IT-96-23/2-A
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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-96-23/2-A
		Date:	31 October 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Liu Daqun, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 October 2007**

PROSECUTOR

v.

DRAGAN ZELENOVIĆ

PUBLIC

JUDGEMENT ON SENTENCING APPEAL

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Julia Thibord

Counsel for the Accused:

Mr. Zoran Jovanović

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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 ("Appeals Chamber" and "International Tribunal", respectively) is seized of an appeal from the Sentencing Judgement rendered by Trial Chamber I on 4 April 2007 in the case *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S ("Sentencing Judgement").

2. The events giving rise to this appeal took place in the Foča municipality and its surrounding villages, eastern Bosnia and Herzegovina, from April to October 1992. Dragan Zelenović ("Appellant") was born on 12 February 1961 in Foča. Prior to 1992, he worked as an electrician in Miljevina. The Appellant was a member of the "Dragan Nikolić Unit", a military unit in Foča which, in the beginning of the war, was part of the Bosnian-Serb Territorial Defence and, from the summer of 1992 onwards, part of the Bosnian-Serb army. The Appellant was a soldier and, *de facto*, a military policeman.[1]

3. The initial indictment against the Appellant was issued on 18 June 1996 and included seven other persons.[2] The indictment was amended on 5 October 1999 and a redacted version of the amended indictment ("Amended Indictment") was filed on 20 April 2001.[3] Following the initial indictment, a number of arrest warrants were issued against the Appellant,[4] who left Foča in 2000 or 2001 and travelled to Russia, where he lived until his arrest on 22 August 2005. He was subsequently transferred to Bosnia and Herzegovina on 8 June 2006 and to the International Tribunal on 10 June 2006.[5]

4. On 29 November 2004, the Office of the Prosecutor ("Prosecution") filed a motion for the referral of the case of the Appellant and Gojko Janković to the authorities of Bosnia and Herzegovina ("11*bis* Motion"). A Referral Bench was appointed by the President of the International Tribunal on 1 December 2004 and the case of Gojko Janković was referred to the authorities of Bosnia and Herzegovina in accordance with the decision of the Referral Bench issued on 22 July 2005.[6] On 14 December 2006, the Prosecution and the Defence filed a confidential Joint Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the

[1] Sentencing Judgement, para. 17.
[2] Sentencing Judgement, para. 1. The seven other accused were Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovać, Zoran Vuković, Dragoljub Kunarac and Radovan Stanković.
[3] Sentencing Judgement, para. 1.
[4] Sentencing Judgement, para. 2.
[5] Sentencing Judgement, para. 4.

Prosecutor pursuant to Rule 62*ter* ("Plea Agreement").[7] According to the Plea Agreement, the Appellant agreed to plead guilty to seven counts of crimes against humanity, three of which charged torture, as provided for by Article 5(f) of the Statute of the International Tribunal ("Statute") (counts 5, 13, and 41), and four of which charged rape, as provided for by Article 5(g) of the Statute (counts 6, 14, 42, and 49).[8] Because of the Appellant's guilty plea, no decision was taken on the 11*bis* Motion with regard to the Appellant.[9]

5. In the Sentencing Judgement, the Trial Chamber described the crimes committed by the Appellant as follows:

> The crimes which Mr. Zelenović has pleaded guilty to were part of a pattern of sexual assaults that took place over a period of several months, and in four different locations, and involved multiple victims. Mr. Zelenović took direct part in the sexual abuse of victims in a number of detention facilities, including the multiple rape of victims FWS-75 and FWS-87. Mr. Zelenović has been found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape. He has also been found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting. Four of the instances of sexual abuse were gang rapes, committed together with three or more other perpetrators. In one of those instances he participated as aider and abettor in the rape of FWS-75 by at least ten soldiers, which was so violent that the victim lost consciousness. He participated as co-perpetrator in an incident during which the victim was threatened with a gun to her head while being sexually abused.[10]

6. On 4 April 2007, the Trial Chamber sentenced the Appellant to 15 years' imprisonment.[11] On 27 April 2007, the Appellant filed a Defence Notice for Leave to Appeal Sentencing Judgement ("Notice for Leave to Appeal"), which was considered by the Appeals Chamber, the Prosecution consenting, as the notice of appeal required under Rule 108 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").[12]

7. The Appellant filed his Defence Appeal on Sentencing Judgement ("Appellant's Brief") on 25 May 2007. On 25 June 2007, the Prosecution filed its Response Brief ("Respondent's Brief") and on 3 July 2007, the Appellant filed its Reply to the Respondent's Brief ("Reply Brief").

8. In the Appellant's Brief, the Appellant submits that the Trial Chamber did not adequately assess the mitigating circumstances in the Sentencing Judgement, namely the Appellant's guilty plea which allowed psychological benefit for victims who would not be required to give evidence;

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[6] Sentencing Judgement, para. 3. The decision was upheld on appeal, *see Prosecutor v. Gojko Janković*, Decision on 11*bis* Referral, 15 November 2005.
[7] Sentencing Judgement, para. 10.
[8] Sentencing Judgement, para. 10.
[9] Sentencing Judgement, paras 9-13.
[10] Sentencing Judgement, para. 38. For a more detailed description of the crimes for which the Appellant was convicted *see* Trial Judgement, paras 21-27.
[11] Sentencing Judgement, para. 70.
[12] Prosecution Motion Concerning "Defence Notice for Leave to Appeal Sentencing Judgement", 3 May 2007 ("Prosecution Motion"), paras 1, 3 and 5. Scheduling Order, 24 July 2007.

and the Appellant's cooperation with the Prosecution in general (first ground of appeal).[13] Furthermore, the Appellant submits that the final judgement of the State Court of Bosnia and Herzegovina in the case of *Prosecutor v. Radovan Stanković* should have been taken into consideration when determining the sentence (second ground of appeal).[14]

[13] Appellant's Brief, para. 4.
[14] Appellant's Brief, para. 5. The Appeals Chamber notes that the Appellant fails to indicate whether the errors alleged are errors of law or of fact.

II. STANDARD OF APPELLATE REVIEW

9. The provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general sentencing guidelines for a Trial Chamber that amount to an obligation to take into account the following factors: the gravity of the offence or totality of the culpable conduct, 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.[15]

10. Sentencing appeals, as appeals from a trial judgement, are appeals *stricto sensu* and not trials *de novo*.[16] The Appeals Chamber will, in principle, only take into account evidence referred to by the Trial Chamber in the body of the Judgement or in a related footnote; evidence contained in the trial record and referred to by the Parties; and additional evidence admitted on appeal.[17] Pursuant to Article 25 of the Statute, 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.[18] These criteria are well established in the jurisprudence of the International Tribunal[19] and the International Criminal Tribunal for Rwanda ("ICTR").[20]

11. Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime.[21] This discretion includes determining the weight given to mitigating or aggravating circumstances.[22] The conclusion as to whether a fact amounts to a mitigating

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[15] *Blagojević and Jokić* Appeal Judgement, para. 320; *Bralo* Judgement on Sentencing Appeal, para. 7; *Galić* Appeal Judgement, para. 392; *Momir Nikolić* Judgement on Sentencing Appeal, para. 6; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 6; *Deronjić* Judgement on Sentencing Appeal, para. 6; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 7; *Čelebići* Appeal Judgement, paras 429 and 716.

[16] *Bralo* Judgement on Sentencing Appeal, para. 8; *Galić* Appeal Judgement, para. 393; *Momir Nikolić* Judgement on Sentencing Appeal, para. 7; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 7; *Deronjić* Judgement on Sentencing Appeal, para. 7; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8; *Kupreškić et al.* Appeal Judgement, para. 408; *Mucić et al.* Judgement on Sentencing Appeal, para. 11; *Čelebići* Appeal Judgement, para. 724.

[17] *Bralo* Judgement on Sentencing Appeal, para. 8. *See also Naletilić and Martinović* Appeal Judgement, paras 11-12; *Blaškić* Appeal Judgement, paras 13 and 24.

[18] *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Bralo* Judgement on Sentencing Appeal, para. 8; *Momir Nikolić* Judgement on Sentencing Appeal, para. 7; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 7; *Deronjić* Judgement on Sentencing Appeal, para. 7; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8; *Furundžija* Appeal Judgement, para. 40.

[19] *Kvočka et al.* Appeal Judgement, para. 14. *See also Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, para. 37; *Tadić* Appeal Judgement, para. 64.

[20] *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320.

[21] *Blagojević and Jokić* Appeal Judgement, para. 321; *Brđanin* Appeal Judgement, para. 500; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 393; *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Babić* Judgement on Sentencing Appeal, para. 7; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 9; *Čelebići* Appeal Judgement, para. 717.

[22] *Brđjanin* Appeal Judgement, para. 500.

circumstance will be reached "on a balance of probabilities".[23] 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 or has failed to follow the applicable law.[24] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[25] To show that the Trial Chamber committed a discernible error in exercising its discretion,

> the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[26]

[23] *Bralo* Judgement on Sentencing Appeal, para. 8; *Babić* Judgement on Sentencing Appeal, para. 43; *Blaškić* Appeal Judgement, para. 697. *See also Čelebići* Appeal Judgement, para. 590.
[24] *Blagojević and Jokić* Appeal Judgement, paras 137 and 321; *Brđanin* Appeal Judgement, para. 500; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 393; *Momir Nikolić* Appeal Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Blaškić* Appeal Judgement, para. 680; *Krstić* Appeal Judgement, para. 242; *Kupreškić et al.* Appeal Judgement, para. 408; *Jelisić* Appeal Judgement, para. 99; *Čelebići* Appeal Judgement, para. 725; *Furundžija* Appeal Judgement, para. 239; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22.
[25] *Brđanin* Appeal Judgement, para. 500; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 393; *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 9; *Čelebići* Appeal Judgement, para. 725.
[26] *Babić* Judgement on Sentencing Appeal, para. 44. *See also, Blagojević and Jokić* Appeal Judgement, paras 137 and 321; *Brđanin* Appeal Judgement, para. 500; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 394; *Momir Nikolić* Judgement on Sentencing Appeal, para. 95.

III. FIRST GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED BY FAILING TO GIVE PROPER WEIGHT TO SPECIFIC FACTORS IN MITIGATION OF SENTENCE

12. The Appellant submits that the Trial Chamber erred in failing to adequately assess the mitigating circumstances in the Sentencing Judgement, by giving insufficient weight to, first, the Appellant's admission of guilt and the resulting psychological benefit for victims who will not be required to give evidence; and, second, to the Appellant's cooperation with the Prosecution in general.[27]

A. The Appellant's Guilty Plea and its Effect in Relieving Victims from Testifying

13. The Appellant submits that his guilty plea is of "extraordinary importance", since it is the first guilty plea in the practice of the International Tribunal in connection with the massive rapes committed during the armed conflict in the Foča municipality.[28] In his view, his admission of guilt in this context is of such importance that it should have been given more weight than that given to guilty pleas in other cases.[29] Whilst recognising that the Trial Chamber took into account the beneficial effects of the guilty plea for the victims,[30] the Appellant argues that the Trial Chamber erred "in not providing a concrete appraisement of this particular circumstance and in not mentioning its significance" in determining the sentence.[31] Moreover, the Appellant submits that the Trial Chamber failed to assess "the expert's findings relating to the psychological benefit for the victims from their non-appearance before the Court and from avoidance of re-living their traumas".[32] In sum, the Appellant is of the view that the Trial Chamber erred in determining the penalty, since it "construed and assessed this circumstance in a generalized manner".[33]

14. The Prosecution responds that the Appellant did not identify any discernible error in the Trial Chamber's consideration of the guilty plea as a mitigating factor and that the Appellant's arguments "are contrary to the principle that the Chamber has discretion in attributing weight to a guilty plea".[34] In particular, the Prosecution submits that "the Trial Chamber was not obliged to separately specify the degree of mitigation arising from the beneficial effects for the victims" and

[27] Appellant's Brief, para. 4.
[28] Notice for Leave to Appeal, para. 10; Appellant's Brief, para. 7. *See also*, AT. 10.
[29] Appellant's Brief, para. 10. *See also* para. 12, where it is submitted that "it was necessary to accord a concrete and greater importance to this mitigating circumstance, particularly because it was for the first time to happen in the [practice of the International Tribunal]".
[30] These beneficial effects are listed in paragraphs 10-11 of the Appellant's Brief.
[31] Appellant's Brief, para. 9.
[32] Appellant's Brief, para. 9; AT. 11. The report of expert Ana Najman ("Expert Report") is included as Annex C to the Defence Sentencing Brief, 14 February 2007.
[33] Appellant's Brief, para. 13; AT. 9-10.

that in any event, the Trial Chamber expressly took into account the fact that victims were relieved from testifying.[35] The Prosecution contends that the Trial Chamber did not err by omitting to refer to the Expert Report, since it is not obliged "to set out in detail each and every factor it relied upon" and that, "the Trial Chamber's reasoning is consistent with the expert's conclusion".[36] Moreover, the Prosecution argues that the Trial Chamber did not err by not according more weight to the Appellant's guilty plea on the basis that it is the first one concerning the mass rapes which occurred during the armed conflict in Bosnia and Herzegovina.[37] According to the Prosecution, this assertion is overstated, since three other accused persons before the International Tribunal have pleaded guilty to charges of rape and a fourth admitted that they occurred in the Keraterm Camp.[38] The Prosecution concedes however that the Appellant's guilty plea is the first one concerning the rapes which occurred in the Foča region in 1992.[39] In addition, the Prosecution asserts that the beneficial effect of a guilty plea for the victims must be assessed against the inherent gravity of the offences[40] and that a "guilty plea does not deserve more weight because it admits particularly traumatising and humiliating crimes".[41]

15. In his Reply Brief, the Appellant restates his views on the weight that should be given to his guilty plea and submits that "precisely because of the nature of the crime the guilty plea has special importance in terms that victims will be relieved of the obligation to testify".[42] He further argues that the Trial Chamber did not attribute adequate importance to the Expert Report relating to the psychological benefit for the victims from their non-appearance before the Court and that this should be given more weight in the present case than in other cases where an accused pleaded guilty since "it needs to be particularly viewed in the light of the nature of emotional sufferings that victims of the rape would experience when testifying."[43]

16. The Appeals Chamber recalls at the outset that the mitigating weight to be attached to a guilty plea lies within the discretion of the Trial Chamber.[44] Therefore, the assessment of the beneficial effects resulting from that guilty plea also lies within such discretion.

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[34] Respondent's Brief, para. 10.
[35] Respondent's Brief, para. 11.
[36] Respondent's Brief, para. 12.
[37] Respondent's Brief, para. 13.
[38] Respondent's Brief, para. 13 and in particular, footnote 39.
[39] AT. 24.
[40] Respondent's Brief, para. 15.
[41] Respondent's Brief, para. 16; AT. 24.
[42] Reply Brief, para. 8.
[43] Reply Brief, para. 10.
[44] *Bralo* Judgement on Sentencing Appeal, para. 42. *See also Momir Nikolić* Judgement on Sentencing Appeal, para. 82. *Jelisić* Appeal Judgement, para. 121.

17. The parties agree on the fact that the guilty plea and the subsequent relieving effect on victims who will not have to testify before the International Tribunal have been considered as a mitigating factor by the Trial Chamber in the Sentencing Judgement.[45] The Trial Chamber stated in this respect that "the guilty plea can be given considerable weight in mitigation".[46] Moreover, it stated that the fact that a guilty plea involving serious crimes such as torture and rape is likely to save the victims from reliving the trauma through testifying, is an effect that must be taken into consideration when determining the weight in mitigation the guilty plea should be given.[47] Further, the Trial Chamber was cognisant of the fact that the Appellant was the first accused person to admit responsibility for rapes which occurred in the Foča municipality in 1992 and took this factor into consideration, stressing that such an admission was contributing to "the establishment of truth and thereby to reconciliation in the region".[48]

18. The Appeals Chamber finds that the Appellant fails to show that the Trial Chamber gave insufficient weight to this mitigating circumstance. In addition, the Appeals Chamber recalls that, "upon finding that mitigating circumstances have been established, a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber".[49] The Appeals Chamber holds that a Trial Chamber is not required to explicitly mention the extent of the mitigating value it grants to a guilty plea.[50] The Appeals Chamber therefore finds that, having considered and given "considerable weight"[51] to the Appellant's guilty plea and its beneficial effects for the victims as well as to the fact that this was the first guilty plea concerning the rapes that occurred "in the region", the Trial Chamber did not commit any discernible error when not specifying the degree of mitigation it accorded to the guilty plea.

19. With regard to the Appellant's submission that the Trial Chamber erred by failing to assess the Expert Report in relation to the psychological benefit for the victims from their non-appearance before the Court,[52] the Appeals Chamber recalls that Trial Chambers, although required to give a reasoned opinion,[53]

> [...] are not required to "articulate every step" of their reasoning in reaching particular findings, and failure to list in a judgement "each and every circumstance" placed before them and

[45] Appellant's Brief, paras 6, 8 and 12; Respondent's Brief, paras 10-13.
[46] Sentencing Judgement, para. 46. *See also* para. 68, where the Trial Chamber states that it "has given considerable weight to Mr. Zelenović's guilty plea".
[47] Sentencing Judgement, para. 49.
[48] Sentencing Judgement, para. 48.
[49] *Miodrag Jokić* Judgement on Sentencing Appeal, para. 57; *Bralo* Judgement on Sentencing Appeal, para. 84. *See also Babić* Judgement on Sentencing Appeal, para. 44.
[50] *See* for cooperation with the Prosecution as a mitigating factor, *Blaškić* Appeal Judgement, para. 702.
[51] Sentencing Judgement, paras 46 and 68. *See also* para. 56, where the Trial Chamber held that the Appellant's guilty plea was one of the main mitigating circumstances in this case.
[52] Appellant's Brief, para. 9; AT. 11.
[53] Art. 23(2) of the Statute and Rule 98*ter*(C) of the Rules. *See also Kordić and Čerkez* Appeal Judgement, para. 383.

considered "does not necessarily mean that [they] either ignored or failed to evaluate the factor in question.[54]

In any event, the transcript of the sentencing hearing held on 23 February 2007 shows that the Expert Report was discussed by the parties and duly taken into consideration by the Trial Chamber.[55] Furthermore, the Appeals Chamber finds that the Trial Chamber's reasoning according to which "a guilty plea is likely to save the victims from reliving the trauma through testifying"[56] is reflective of the Expert Report's conclusion that "by his admitting the committed offence the accused frees the victims from testifying, from painful confrontation and retraumatization".[57]

20. Consequently, this part of the Appellant's first ground of appeal is dismissed.

B. The Appellant's Cooperation with the Prosecution

21. The Appellant alleges that according to the Plea Agreement, the cooperation which he is obliged to only relates to "the proceedings against the co-accused or in other cases where charges encompass [...] known persons and events."[58] The Appellant submits that he nonetheless agreed to provide cooperation and information that went beyond the scope of the obligation he assumed.[59] Consequently, the Appellant submits that the Trial Chamber erred in the Sentencing Judgement, "when it characterized the cooperation offered by Mr. Zelenović [...] as 'some initial cooperation'" and gave this circumstance less importance than it deserved.[60]

22. The Prosecution responds that the Trial Chamber considered both the Appellant's commitment to cooperate and the cooperation he has already given and that the Appellant failed to show that the Trial Chamber discernibly erred in giving weight in mitigation to his cooperation with the Prosecution.[61] Moreover, the Prosecution contests the Appellant's interpretation of the extent of the obligation to cooperate contained in the Plea Agreement and submits that, "the Trial Chamber gave Zelenović credit for making a full commitment to co-operate and treated this as one of the 'main' mitigating circumstances".[62] Therefore, the Prosecution submits that the Appellant did not

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[54] *Babić* Judgement on Sentencing Appeal, para. 43 (footnote omitted) quoting *Kupreškić et al.* Appeal Judgement, para. 458.
[55] T. 500; T. 501; T. 512; T. 518.
[56] Sentencing Judgement, para. 49.
[57] Expert Report, p. 13.
[58] Appellant's Brief, para. 17. The Appeals Chamber notes that a large portion of the Appellant's submissions with respect to his cooperation with the Prosecution has been filed confidentially. By motion filed on 11 October 2007, the Appellant requested that the Appeals Chamber maintain the confidentiality of paragraphs 18-21 of the Appellant's Brief, as well as allow the parties to discuss the issue of cooperation in private session during the appeals hearing of 15 October 2007. *See* Defence Response on "Questions to the Parties for Appeal Hearing on 15 October 2007" with Annex, 11 October 2007. The Prosecution agreed with the Appellant's request, AT. 25.
[59] Reply Brief, para. 14.
[60] Appellant's Brief, para. 22.
[61] Respondent's Brief, paras 18-19.
[62] Respondent's Brief, para. 23.

demonstrate that the Trial Chamber underestimated the value of his promised or actual cooperation with the Prosecution.[63]

23. In his Reply Brief, the Appellant maintains that his "readiness to cooperate went beyond the scope of the established obligations".[64] Therefore, the Appellant upholds that the Trial Chamber erred when assessing his cooperation as "initial", rather than "substantial", and in not attributing it sufficient weight in mitigation of sentence.[65]

24. The Appeals Chamber recalls that substantial cooperation with the Prosecution is the only mitigating circumstance expressly mentioned in the Rules.[66] However, what constitutes "substantial cooperation" is not defined by the Rules. It is within the Trial Chamber's discretion to evaluate the extent and the nature of the accused's cooperation[67] and to determine the weight, if any, it should be accorded in mitigation.[68] As correctly noted by the Trial Chamber, an accused's cooperation does not need to be substantial[69] for it to be taken into account as a mitigating circumstance.[70]

25. The Appeals Chamber notes that the Plea Agreement does not specify the exact content of the Appellant's obligation to cooperate, but rather defines this obligation in broad terms.[71] According to the Plea Agreement, the Appellant agrees,

> to co-operate with, and to provide truthful and complete information to the Office of the Prosecutor whenever requested. In accordance with such co-operation, Dragan Zelenović agrees to meet as often as necessary with members of the Office of the Prosecutor in order to provide them with full and complete information and evidence that is known to him. Mr. Zelenović agrees to be truthful and candid, and to freely answer all questions put to him by members of the Office of the Prosecutor.[72]

Therefore, the Appeals Chamber finds that the Appellant did not prove that his cooperation with the Prosecution went "beyond the scope of the established obligations"[73] and "as such represents substantial co-operation".[74]

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[63] Respondent's Brief, para. 24.
[64] Reply Brief, para. 11.
[65] Reply Brief, para. 14.
[66] *See* Rule 101(B)(ii) of the Rules.
[67] *Bralo* Judgement on Sentencing Appeal, para. 51. *See also Jelisić* Appeal Judgement, para. 124.
[68] *Bralo* Judgement on Sentencing Appeal, para. 51; *Momir Nikolić* Judgement on Sentencing Appeal, para. 91. *See also Jelisić* Appeal Judgement, para. 126.
[69] *See* Rule 101(B)(ii) of the Rules.
[70] Sentencing Judgement, para. 52. *See also Bralo* Judgement on Sentencing Appeal, para. 51; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 66; *Vasiljević* Appeal Judgement, para. 180.
[71] Plea Agreement, para. 9.
[72] Plea Agreement, para. 9, as quoted in the Sentencing Judgement, para. 52.
[73] Reply Brief, para. 11.
[74] Reply Brief, para. 14.

26. In relation to the Appellant's submission that the Trial Chamber erred when considering his cooperation with the Prosecution as merely "some initial cooperation", the Appeals Chamber notes the Trial Chamber's finding that, regardless of the initial or substantial character of the cooperation,

> it is the *commitment* to cooperate *as well as* actual cooperation, even if due to the particular experiences of the convicted person his or her full and sincere assistance is judged to be of little or no value to ongoing investigations or trials, that determines the weight that should be attached to this factor.[75]

The Trial Chamber further found that the Appellant's commitment to cooperate with the Prosecution was one of the "main mitigating circumstances in this case".[76] Hence, the Appeals Chamber is satisfied that the Trial Chamber did not commit a discernible error when considering the scope of the Appellant's cooperation with the Prosecution in mitigation of the sentence.

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

[75] Sentencing Judgement, para. 52 (footnote omitted; emphases added).
[76] Sentencing Judgement, para. 56.

IV. SECOND GROUND OF APPEAL: WHETHER THE STANKOVIĆ APPEAL JUDGEMENT RENDERED BY THE STATE COURT OF BOSNIA AND HERZEGOVINA SHOULD HAVE BEEN TAKEN INTO CONSIDERATION IN DETERMINING THE SENTENCE

28. This ground of appeal is based on the Appellant's contention that the Trial Chamber should have taken into account the appeal judgement in the case of *Prosecutor v. Radovan Stanković*[77] before the State Court of Bosnia and Herzegovina in determining the sentence against the Appellant. He argues that whilst it was possible for the Trial Chamber to learn about the *Stanković* Appeal Judgement, which was rendered on 28 March 2007 and "submitted to the first-instance court" on 17 April 2007, it did not take this judgement into account for the reason that the case was still under appeal.[78]

29. The Trial Chamber "refrained from taking guidance from [the *Stanković*] case",[79] having considered the arguments of the parties and "in particular the fact that the judgement in the *Stanković* case [was] under appeal."[80] The Appeals Chamber finds that the Appellant does not demonstrate that the Trial Chamber erred in this respect. Both parties agree that the *Stanković* Appeal Judgement was only made public on 17 April 2007,[81] which occured after the rendering of the Sentencing Judgement in the present case. Hence, the Appellant does not substantiate his allegation that it was possible for the Trial Chamber to learn about the *Stanković* Appeal Judgement prior to the rendering of the Sentencing Judgement.

30. For the foregoing reasons, the Appellant's second ground of appeal is dismissed.

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[77] Appellant's Brief, paras 25, 27; *Prosecutor v. Radovan Stanković* Case No. X-KRŽ-05/70, Panel of the Appellate Division, Appeal Judgement, 28 March 2007 (State Court of Bosnia and Herzegovina) ("*Stanković* Appeal Judgement").
[78] Notice for Leave to Appeal, para. 15.
[79] Trial Judgement, para. 69.
[80] Trial Judgement, para. 69.
[81] Confidential Defence Response on "Questions to the Parties for Appeal Hearing on 15 October 2007" with Public Annex, 11 October 2007, para. 9. For the Prosecution, *see* AT. 31. The Appeals Chamber notes that, during the appeal hearing, Counsel for the Appellant argued that the Trial Chamber should have taken into account the first instance Judgement in *Prosecutor v. Radovan Stanković* (AT. 46-47). The Appeals Chamber declines to consider this argument as it was raised for the first time during the appeal hearing and falls outside the scope of the arguments raised in the Appellant's Notice for Leave to Appeal. In any event, the Appeals Chamber is of the view that the first instance Judgement in *Stanković* would not have assisted the Appellant in making his case.

V. DISPOSITION

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

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

NOTING the respective written submissions of the Parties and the oral arguments they presented at the appeal hearing of 15 October 2007;

SITTING in open session;

DISMISSES the Appellant's grounds of appeal;

AFFIRMS the sentence of 15 (fifteen) years' imprisonment as imposed by the Trial Chamber, subject to credit being given under Rule 101(C) of the Rules for the time Dragan Zelenović has already spent in detention since 22 August 2005; and

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 in which his sentence will be served.

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

Dated this 31st day of October 2007 at The Hague, The Netherlands.

Liu Daqun
Presiding Judge

Mohamed Shahabuddeen
Judge

Mehmet Güney
Judge

Andrésia Vaz
Judge

Wolfgang Schomburg
Judge

[Seal of the International Tribunal]

VI. ANNEX A: PROCEDURAL BACKGROUND

A. Filing of the appeal submissions

31. The Appellant filed a "Defence Notice for Leave to Appeal Sentencing Judgement" on 27 April 2007.[82] The Appellant's Brief was filed on 25 May 2007[83] and the Respondent's Brief on 25 June 2007.[84] The Appellant filed his Reply Brief on 3 July 2007.[85]

B. Composition of the Appeals Chamber

32. By order of 2 May 2007, the President of the International Tribunal, Judge Fausto Pocar, designated the following Judges to hear the present appeal: Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Liu Daqun, Judge Andrésia Vaz and Judge Wolfgang Schomburg.[86] On 24 July 2007, having been elected as Presiding Judge in the present appeal pursuant to Rule 22(B) of the Rules, Judge Liu Daqun issued an order designating himself as the Pre-Appeal Judge with responsibility for all pre-appeal proceedings in this case, in accordance with Rules 65*ter* and 107 of the Rules.[87]

C. Substantive motions

33. On 3 May 2007, the Prosecution filed a motion requesting the Appeals Chamber to consider the Defence's Notice for Leave to Appeal[88] as the notice of appeal required under Rule 108 of the Rules and to consequently determine the deadlines for the remainder of the briefing in this appeal based on the date of the Notice for Leave to Appeal, namely 27 April 2007.[89] In the Appellant's Brief, the Appellant did not take a position regarding the request made to the Appeals Chamber in the Prosecution Motion. In the Scheduling Order of 24 July 2007, the Pre-Appeal Judge granted the Prosecution's request and confirmed that the Notice for Leave to Appeal constituted the notice of appeal required under Rule 108 of the Rules.[90]

34. On 18 July 2007, the Prosecution filed a confidential motion requesting the Appeals Chamber to strike out portions of the Reply Brief "because they are not supported by evidence in

[82] Defence Notice for Leave to Appeal Sentencing Judgment, 27 April 2007.
[83] Defence Appeal on Sentencing Judgement, 25 May 2007.
[84] Prosecution's Response Brief, 25 June 2007.
[85] Defence Reply to "Prosecution Response Brief", 3 July 2007.
[86] Order Assigning Judges to a Case Before the Appeals Chamber, 2 May 2007.
[87] Order Designating Pre-Appeal Judge, 24 July 2007.
[88] Prosecution Motion Concerning "Defence Notice for Leave to Appeal Sentencing Judgement", 3 May 2007.
[89] Prosecution Motion, paras 1 and 5.
[90] Scheduling Order, 24 July 2007.

the record and he has not sought to adduce additional evidence to support them under Rule 115"[91] of the Rules. The Appellant responded on 31 July 2007.[92] The Prosecution filed its reply on 6 August 2007.[93] On 6 September 2007, the Appeals Chamber issued its confidential Decision on Prosecution Motion to Strike Portions of the Appellant's Reply, partially granting the Prosecution's request and striking the last two sentences of paragraph 13 of the Reply Brief.

D. Status Conference

35. In accordance with Rule 65*bis*(B) of the Rules, a status conference was held on 27 August 2007.[94]

E. Appeal Hearing

36. Pursuant to the Scheduling Order of 20 September 2007, the hearing on the merits of the appeal took place on 15 October 2007.

[91] Prosecution Motion to Strike Portions of Appellant's Reply (confidential), 18 July 2007, para. 1.
[92] Defence Response to Prosecution Motion to Strike Portions of Appellant's Reply (confidential), 31 July 2007.
[93] Prosecution Reply to Defence Response to Prosecution Motion to Strike Portions of Appellant's Reply (confidential), 6 August 2007.
[94] Scheduling Order, 24 July 2007. During the status conference, the Pre-Appeal Judge asked the Appellant about his health condition during detention, AT. 3. In order for the information to be complete, the Appellant submitted the Defence Notice Regarding Health Condition of the Accused Dragan Zelenović with Confidential Annex, 11 October 2007. The issue was further mentioned by the Appellant in his final word at the end of the appeal hearing, AT. 49.

VII. ANNEX B: 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").

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Sentencing Judgement, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ & JOKIĆ
Prosecutor v. Vidoje Blagojević & Dragan Jokić, Case No IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

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

BRALO
Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Judgement on Sentencing Appeal").

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. It-99-36-A, Judgement, 3 April 2007 (*Brđanin* Appeal Judgement).

"ČELEBIĆI"
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").

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Judgement on Sentencing Appeal").

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

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement").

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

M. JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Miodrag Jokić* Judgement on Sentencing Appeal").

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

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

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

MUCIĆ, DELIĆ AND LANDŽO
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 Sentencing Appeal").

NALETILIĆ AND MARTINOVIĆ
Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-02-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal").

M. NIKOLIĆ
Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Appeal Sentencing Judgement, 8 March 2006 ("*Momir Nikolić* Judgement on Sentencing Appeal").

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 on Sentencing Appeal, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals").

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

ZELENOVIĆ
Prosecutor v. Dragan Zelenović, Case No. IT-96-23/2-S, Sentencing Judgement, 4 April 2007 ("Sentencing 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. Eliézer Niyitegeka, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement").

3. Other courts

STANKOVIĆ
Prosecutor v. Radovan Stanković, Case No. X-KRŽ-05/70, First Instance Panel, Verdict, 14 November 2006 (State Court of Bosnia and Herzegovina) ("*Stanković* Judgement").

Prosecutor v. Radovan Stanković, Case No. X-KRŽ-05/70, Panel of the Appellate Division, Verdict, Appeal Judgement, 28 March 2007 (State Court of Bosnia and Herzegovina) ("*Stanković* Appeal Judgement").

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.

Amended Indictment	*Prosecutor v. Gojko Janković, Dragan Zelenović and Radovan Stanković,* Case No. IT-96-23/2-1 Amended Indictment, 20 April 2001
Appellant	Dragan Zelenović
Appellant's Brief	*Prosecutor v. Dragan Zelenović,* Case No. IT-96-23/2-A, Defence Appeal on Sentencing Judgement (Confidential Version), 25 May 2007
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 in the final transcripts released to the public.
Defence	Counsel for Dragan Zelenović
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
International Tribunal	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
Notice for Leave to Appeal	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Defence Notice for Leave to Appeal Sentencing Judgement, 27 April 2007
Plea Agreement	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62*ter*, 14 December 2006
Prosecution	Office of the Prosecutor
Prosecution Motion	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Prosecution Motion Concerning "Defence Notice for Leave to Appeal Sentencing Judgement", 3 May 2007
Reply Brief	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Defence Reply to "Prosecution Response Brief" (Confidential Version), 3 July 2007
Respondent's Brief	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Prosecution's Response Brief (Confidential Version), 25 June 2007
Rules	Rules of Procedure and Evidence
Sentencing Hearing	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Hearing, 23 February 2007 ("Sentencing Hearing")
Sentencing Judgement	*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Judgement, 4 April 2007
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 specified otherwise. Minor differences may therefore exist between the pagination therein and in the final transcripts released to the public.
UN	United Nations