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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-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

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.

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

[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

[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,

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.