamber's position was a decision of the German Constitutional Court (*Bundesverfassungsgericht*).[204] In acknowledging that a convicted person ought to be given a chance to benefit from early release, the Trial Chamber noted that "before release and reintegration, at least the term of imprisonment recommended by the Prosecutor has in fact to be served".[205]

94. The Appeals Chamber notes that nothing in the Statute or the Rules of the International Tribunal provides that an accused has to serve the time recommended by the Prosecution to be granted early release. Pursuant to Rule 125 of the Rules, the period of time that an accused will actually serve in detention, as opposed to the sentence imposed in a Judgement, is dependent upon a certain number of factors pertaining to "*inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor".[206] Under the International Tribunal's law, eligibility for early release is dependant on the applicable law of the State in which the convicted person is imprisoned, which State shall notify the International Tribunal of such eligibility.[207] Ultimately, the President determines, in consultation with the

[202] Appellant's Brief, para. 181. The Appeals Chamber notes that the Appellant, at paragraph 180 of the Appellant's Brief, reiterates his argument that the Trial Chamber failed properly to consider his co-operation with the Prosecution. His arguments in that respect have been addressed above under Section V(D) and this part of the Appellant's argument will therefore not be dealt with under the present ground of appeal.
[203] Respondent's Brief, footnote 165.
[204] BVerfGE 45, 187 (245).
[205] Sentencing Judgement, para. 282.
[206] Rule 125 of the Rules (General Standards for Granting Pardon or Commutation).
[207] Article 28 of the Statute and Rule 123 of the Rules.

members of the sentencing chamber and the Bureau, whether or not early release should be granted.[208]

95. Although neither the Statute nor the Rules provide that Trial Chambers have the discretion to recommend a minimum sentence, the Appeals Chamber has previously held that such discretion "flows from the powers inherent in its judicial function and does not amount to a departure from the Statute and the Rules".[209] Accordingly, the Appeals Chamber finds that a Trial Chamber may determine what it considers to be the minimum term of imprisonment an accused should serve. A Trial Chamber may also consider the possibility that an accused be granted early release when determining what constitutes an appropriate sentence. Nevertheless, a Trial Chamber must always consider that early release is only a possibility offered to a convicted person provided that the above mentioned conditions are met. It is for example conceivable that a convicted person's character, even though possibly showing a potential for reintegration at the time of sentencing, evolves to the contrary while serving his sentence.

96. The Appeals Chamber understands that, when concluding that before being released, "at least the time recommended by the Prosecutor has in fact to be served", the Trial Chamber did not consider that it was bound to apply the recommendation of the Prosecution. In fact, the recommendation of the Prosecution was as to the final sentence and not as to a minimum term the Appellant should spend in detention. The Appeals Chamber is convinced that the reference to the term of imprisonment recommended by the Prosecution was made by the Trial Chamber after having assessed that 15 years constituted what it itself considered an appropriate time the Appellant should effectively serve before he could benefit from an early release. The question before the Appeals Chamber is therefore whether the Trial Chamber erred in attaching too much weight to the possibility of an early release.

97. The Appeals Chamber notes that the Trial Chamber, by imposing a sentence of 23 years, clearly – although not expressly – entered into a calculation to reflect the practice of the International Tribunal of granting early release after the convicted person has served two-thirds of his sentence:[210] the term of 15 years clearly amounts to two-thirds of the sentence it effectively

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[208] See Article 28 of the Statute; Rule 124 of the Rules; Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, IT/146, 7 April 1999, para. 7.

[209] *Tadić* Judgement in Sentencing Appeals, para. 28. See also *Krstić* Appeal Judgement, para. 274, in which the Appeals Chamber held: "As the Appeals Chamber explained in the *Tadić* Judgement in Sentencing Appeals, the decision whether to impose a minimum sentence is within the sentencing Chamber's discretion. The imposition of a minimum sentence is ordered only rarely. In the absence of compelling reasons from the Prosecution as to why it should do so, the Appeals Chamber does not believe that a minimum sentence is appropriate in this case."

[210] *Prosecutor v. Miroslav Tadić*, Case No. IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 4: "[…] the eligibility for pardon or commutation of sentence in the enforcement states generally 'starts at two-thirds of the sentence served'. It has been a consistent

rendered. The Appeals Chamber considers that the Trial Chamber mechanically – not to say mathematically – gave effect to the possibility of an early release. By doing so, it attached too much weight to the possibility of an early release. As a consequence, the Appeals Chamber (Judge Shahabuddeen dissenting) finds that a reduction of sentence shall be granted.

98. The Appeals Chamber now turns to the Appellant's last argument under this ground of appeal that the Trial Chamber, at paragraphs 279-282 of the Sentencing Judgement, referred exclusively to the recommendation of the parties as "the recommendation of the Prosecution", and by doing so failed to "properly consider this recommendation as being the clear and unambiguous one of *both parties*".[211] Pursuant to Rule 62*ter*(A)(ii), "[t]he Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber: (ii) submit that a specific sentence or sentencing range is appropriate; […]". Accordingly, a recommendation as to the sentence is certainly a result of an agreement between both parties but is submitted to the Trial Chamber by the Prosecution. Formally, the recommendation is indeed a "recommendation of the Prosecution". In the paragraphs at issue, the Trial Chamber accordingly refers mostly to the "recommendation of the Prosecution" but not, as alleged by the Appellant, "exclusively".[212] Further, it is clear from the Trial Chamber's analysis of the "Submissions of the Parties" that although the recommendation of a sentence of 15 years was made by the Prosecution, such recommendation resulted from an agreement between both parties and that the Defence itself was aware that formally the recommendation was made by the Prosecution.[213] Therefore, the argument of the Appellant in this respect is unfounded.

practice of this Tribunal to apply this standard when determining the eligibility of persons imprisoned at the UNDU for pardon or commutation of sentence."

[211] Appellant's Brief, para. 184.

[212] Sentencing Judgement, para. 281: "[…] the one recommended by the Parties".

[213] *Ibid*., paras 275-278.

# IX. SEVENTH GROUND OF APPEAL: THE TRIAL CHAMBER REFERRED TO MATTERS OUTSIDE THE SCOPE OF THE INDICTMENT OR OF THE AGREED FACTS

99. The Appellant alleges that the Trial Chamber erred by wrongly taking into account in the Sentencing Judgement facts that fall outside the scope of the Indictment or of the agreed facts.[214] The Appellant identifies six passages of the Sentencing Judgement falling outside the Indictment and the agreed facts.

100. He submits that those matters were not objected to by the Defence during the Sentencing Hearing in compliance with the express request by the Presiding Judge that no objections or interventions be made and in light of the assurance given by the Judge that should a witness testify beyond the scope of the Indictment, the evidence in question would not be relied upon.[215]

101. The Prosecution understands this ground of appeal to be an allegation of abuse of discretion in violation of ICTY Rule 62*bis* (ii) and (iv), which resulted in material prejudice to the Appellant.[216] The Prosecution notes that the factual basis of the Appellant's guilty plea comprises the specific factual allegations set forth in the Indictment.[217] It submits that the factual assertions made by the Appellant do not withstand the scrutiny of the Trial Chamber's findings and the trial record.[218] The Prosecution considers that the Appellant should be deemed to have waived the possibility of appealing on this ground. It notes that the Appellant did cross examine witnesses and appeared to make legal and factual submissions in the course of the Sentencing Hearing, although he did not present the particular concerns he raises now during the Sentencing Hearing. [219] The Appellant offers no argument in Reply.[220]

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[214] Notice of Appeal, para. 7. Appellant's Brief, para. 186.
[215] T. 201 lines 12-25 to line 1 of T. 202, 3 November 2003: "Then for the purpose of clarification, this indictment forms now the only basis for the now-following hearing. The mere purpose of this hearing is to receive, pursuant to Rule 100, information that may assist the Trial Chamber in determining an appropriate sentence. This means completing the picture, mitigating factors, aggravating factors as we all know of it from the settled jurisprudence of this Tribunal. However, it might be that the testimony might be -- go beyond this indictment. In this case, the Trial Chamber does not want to intervene. **This does, however, not mean that the factual basis of the plea agreement can or will be broadened or limited.** In case a witness should testify beyond the scope of the indictment, it's not necessary to object respect vis-à-vis especially a victim, as it is the special mandate of this Tribunal also to assist in reconciliation and finding the truth and this may forbid and it goes without saying that it's the respect, vis-à-vis the victim, not to intervene." (emphasis added by the Appellant, paragraph 187 of the Appellant's Brief).
[216] Respondent's Brief, para. 100.
[217] *Ibid*., para. 104, referring to the Joint Plea Agreement Submission, para. 10.
[218] Respondent's Brief, para. 101.
[219] *Ibid*., para. 108.
[220] Brief in Reply, para. 27, stating that the "Appellant joins issue with the Respondent on these matters".

102. The Appeals Chamber will turn to examine the specific portions of the Sentencing Judgement challenged by the Appellant only if it rejects the Prosecution's argument that the Appellant waived the possibility of appealing on the grounds raised in the seventh ground of appeal and that the latter should be dismissed accordingly.

103. The Appeals Chamber notes that, on the eve of the Sentencing Hearing, the Presiding Judge made the following statement informing the parties about the procedure envisaged to be applied and asked the parties whether they agreed with the suggested procedure:

> Then for the purpose of clarification, this indictment forms now the only basis for the now-following hearing. The mere purpose of this hearing is to receive, pursuant to Rule 100, information that may assist the Trial Chamber in determining an appropriate sentence. This means completing the picture, mitigating factors, aggravating factors as we all know of it from the settled jurisprudence of this Tribunal. However, it might be that the testimony might be -- go beyond this indictment. In this case, the Trial Chamber does not want to intervene. This does, however, not mean that the factual basis of the plea agreement can or will be broadened or limited. In case a witness should testify beyond the scope of the indictment, it's not necessary to object respect vis-à-vis especially a victim, as it is the special mandate of this Tribunal also to assist in reconciliation and finding the truth and this may forbid and it goes without saying that it's the respect, vis-à-vis the victim, not to intervene. [221]

104. The Appeals Chamber notes that the Presiding Judge did not request the parties not to object, but rather suggested that it was not necessary to do so. This statement has to be placed in its context. The statement in question was made before the first witness was heard. The Presiding Judge made a clear link between the procedure suggested and the wish to avoid interventions in order to show respect to the victims. Therefore, the Appeals Chamber finds that the statement of the Presiding Judge concerned examination of witnesses and objections interrupting the witnesses' testimonies, rather than closing arguments of the parties and possible arguments that could have been raised at that stage.

105. Asked whether it agreed as to the suggested procedure, Counsel for the Appellant stated "if in any statement, expert or otherwise, there is an opinion stated which goes so far beyond the scope of the indictment that it would be improper to take it into consideration, […] that is a matter that can properly be left to the discretion of the Judges."[222]

106. Further, the Appeals Chamber notes that, when asked by the Presiding Judge whether he would accept a particular expert witness statement without requesting the expert to testify in person, the same Counsel agreed with the caveat that it may be necessary to comment and identify those areas going beyond the scope of the Indictment.

[221] T. 031103, pp. 201-202, 3 November 2003 (emphasis added).
[222] *Ibid*, p. 202.

> […] Pursuant to Rule 94 bis (B)(i), do you accept the expert witness statement without request for the foreseen time limit and without the necessity to testify in person? MR. MORRISON: Your Honour, yes. The only caveat that the Defence would always have in those circumstances is it may be necessary to comment on the statement in conclusion, specifically to identify those areas where the Defence would say it goes beyond or may go beyond the scope of the indictment. But as to the generality of the statement, it seems, with great respect, to the Trial Chamber's view of her expertise, that most of it falls into the category of what one might call common sense. JUDGE SCHOMBURG: Thank you for this clarification. So I take it that you accept it, and no doubt it has to be discussed if you so want.[223]

107. While the issue of whether a statement of a witness goes beyond the scope of the Indictment is an issue for the Judges to determine, if the Appellant had any objections to the evidence presented at the Sentencing Hearing, he should have drawn the attention of the Judges to that evidence during his closing arguments. From the statements made by Counsel, the Appeals Chamber finds that the Appellant was aware that at the close of the Sentencing Hearing he could object to the Trial Chamber considering evidence that in his view went beyond the scope of the Indictment. Counsel for the Appellant made no such objections in his closing arguments and by this failure has waived his right to do so on appeal. Accordingly, this ground of appeal is dismissed.

[223] *Ibid*., p. 203.

# X. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

**PURSUANT** to Article 25 of the Statute and Rules 117 and 118 of the Rules;

**NOTING** the arguments presented by the parties at the hearing of 29 November 2004;

**SITTING** in open session;

**ALLOWS**, Judge Shahabuddeen dissenting, the Appellant's ground of appeal that the Trial Chamber erred in taking into account the time he would actually serve in detention;

**DISMISSES** the Appellant's ground of appeal in all other respects and, Judge Shahabuddeen dissenting, **IMPOSES** a new sentence;

**SENTENCES,** Judge Shahabuddeen dissenting, the Appellant to 20 (twenty) years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention, that is from 20 April 2000 to the present day;

**ORDERS**, in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

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

| | | |
|---|---|---|
| _____ | _____ | _____ |
| Judge Theodor Meron<br>Presiding | Judge Fausto Pocar | Judge Mohamed Shahabuddeen |
| _____ | _____ | |
| Judge Mehmet Güney | Judge Inés Mónica Weinberg de Roca | |

Judge Mohamed Shahabuddeen appends a partial dissenting opinion.

Signed on the second day of February 2005,
and issued on the fourth day of February 2005,

At The Hague,
The Netherlands.

# XI. PARTIAL DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I support the judgement of the Appeals Chamber save on one point, which concerns the minimum term. I propose to state my views on that point, but, before doing so, I would allude to another matter, which concerns the question of *de facto* attempted murder.

**The question of *de facto* attempted murder**

2. In paragraph 40 of its judgement, the Appeals Chamber considers that "the Trial Chamber erroneously qualified the beatings underlying the crime of torture as having 'all of the making of *de facto* attempted murder'". In paragraph 38, the Appeals Chamber said:

> The analysis of the section of the Sentencing Judgement dealing with the totality of the evidence relating to the charge of torture, as previously noted and as the Appellant correctly submitted, does not give any indication that the Trial Chamber found that he committed those crimes with the intention to kill, but shows that the purpose was to obtain information from the victims or to punish. Therefore, it is difficult to understand why the Trial Chamber found that the circumstances surrounding these acts of torture had "all of the making" of *de facto* attempted murder.

3. This assessment gives me difficulty. As is recalled in paragraph 94 of the judgement of the Trial Chamber:

> [T]he Accused approached Fikret Arnaut in the hangar and said words to the effect: "*I can't believe how an animal like this can't die; he must have two hearts.*" The Accused then beat Fikret Arnaut again and stomped on his chest.[1]

4. It seems to me that, in making this statement, the appellant manifested an intention that his victims should die from the beatings; further, the statement formed an inextricable part of the Trial Chamber's discussion of "The torture of Fikret Arnaut".

5. The judgement of the Appeals Chamber says that there is no "indication" that the Trial Chamber "found" that the Appellant committed the crimes with the intention to kill. True, there is no

formal finding to that effect, but there is an "indication" that that was a finding that the Trial Chamber made on the basis of "the totality of the evidence relating to the charge of torture".

6. Page 17 of the Trial Judgement reads thus:

> 2. Facts Related to the Individual Criminal Conduct of the Accused
>
> 63. The Trial Chamber will now review the facts specific to each of the counts in the Indictment.
>
> 64. The Accused admitted the veracity of each of the now following facts …

7. One of "the now following facts" included the matters set out in paragraph 94 (above) of the Trial Judgement. So that the Appellant himself accepted the veracity of the statement attributed to him in paragraph 94 of the Trial Judgement, namely, that he told Fikret Arnaut words to the effect: *"I can't believe how an animal like this can't die; he must have two hearts."* And the Trial Chamber in turn found that statement to be one of the "Facts Related to the Individual Criminal Conduct of the Accused" as mentioned at page 17 of its judgement.

8. Finally, when the Trial Chamber qualified the beatings underlying the crime of torture as having "all of the making of *de facto* attempted murder", in my view it thereby indicated that it accepted that there was an intention to kill.

9. I do not think that it was accurate of the Appeals Chamber to take the view that there was no "indication" that the Trial Chamber found that there was an intention to kill; such a view is neither reasonable nor substantial. However, as the Appeals Chamber does not consider that the error attributed to the Trial Chamber affects the outcome of the appeal, I shall not pursue the point.

**The minimum term**

10. In paragraph 97 of its judgement, "the Appeals Chamber finds that a reduction of sentence shall be granted" because it "considers that the Trial Chamber mechanically – not to say mathematically – gave effect to the possibility of an early release", the reference being to the Trial Chamber's statement, in paragraph 282 of its judgement, that the minimum term of imprisonment

[1] Sentencing Judgement, IT-94-2-S, of 18 December 2003.

had to be served "before release and reintegration". A reduction of three years from the original sentence of 23 years' imprisonment has been granted and the minimum term has gone.

11. Paragraph 282 of the judgement of the Trial Chamber (which has been referred to) reads:

> The Trial Chamber is aware that from a human rights perspective each accused, having served the necessary part of his sentence, ought to have a chance to be reintegrated into society in the event that he no longer poses any danger to society and there is no risk that he will repeat his crimes.[2] However, before release and reintegration, at least the term of imprisonment recommended by the Prosecutor has in fact to be served. In conclusion, the Trial Chamber finds that the sentence declared in the following Disposition is adequate and proportional.

12. The focus will be on the second sentence concerning a requirement that, "before release and reintegration, at least the term of imprisonment recommended by the Prosecutor has in fact to be served". In approaching the issues raised, it will be useful to give attention to some preliminary considerations.

13. First, the second sentence in paragraph 282 of the judgement of the Trial Chamber (occurring two paragraphs before the disposition in the judgement) does not reappear in that disposition. In my opinion, that circumstance does not mean that the sentence is any the less part of the order of the Trial Chamber. The question is whether the Trial Chamber intended compliance. It clearly did. The matter was correctly so understood by the Appeals Chamber.

14. Second, it might be said that the phrasing of the sentence shows that it is hortatory or that it is indicative of an expectation or hope, as distinguished from being an order. In the *Tadić Sentencing Judgement*,[3] the judgement of the Trial Chamber read:

> The Trial Chamber recommends that, unless exceptional circumstances apply, Duško Tadić's sentence should not be commuted or otherwise reduced to a term of imprisonment less than ten years from the date of this Sentencing Judgment or of the final determination of any appeal, whichever is the latter (sic).

[2] BVerfGE 45, 187 (245).
[3] IT-94-I-T, of 14 July 1997, para. 76.

15. On appeal, the Appeals Chamber treated the recommendation as an order imposed by the Trial Chamber.[4] True, the passage was part of the section dealing with "Penalties". But the point is that the mere fact that it was a recommendation did not preclude it from being included in that section.

16. Third, the term mentioned in the second sentence of paragraph 282 of the judgement of the Trial Chamber in this case (as having to be actually served in prison before release) is referred to in paragraph 95 of the judgement of the Appeals Chamber as a "minimum term of imprisonment". The shortened expression "minimum term" was in fact used by the Appeals Chamber in paragraph 32 of the *Tadić Judgement in Sentencing Appeals*[5]; it is likewise used in this opinion.

17. Fourth, caution is appropriate to the exercise of the power to impose a minimum term of imprisonment, but there is no doubt about the availability of the power.[6] Its existence elsewhere is not unknown[7]. I respectfully agree with the statement in paragraph 95 of the judgement of the Appeals Chamber that it "finds that a Trial Chamber may determine what it considers to be the minimum term of imprisonment an accused should serve".

18. Fifth, I also agree that, as mentioned in paragraph 96 of the judgement of the Appeals Chamber, in imposing a minimum term of 15 years, the Trial Chamber was not simply acting on the recommendation of the Prosecution, but that it itself considered that that was the appropriate period that the Appellant should effectively serve.

19. Going on now to the principal issue raised, the Appeals Chamber's view "that a reduction of sentence shall be granted" is based, I think, on these two propositions:

> (i) The decision of the Trial Chamber to impose a minimum term of imprisonment to be served "before release" is in conflict with article 28 of the Statute under which the President can grant early release even before the end of the minimum term.
>
> (ii) The sentence of 23 years' imprisonment was fixed artificially so as to produce a period of 15 years after application of the general rule relating to early release.

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[4] IT-94-1-A and IT-94-1-A*bis,* of 26 January 2000, paras. 6, 27-32.
[5] IT-94-1-A and IT-94-1-A*bis,* of 26 January 2000.
[6] See *Tadić Sentencing Judgement,* IT-94-1-T, of 14 July 1997, para. 76, *Kordić*, IT-95-14/2-T, of 26 February 2001, para. 850, and *Tadić*, *Judgement in Sentencing Appeals,* IT-94-1-A and IT-94-1-A*bis*, of 26 January 2000, para. 28.

20. These propositions will be examined below.

*(i)"Before release"*

21. That it is the general practice of the Tribunal to grant early release after two-thirds of the sentence has been served is borne out by footnote 208 of the Appeals Chamber's judgement, which cites the President's decision in the *Miroslav Tadić* case[8] for the proposition that –

> [T]he eligibility for pardon or commutation of sentence in the enforcement states generally 'starts at two-thirds of the sentence served'. It has been a consistent practice of this Tribunal to apply this standard when determining the eligibility of persons imprisoned at the UNDU for pardon or commutation of sentence.

22. However, the Appeals Chamber correctly points out that the general practice is subject to modification through the workings of variable factors. Depending on the circumstances, under article 28 of the Statute the President could grant early release with effect from a time that might be anterior to the end of a minimum term. There would therefore be difficulty if the minimum term imposed in this case meant that the President could not do that.

23. The President's power to grant early release is a valuable one; it is required by the interests of justice. But, in my respectful view, it is not called into question by a Trial Chamber which determines that an accused is to serve a minimum term of imprisonment "before release".

24. A minimum term represents the *minimum* period of actual imprisonment. It is necessarily and intrinsically intended to be served "before release". If those words had not been used by the Trial Chamber, their intention would be implied when it imposed a minimum term. Whether the words are used or not makes no difference. So if in this case the minimum term is invalidated because of the use of those words, there is really no power to impose a minimum term in any case. But the judgement of the Appeals Chamber correctly accepts that there is power to impose a minimum term. Therefore, it cannot be that the mere use of the words "before release" results in invalidity.

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[7] See, for example, section 269 of the Criminal Justice Act 2003 (UK) and Amendment No. 8 to the Consolidated Criminal Practice Direction, Š2004Ć ALL ER (D) 552 (Jul).

[8] *Prosecutor v. Miroslav Tadić*, IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, of 24 June 2004, para. 4.

25. How then is one to reconcile the imposition of a minimum term to be served "before release" with the power of the President to grant release before the end of the minimum term? I suggest this way:

26. The provisions of article 28 of the Statute operate after the sentence has been imposed; the sentence is subject to the operation of those provisions. A minimum term is an integral part of the sentence. Whatever the sentence says, the provisions of that article apply – they apply whether the sentence is in the ordinary way still to run or whether any minimum term of the sentence is still to run. Hence, the President can grant early release even before the expiry of a minimum term whether or not the Trial Chamber stated that it was to be served "before release".

27. The fact that an element in an order relating to a minimum term can be superseded by a later decision of the President to grant early release does not mean that that element was bad when it was originally incorporated in the order. The order made by the Trial Chamber falls in law to be read as if it included the words "subject to article 28 of the Statute". In effect, the minimum term is to be served "before release" only in those cases in which the President does not grant earlier release. In other cases, the minimum term would have full effect – as it could, no case of actual difficulty having as yet arisen.

28. As mentioned above, paragraph 76 of the *Tadić Sentencing Judgement*[9] expressly said that the sentence of the accused "should not be commuted or otherwise reduced to a term of imprisonment less than ten years …". This was a plain reference to the power of the President to grant early release under article 28 of the Statute. The Appeals Chamber nonetheless proceeded on the basis that the Trial Chamber's order was correct; at least, the point was not the subject of challenge on appeal.[10]

29. I return to the fact that the effect of the judgement of the Appeals Chamber is to remove the old minimum term. Apart from the question relating to the requirement of the Trial Chamber that the minimum term be served "before release", the correctness of the minimum term has not been questioned by the Appeals Chamber. What has been in issue is the correctness of the sentence of 23 years. Therefore it seems to me that, on the view taken by the Appeals Chamber, the proper course

[9] IT-94-I-T, of 14 July 1997, para. 76.
[10] IT-94-1-A and IT-94-1-A*bis*, of 26 January 2000, para. 24.

is to maintain the minimum term shorn of the offending reference to its having to be served "before release …".

30. Also, while the old minimum term has been removed, no new minimum term has been instituted, reasons for the omission not appearing. The course followed has the virtue of avoiding the problem of reconciling the imposition of a minimum term with the power of the President to grant early release. Whether that problem has led to that course is a matter on which I am not clear. What is clear is this: if a similar course is adopted in every case, there will be no value in affirming that a Trial Chamber has a right to impose a minimum term, as the Appeals Chamber has affirmed.

*(ii) The suggested mechanical or mathematical approach to computation of the sentence*

31. I understand the Appeals Chamber's finding of invalidity of the sentence to be also based on the view that the Trial Chamber first fixed 15 years as the period of actual imprisonment and then worked forwards to establish a sentence of 23 years which, after application of the two-thirds rule, would leave 15 years as the period of actual imprisonment. The artificiality of that course condemns it. But I am not satisfied that that was the course taken by the Trial Chamber.

32. In determining the sentence, the Trial Chamber referred to standard sentencing factors, including the gravity of the crime, aggravating factors and mitigating factors. In its judgement, it discussed "Sentencing Law" in chapter VII extending from paragraph 120 to paragraph 174, "Factors Related to Individual Responsibility" in chapter VIII extending from paragraph 175 to paragraph 274, and "Determination of Sentence" in chapter IX extending from paragraph 275 to paragraph 284. Thus, some 160 paragraphs were devoted to a discussion of sentencing considerations. Making an interim finding, in paragraph 214 of its judgement the Trial Chamber said:

> In conclusion, taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life. There are, however, mitigating circumstances to which the Trial Chamber will now turn.

33. The mitigating circumstances were then scrupulously examined from paragraph 215 to paragraph 274 of the judgement of the Trial Chamber, in which last paragraph the Trial Chamber said:

> Considering all the above-mentioned mitigating circumstances together and giving particular importance to such factors as the guilty plea, expression of remorse, reconciliation and the disclosing of additional information to the Prosecution, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted.

34. I cannot find that this full and careful approach was intended to apply only to the determination of the minimum term; it obviously applied to the determination of the sentence as a whole. It was in this meticulous way that the Trial Chamber established the sentence of 23 years, specifically stating that that "sentence [as] declared in the following Disposition is adequate and proportional."[11] There is no suggestion that the Trial Chamber at any time thought of adopting a mechanical or mathematical approach to the computation of the sentence.

35. True, on the application of the two-thirds rule, the sentence of 23 years left 15 years as the minimum term. But, on the face of the materials before the Appeals Chamber, there is no rational basis for supposing – however inviting the supposition may be – that the Trial Chamber made the calculation the other way round, namely, that it first fixed 15 years as the minimum term and then artificially worked forwards to arrive at a sentence of 23 years on the basis of the two-thirds rule.

36. The reverse of the supposition is borne out by the exhaustive analysis which the Trial Chamber made of the normal considerations leading to the determination of a sentence. The material is consistent with the view that, on the basis of that analysis, the Trial Chamber determined that 23 years would be the appropriate sentence; then, applying the two-thirds rule, it arrived at a figure of 15 years which it proceeded to fix as the outer limit of what it considered should be a minimum term. I see nothing wrong in that: as argued above, the Trial Chamber's order does not prevent the President from granting early release even before the end of the minimum term.

37. The foregoing assumes that the minimum term did not influence the Trial Chamber in determining the sentence of 23 years' imprisonment. However, let it be assumed that that is wrong and that the Trial Chamber did take account of the minimum term in determining the sentence of 23 years' imprisonment. Still it seems to me that that is far removed from saying that the Trial

Chamber first determined the minimum term and then artificially fixed the sentence so as to produce the minimum term on the basis of the two-thirds rule. That is the proposition underpinning the judgement of the Appeals Chamber; there is no basis for it.

**Conclusion**

38. For these reasons, I regret that I am not able to accept that there is any case for a reduction of the sentence. In other respects, I however support the judgement of the Appeals Chamber.

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

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Mohamed Shahabuddeen

Signed on the second day of February 2005,
and issued on the fourth day of February 2005,
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

[11] Sentencing Judgement, IT-94-2-S, of 18 December 2003, para. 282.

# XII. GLOSSARY OF TERMS

## A. List of Cited Court Decisions

### 1. ICTY

**ALEKSOVSKI**
*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

**BANOVIĆ**
*Prosecutor v. Predrag Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement")

**BLAŠKIĆ**
*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

**"ČELEBIĆI" (A)**
*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

**"ČELEBIĆI" (B)**
*Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgement on Sentence Appeal")

**ERDEMOVIĆ**
*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement")

*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T *bis*, Sentencing Judgement, 5 March 1998 ("*Erdemović* 1998 Sentencing Judgement")

**FURUNDŽIJA**
*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

**JELISIĆ**
*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

**JOKIĆ**
*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement")

**KORDIĆ**
*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement")

**KRSTIĆ**
*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

**Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ**
*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić, a.k.a. "Vlado"*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement").

**M. NIKOLIĆ**
*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Momir Nikolić* Sentencing Judgement").

**OBRENOVIĆ**
*Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement").

**PLAVŠIĆ**
*Prosecutor v. Biljana Plavšić,* Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003 ("*Plavšić* Sentencing Judgement").

**SIKIRICA, DOŠEN AND KOLUNDŽIJA**
*Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 ("*Sikirica et al.* Sentencing Judgement").

**M. SIMIĆ**
*Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002 ("*Simić* Sentencing Judgement").

**STAKIĆ**
*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement").

**D. TADIĆ**
*Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals").

**TODOROVIĆ**
*Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001 ("*Todorović* Sentencing Judgement").

**VASILJEVIĆ**
*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

**AKAYESU**
*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

**KAYISHEMA AND RUZINDANA**
*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement ")

**MUSEMA**
*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

**NIYITEGEKA**
*Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

**RUGGIU**
*Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000 ("*Ruggiu* Judgement and Sentence")

**RUTAGANDA**
*Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

**SERUSHAGO**
*Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999 ("Serushago Sentence").

*Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-A, Reasons for Judgment [Appeal against Sentence], 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

3. Other Decisions

**BVerfG**, BVerfGE 45, 187 (245, 255F).

**R. V. ARKELL**
*R. v. Arkell*, [1990] 2 S.C.R. 695

**R. V. MARTINEAU**
*R. v. Martineau*, [1990] 2 S.C.R. 633

## B. List of Abbreviations

*According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.*

| | |
|---|---|
| ACHR | American Convention of Human Rights of 22 November 1969 |
| AT | Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited. |
| BVerfGE | Bundesverfassungsgerichtsentscheidung (Decisions of the German Federal Constitutional Court) <accessible through website: http://www.bverfg.de> |
| Defence | The Accused, and/or the Accused's counsel |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention of Human Rights) |
| Federal Criminal Code of 1976/77 | Criminal Code of the Socialist Federal Republic of Yugoslavia adopted on 28 of September 1976 and entered into force on 1 July 1977 |
| ICCPR | International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966. Entry into force on 23 March 1976 |
| ICTR | International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 |
| ICTY | 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 |
| Indictment | Third Amended Indictment of 31 October 2003 in this case |
| *inter alia* | Among other things |
| International Tribunal | See: ICTY |
| JNA | Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia) |
| p. | Page |
| pp. | Pages |
| para. | Paragraph |

| | |
|---|---|
| paras | Paragraphs |
| Principle of *lex mitior* | Principle according to which an accused has the right to benefit from the most lenient penalty in cases where the law has changed between the time of the criminal conduct and the date of sentencing |
| Prosecution | Office of the Prosecutor |
| Rules | Rules of Procedure and Evidence of the ICTY |
| Statute | Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993) |
| T. | Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited. |
| UNDU | United Nations Detention Unit for persons awaiting trial or appeal before the ICTY |