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l'ex-Yougoslavie



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APPEALS CHAMBER

The Hague, 30 August 2005

JP/MOW/998e

APPEALS JUDGEMENT IN THE CASE THE PROSECUTOR v. MIODRAG JOKIĆ

• SENTENCE OF 7 YEARS' IMPRISONMENT AFFIRMED

Please find below a summary of the judgement delivered by the Appeals Chamber, composed of Judges Weinberg de Roca (presiding), Shahabuddeen, Mumba, Güney and Schomburg, as read out by the presiding Judge.

In accordance with the scheduling order issued on 19 July 2005, today the Appeals Chamber will deliver its judgement on sentencing appeal.

Mr. Miodrag Jokić has appealed against the sentencing judgement issued by Trial Chamber I of this International Tribunal on 18 March 2004. The Prosecution has not appealed the sentencing judgement.

This case relates to events which took place in Croatia, where forces of the Yugoslav People's Army under the command of, among others, Miodrag Jokić shelled the Old Town of Dubrovnik from the early hours of 6 December 1991 until late that day. The Trial Chamber accepted the Prosecution's position that the attack was not ordered by the Appellant and that he had knowledge of the unlawful shelling and failed to prevent, mitigate, stop or punish the shelling. As a result of the shelling, two civilians were killed and three civilians were wounded, numerous buildings were destroyed, including institutions dedicated to religion, charity, education, the arts and sciences, and historic monuments.

On 27 August 2003, Miodrag Jokić pleaded guilty to the second amended indictment and the Trial Chamber entered a conviction against him for six counts of violations of the laws or customs of war pursuant to Article 3 of the Statute, including Count 1, murder; Count 2, cruel treatment; Count 3, the unlawful attack on civilians; Count 4, devastation not justified by military necessity; Count 5, the unlawful attack on civilian objects; and Count 6, the destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science.

On 18 March 2004, the Trial Chamber sentenced Mr. Jokić to seven years of imprisonment.

Mr. Jokić appealed his sentence on 16 April 2004 and the appeal hearing took place on 26 April 2005.

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 emphasise 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.

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 had initially raised seven grounds of appeal but, on 30 June 2004, he withdrew his fourth ground of appeal. I will briefly address the remaining six grounds of appeal in turn.

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Under his first ground of appeal the Appellant submits that the Trial Chamber erred in ruling that he is liable under Article 7(1) of the Statute for aiding and abetting events prior to 6 December 1991 as it went beyond what was pleaded in the second amended indictment and agreed upon in the plea agreement.

The Appeals Chamber notes that the Trial Chamber was cognisant of the fact that the second amended indictment was limited to the events on 6 December 1991, and that the Trial Chamber accepted the Appellant's guilty plea on the basis of the plea agreement.

The Appeals Chamber remarks that the finding of guilt entered by the Trial Chamber for Counts 1 through 6 were unambiguously limited to the Appellant's acts and omissions that occurred on 6 December 1991. The sentencing judgement made it clear that the Appellant was only being sentenced on the basis of his conduct on 6 December 1991. The Trial Chamber merely cited the Appellant's conduct concerning similar attacks on 23 and 24 October and on 9 November 1991, in order to provide context for the crimes committed on 6 December 1991. This context was relevant in establishing the *mens rea* requirement for the conviction of aiding and abetting. Accordingly, the Appeals Chamber is satisfied that the Trial Chamber did not err in making a *mere* reference – *and not a finding on the crimes charged* – to the events prior to 6 December 1991 in its sentencing judgement.

Moreover, even if the Trial Chamber had erred in referring to the earlier events this would not merit alteration of the sentencing judgement by the Appeals Chamber as the Appellant has not demonstrated that the sentence was affected by the Trial Chamber's alleged consideration of conduct prior to 6 December 1991.

This part of the Appellant's first ground of appeal is dismissed.

The Appeals Chamber notes that the Appellant was convicted for his role on 6 December 1991 under Article 7(1) and 7(3) of the Statute based on same facts. The jurisprudence of the Appeals Chamber shows that concurrent convictions for individual and superior responsibility in relation to the same counts based on the same facts constitutes a legal error.

The Appeals Chamber is aware that the issue of concurrent convictions has not been appealed and that the Appellant appealed only his sentence. There is, however, an insoluble nexus between a conviction and a sentence. Also, in the case of an error of law, the Appeals Chamber has the discretionary power to correct this error *proprio motu* if the interests of justice so require. The Appeals Chamber therefore holds that, in accordance with settled jurisprudence, only one conviction under each count can be entered pursuant to Article 7(1) of the Statute. Thus, the Appeals Chamber vacates the Appellant's convictions for Counts 1 to 6 in so far as they are based on a finding of the Appellant's superior responsibility under Article 7(3) of the Statute.

This, however, does not necessarily mean that a reduction of the sentence is required. The Appeals Chamber holds that the Trial Chamber was required to consider the Appellant's superior position as an aggravating factor in sentencing as it was agreed upon by the parties and accepted by the Trial Chamber that the Appellant held a leadership position. Indeed, the Trial Chamber expressly considered the Appellant's leadership position in its discussion of the aggravating circumstances. Thus, the Trial Chamber fully recognized, as an aggravating factor, that the Appellant held a position of authority and the power of a high-ranking officer over others committing the crimes charged under Counts 1 through 6 as is reflected in the sentence imposed.

For the foregoing reasons, the Appeals Chamber concludes that its vacating of the Trial Chamber's convictions of the Appellant as a superior has no impact on the Appellant's sentence.

In his second ground of appeal, the Appellant submits that the Trial Chamber erred by having recourse to provisions of the Criminal Code of the former Yugoslavia which would not have been applicable to the range of penalties that courts in the former Yugoslavia could have passed for comparable crimes.

The Appellant claims that under the provisions of the Criminal Code of the former Yugoslavia considered by the Trial Chamber, criminal liability is limited to those who are direct perpetrators.

Since his criminal responsibility was incurred by omission, the Appellant submits that the provisions referred to by the Trial Chamber are not applicable to his case.

The Appeals Chamber finds that the articles of the Criminal Code of the former Yugoslavia the Trial Chamber referred to - which encompass war crimes, means and modes to wage combat operations, and the protection of cultural property - prohibit criminal conduct against legal values which are also protected in the offences to which the Appellant pleaded guilty. Moreover, the Appeals Chamber observes that the principles of aiding and abetting as well as criminal liability by omission are enshrined in the Criminal Code of the former Yugoslavia.

Therefore, these articles provide guidance on the general practice regarding prison sentences in the courts of the former Yugoslavia concerning the acts and omissions to which the Appellant pleaded guilty and for which he has been convicted. The Appeals Chamber emphasises that although a Trial Chamber should take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, it is not obliged to conform to it.

The Appeals Chamber notes that the Trial Chamber did not expressly refer to all the articles of the Criminal Code of the former Yugoslavia that might be relevant for the present case. However, the Appeals Chamber considers that Trial Chambers are not obliged to consider each and every applicable provision of the laws of the former Yugoslavia.

Therefore, the Appeals Chamber finds that the Trial Chamber was correct in its approach and dismisses the second ground of appeal.

Under his third ground of appeal, the Appellant alleges that the Trial Chamber erred in law in deciding that, in the case of plea agreements, it would primarily rely on mitigating factors agreed upon by the parties. In his view the Trial Chamber departed from the standard set out in the Čelebići case, in which the Appeals Chamber found that mitigating factors should be established by a defendant on the balance of probabilities.

The Appeals Chamber is not satisfied that the Trial Chamber wrongly departed from the “balance of probabilities” standard set out in the Čelebići appeal judgement. The Trial Chamber recalled the correct standard and concluded that, in cases of plea agreements, it would primarily rely on the mitigating factors agreed to by the parties. In other words, the Trial Chamber logically relieved the Appellant from discharging the burden of establishing mitigating circumstances on the balance of probabilities, with respect to those mitigating circumstances agreed upon by the parties.

Moreover, the Appellant submits that three mitigating factors were identified solely by him in addition to those identified by the Prosecution, namely, (1) his age; (2) five events regarding his conduct prior to, during and after the commission of the offence and; (3) exceptional family circumstances. However, the Appeals Chamber finds that all of these factors were considered by the Trial Chamber.

With respect to the Appellant’s specific argument that the post-conflict conduct is a “separate and distinct mitigating circumstance” that should not be “commingled with remorse”, the Appeals Chamber finds that it was within the discretion of the Trial Chamber to consider the Appellant’s post-conflict conduct as an expression of his sincere remorse, instead of assessing his post-conflict conduct as a distinct mitigating circumstance.

Moreover, the Appeals Chamber finds the Trial Chamber correctly weighed all the mitigating circumstances, both the ones agreed upon by the parties and the ones presented only by the Appellant.

The third ground of appeal is dismissed.

Under his fifth ground of appeal the Appellant submits that the Trial Chamber erred in not taking into account as a factor in mitigation his health and his family situation which, in his view, are “extraordinary” and amount to “exceptional circumstances”.

With respect to the Appellant’s assertion that the Trial Chamber incorrectly held that he shared the same family circumstances as other accused, the Appeals Chamber observes that the Trial

Chamber only provided a reason as to why, in general, limited weight has been attached in mitigation to factors such as the family situation of an accused. The Trial Chamber did not, however, compare the Appellant's personal circumstances to those of other accused.

With respect to the Appellant's argument that the Trial Chamber disregarded the evidence before it, the Appeals Chamber finds that the Trial Chamber correctly referred to the evidence presented by the Appellant and thus took it into account. The Trial Chamber expressly referred to the Appellant's written submissions which contain evidence presented by the Appellant to show that his personal circumstances were of an exceptional nature, including a confidential submission in that respect. The Appeals Chamber finds that the Trial Chamber was under no obligation to discuss the Appellant's personal circumstances in more detail than it did, in particular in light of the fact that some of the evidence proffered by the Appellant concerning his family circumstances is of a confidential nature.

Moreover, the Appellant argues that, since in its orders on provisional release, the Trial Chamber considered that his extraordinary health and family considerations amounted to exceptional circumstances, the Trial Chamber should have also held in the sentencing judgement, that his family circumstances were exceptional and attached weight to them as a mitigating factor.

The Appeals Chamber does not agree. The Trial Chamber's considerations when granting the Appellant's provisional release are not necessarily relevant to its assessment of the circumstances in mitigation of the Appellant's sentence. Whereas pursuant to Rule 65(B) of the Rules an accused may be provisionally released if the Trial Chamber is satisfied that he or she will appear for trial and, if released, will not pose a danger to any victim, witness or other person; concerning the evaluation of an accused's conduct in order to mete out an appropriate sentence, it is open to a Trial Chamber to weigh the mitigating circumstances against other factors, such as, the gravity of the crime, the particular circumstances of the case and the form and degree of the participation of the accused in the crime.

For the foregoing reasons, the Appeals Chamber dismisses the Appellant's fifth ground of appeal.

In his sixth ground of appeal, the Appellant alleges that the Trial Chamber erred in law and in fact and abused its discretion by failing to consider the totality of the evidence presented by the parties in relation to his good character and professionalism. The Appellant's first argument is that some witnesses' testimonies, including the testimonies of two investigators from the Office of the Prosecutor, were not taken into account by the Trial Chamber. Secondly, the Appellant submits that the Trial Chamber also failed to consider evidence of his good character and personal integrity, such as, his voluntary surrender, his conduct while on provisional release, and his admission of guilt.

With respect to the alleged error concerning the witnesses' testimonies, I will not go into detail and instead will only summarise the main reasoning. Trial Chambers 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 considered, does not necessarily mean that they either ignored or failed to evaluate the factor in question. With respect to witness' testimonies, a Trial Chamber is in no way obliged to refer to every phrase pronounced by a witness during his testimony; Chambers may, where they deem appropriate, stress the main parts of the testimony relied upon in support of a finding. A reference to a certain portion of the witness' testimony is *prima facie* evidence that the Trial Chamber was cognisant of the whole testimony and took it into account.

The Appeals Chamber finds that the Trial Chamber was cognisant of all testimonies and took the relevant parts into account.

The Appellant furthermore alleges that the Trial Chamber should have taken into account evidence of his good character, namely, 1) his voluntary surrender and the fact that he was the first officer of the Yugoslav People's Army to voluntarily surrender without the framework of the law on cooperation between the International Tribunal and the former Federal Republic of Yugoslavia; 2) the fact that he always complied fully with the terms and conditions of his provisional release; 3) the fact that he admitted his guilt and 4) the fact that he apologized to the Croatian Minister for Maritime Affairs and Foreign Affairs on the day of the shelling and concluded a cease fire the day after.

The Appeals Chamber finds that all of these factors were considered by the Trial Chamber and taken into account, albeit not specifically as evidence of the Appellant's good character. However, it is within the Trial Chamber's discretion to consider this evidence as indicative of the Appellant's sincere remorse and his cooperation with the International Tribunal; the Trial Chamber was not bound to consider these factors when assessing the Appellant's good character as well.

Therefore, the Appellant's sixth ground of appeal is dismissed.

Under his seventh ground of appeal, the Appellant does not allege any error on the part of the Trial Chamber. Rather he requests the Appeals Chamber to consider his cooperation in the Strugar case after the rendering of the sentencing judgement, as a factor in mitigation "in the interests of justice". He relies on a finding by the Appeals Chamber in the Kupreškić case in support of his request. However, the Kupreškić case is not comparable with the case at hand. In the present case, the Trial Chamber took into account the Appellant's cooperation with the Prosecution as a factor in mitigation of his sentence, and qualified this cooperation as being of "exceptional importance". Moreover, the Trial Chamber noted in the sentencing judgement that the parties had made specific submissions to the Trial Chamber and it referred to the portions of the sentencing hearing that confirm the possible value of the Appellant's testimony for other cases, as well as his willingness to testify in future cases. The Appeals Chamber thus concludes that the Trial Chamber was fully aware of the cooperation that the Appellant had provided and could provide in future cases, as realised later on in the Strugar case, and took this fact into account. Accordingly, the Appellant's request is dismissed.

I shall now read the operative paragraph of the Appeals Chamber judgement. Mr. Jokić, 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 arguments they presented at the hearing of 26 April 2005;

Sitting in open session;

Vacates, *proprio motu*, the Appellant's conviction under Counts 1 through 6 insofar as they are based on a finding of the Appellant's superior responsibility under Article 7(3) of the Statute;

Dismisses all the grounds of appeal filed by the Appellant;

Affirms the sentence of seven years of imprisonment as imposed by the Trial Chamber; and

Orders in accordance with Rule 103(C) and Rule 107 of the Rules, that Miodrag Jokić 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.

*The full text of the indictment is available on the Tribunal's website
<http://www.un.org/icty>. Hard copies can be obtained from the Media Office.
Courtroom proceedings can be followed on the Tribunal's website.*