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APPEALS CHAMBER

CHAMBRE D'APPEL

The Hague, 20 July 2005
CT/MOW/992e

APPEALS JUDGEMENT IN THE CASE THE PROSECUTOR v. MIROSLAV DERONJIĆ

• AFFIRMS SENTENCE OF 10 YEARS' IMPRISONMENT

Please find below a summary of the Judgement delivered by the Appeals Chamber, composed of Judge Meron (presiding), Judge Pocar, Judge Shahabuddeen, Judge Güney and Judge Weinberg de Roca, as read out by the Presiding Judge.

SUMMARY

In accordance with the Scheduling Order issued on 1 July 2005, today the Appeals Chamber will deliver its Judgement on Sentencing Appeal in this case.

Mr. Deronjić has appealed against the Sentencing Judgement rendered by Trial Chamber II of this International Tribunal on 30 March 2004. This case concerns events which took place in the village of Glogova, in the Bratunac Municipality in eastern Bosnia and Herzegovina in May 1992. Miroslav Deronjić was then President of the Bratunac Crisis Staff and a member of the Serbian Democratic Party of Bosnia and Herzegovina. In the evening of 8 May 1992, he ordered an attack on the village of Glogova as part of his participation in a joint criminal enterprise, the objective of which was the permanent removal, by force or other means, of Bosnian Muslim inhabitants from the village of Glogova through the commission of the crime of persecutions. The village of Glogova was burned down in part and the Bosnian Muslim residents were forcibly displaced. As a result of this attack, 64 Muslim civilians from the village were killed, Bosnian Muslim homes, private property, and the mosque were destroyed, and a substantial part of Glogova was razed.

On 29 September 2003, the parties entered a Plea Agreement, based on the Second Amended Indictment and a separate Factual Basis. At the Plea Hearing held on 30 September 2003, the Appellant pleaded guilty to the single charge of persecutions as set forth in the Second Amended Indictment. In order to reconcile discrepancies that the Trial Chamber identified between the Second Amended Indictment and the Factual Basis filed by the parties, the Trial Chamber invited the parties to provide further clarification. During the Sentencing Hearing of 27 and 28 January 2004, the Trial Chamber entered a finding of guilt in relation to the charge of persecutions, a crime against humanity under Article 5(h) of the International Tribunal's Statute. After a further review of the Appellant's Testimony given on 27 January 2004, the Second Amended Indictment and the Factual Basis, the Trial Chamber found further material discrepancies and ordered a continuation of the Sentencing Hearing to be held on 5 March 2004, in order to verify that the Appellant's guilty plea could still fulfill the prerequisites of Rule 62bis of the Rules.

The Appellant was held individually criminally responsible pursuant to Article 7(1) of the Statute of the International Tribunal for his substantial participation as a co-perpetrator in a joint criminal enterprise. The Trial Chamber sentenced the Appellant to 10 years of imprisonment, Judge Schomburg dissenting, with credit for time already served in detention.

Following the practice of the International Tribunal, I will not read out the text of the Judgement except for the disposition. Instead, I will summarise the issues on this appeal and the findings of the Appeals Chamber. I emphasize that this summary is not part of the written Judgement which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written Judgement will be made available to the parties and to the public at the conclusion of this hearing.

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Media Office/Communications Service

Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands
Tel.: +31-70-512-5343; 512-5356 Fax: +31-70-512-5355

I will not elaborate on the standard of review on appeal and the relevant provisions on sentencing since I have already addressed that during my opening statement at the Appeal Hearing.

The Appellant raises four grounds of appeal, which I will address in turn.

In his first ground of appeal the Appellant contends that the Trial Chamber erred in law and in fact and abused its discretion in reaching conclusions and findings which are based upon evidence not specifically contained in the Second Amended Indictment, the Plea Agreement or the Factual Basis; he refers to all these documents as the "Plea agreement package". In support of this contention, the Appellant draws the attention of the Appeals Chamber to various paragraphs of the Sentencing Judgement which he claims are contradictory or contain errors of law or fact.

The Appeals Chamber finds that the Trial Chamber appropriately and necessarily looked beyond the Plea Agreement Package to other evidence as independent indicia in order to satisfy itself that there was a sufficient factual basis for the guilty plea. The Trial Chamber's approach was consistent with Rule 62bis of the Rules of Procedure and Evidence. In addition, the Appeals Chamber finds that the Trial Chamber did not err in determining the Appellant's sentence by considering all relevant information it had before it.

With respect to the specific errors of law and fact alleged by the Appellant under his first ground of appeal, the Appeals Chamber recalls that, in general, a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement or to every submission made during the trial. If the evidence cited does not directly support the facts on which the Trial Chamber's challenged finding is based, the determination as to whether the Trial Chamber made an error must be considered on a case-by-case basis and in light of all the evidence before it. Moreover, the Appeals Chamber emphasizes that it is for the Appellant to demonstrate that he was prejudiced by the error.

The Appeals Chamber has carefully examined each allegation concerning the legal and factual errors alleged by the Appellant. It concludes that none of the Appellant's arguments under this ground of appeal has any merit. The Appellant has failed to show that the Trial Chamber erred to the prejudice of the Appellant: (1) in finding that he accepted the arrival of volunteers and their involvement in the use of force; (2) in concluding that the Appellant joined the mission to disarm the population of Glogova by not only accepting it, but also by participating in it; (3) in making a remark about the temporal length of the joint criminal enterprise; (4) in stating that the crime was long-planned; (5) in its statements concerning the Appellant's *mens rea*; (6) in various paragraphs that the Appellant claims insinuate his responsibility for additional crimes not contained in the Second Amended Indictment; (7) in concluding that the Appellant abused his authority and political power as President of the Crisis Staff and the Municipal Board to commit the crimes he was charged with; (8) in making reference to the fact that the Appellant's involvement during the attack on Glogova included "planning"; (9) in concluding that the Appellant had a leading position in this operation; and, finally, (10) in reaching factual conclusions concerning the vulnerability of the inhabitants of Glogova. The Appellant's first ground of appeal is accordingly dismissed.

In his second ground of appeal, the Appellant contends that the principle of *lex mitior* is applicable in his case and submits that the Trial Chamber erred in law and in fact in concluding that "the Tribunal, having primacy vis-à-vis national jurisdictions in the former Yugoslavia, is not bound to apply a more lenient penalty - if any - under these jurisdictions."

The principle of *lex mitior* is understood to mean that the more lenient law has to be applied if the laws relevant to the offence have been amended. The Appeals Chamber reiterates its finding in the *Dragan Nikolić* Sentencing Appeal Judgement that the principle of *lex mitior* applies to the Statute of the International Tribunal, and therefore, if ever there is a change in the Statute regarding sentencing powers, the International Tribunal would have to apply the version of the Statute resulting in the less severe penalty.

With respect to the applicability of the principle of *lex mitior* to the relationship between the law of the International Tribunal and the law relevant for the national courts of the former Yugoslavia, the issue is whether differing national criminal laws are relevant and applicable to the law governing the sentencing consideration of the International Tribunal. The Appeals Chamber notes that the answer is to be found in the principle of *lex mitior* itself and, to this end, reiterates its finding in the *Dragan Nikolić* Sentencing Appeal Judgement, where it found that "[t]he 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.”

Consequently, as the International Tribunal is not bound by the law or sentencing practice of the former Yugoslavia, the principle of *lex mitior* is not applicable in relation to those laws. The second ground of appeal is therefore dismissed.

The Appellant contends under his third ground of appeal that the Trial Chamber erred in law and in fact in its assessment of the aggravating circumstances because they are either subsumed in the overall gravity of the offence for which he was convicted, are incorporated as constitutive elements of the crime, or are illustrative of the context of the crime. The Appeals Chamber notes that the Appellant’s arguments in this respect go beyond his Notice of Appeal and that he never sought “variation of the grounds of appeal” pursuant to Rule 108 of the Rules, a procedure he was required to follow if, upon further review, the initial Notice of Appeal proved inadequate. This procedural requirement was met neither by the Appellant’s proviso in his Notice of Appeal, in which he reserved the right to raise any errors that might become apparent subsequent to the full review and analysis of the entire record of the proceedings and him being given a copy of the Sentencing Judgement in his own language, nor by the inclusion of the relevant arguments in his Appeal Brief. Nonetheless, the Appeals Chamber finds that under the circumstances of the case, the Prosecution was not materially prejudiced by the Appellant’s failure to seek a variation of the Notice of Appeal pursuant to Rule 108 of the Rules, and that therefore, pursuant to Rule 5 of the Rules, relief in the form of a refusal to hear the Appellant’s arguments is not required. In light of this lack of material prejudice and the potential importance of the arguments in question for the sentence of the Appellant, the Appeals Chamber decided to consider the Appellant’s arguments concerning the Trial Chamber’s treatment of aggravating factors, notwithstanding the Appellant’s failure to comply with the Rules.

On the merits, the Appellant essentially alleges that the Trial Chamber impermissibly considered the factors in aggravation of his sentence, twice. The Appeals Chamber considers that factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa. The Appeals Chamber acknowledges that, indeed, the Trial Chamber did not expressly address the distinction between the gravity of the offence and the aggravating circumstances in its Sentencing Judgement. This is unfortunate, but it does not necessarily follow that the Trial Chamber undertook impermissible double counting by treating matters relevant to the gravity of the offence also as additional aggravating circumstances. The Appeals Chamber finds that the Sentencing Judgement clearly shows that the Trial Chamber distinguished between aggravating circumstances on the one hand and the gravity of the offence on the other, albeit considering them under the same heading. The Trial Chamber was therefore cognisant of the fact that taking into account matters relevant to the gravity of the offence also as aggravating circumstances, for the purposes of sentencing, is not permissible.

With respect to the Appellant’s remaining arguments under his third ground of appeal concerning the aggravating circumstances considered by the Trial Chamber, namely: (1) the large number of victims; (2) the fact that the attack on Glogova was meticulously planned; (3) the Appellant’s abuse of authority; (4) the fact that the Appellant ordered the additional torching of houses; and (5) the exacerbated vulnerability and defencelessness of the victims; the Appeals Chamber concludes that the Trial Chamber was entitled to rely upon facts related to the context of the crime in imposing its sentence, and finds that the Appellant has failed to demonstrate that the Trial Chamber engaged in the impermissible double-counting of aggravating factors. The third ground of appeal is accordingly dismissed.

Finally, the Appellant contends under his fourth ground of appeal that the Trial Chamber erred in its assessment of the mitigating circumstances. The Appeals Chamber notes, that it has again exercised its discretion to address the merits of the Appellant’s arguments even though some arguments put forward in this ground of appeal impermissibly exceed the scope of his Notice of Appeal.

On the merits, the Appellant submits that the reference by the Trial Chamber to the “negative side effects of the guilty plea” shows that it expressed concerns as to the truthfulness of his admissions. The Appeals Chamber notes that it cannot be inferred from the part of the Sentencing Judgement referred to by the Appellant in support of his argument that the Trial

Chamber challenged the truthfulness of the Appellant's statements. The paragraph referred to by the Appellant is included in the chapeau of the section of the Sentencing Judgement addressing the law applicable to sentencing and contains no reference to the Appellant's case. Furthermore, the Appeals Chamber notes that the Appellant does not make any reference to the Sentencing Judgement in support of his argument that the Trial Chamber challenged his statements as untrue. As a result, the Appeals Chamber finds that the Appellant's argument is without merit.

The Appellant also argues that in determining his sentence, the Trial Chamber only focused on deterrence and retribution and neglected to afford sufficient prominence to the process of rehabilitation. The Appeals Chamber notes that, in citing the *^elebi}i* Appeal Judgement, the Trial Chamber correctly referred to deterrence and retribution as the main purposes of sentencing and correctly considered rehabilitation as a relevant factor that should not be given undue weight. Thus, the Trial Chamber did consider rehabilitation as a sentencing principle and the fact that it decided not to give undue weight to such a factor was within its discretion.

The Appellant further submits that the Trial Chamber erred by not considering as mitigating circumstances some facts which, in his view, show that his character and behaviour amounted to exceptional circumstances. Having carefully examined each of these facts, the Appeals Chamber concludes that the Trial Chamber committed no error.

The Appellant finally asserts that the Trial Chamber did not address at all the personal and family circumstances of the Appellant as a mitigating circumstance despite the fact that he offered substantial reasoning and presented material evidence to that effect. The Appeals Chamber finds that the Trial Chamber in fact referred expressly to the Appellant's arguments regarding his family circumstances, and this reference constitutes *prima facie* evidence that these circumstances were taken into account.

The Appeals Chamber therefore concludes that the Appellant has failed to show that the Trial Chamber committed an error that occasioned a miscarriage of justice on this point or otherwise erred in its treatment of mitigating factors. The fourth ground of appeal is accordingly dismissed.

I shall now read the operative paragraphs of the Appeals Chamber's Judgement on Sentencing Appeal. Mr. Deronjić, please, would you stand.

For the foregoing reasons, the Appeals Chamber, pursuant to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence; noting the respective written submissions of the parties and the oral arguments they presented at the hearing of 17 June 2005; sitting in open session;

DISMISSES unanimously all the grounds of appeal filed by the Appellant;

AFFIRMS unanimously the sentence of 10 years' imprisonment as imposed by the Trial Chamber;

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.

The full text of the Judgement will be available in due course upon request at the Media Office and on the Tribunal's Internet site: www.un.org/icty. Courtroom proceedings can be followed on the Tribunal's website.