



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-02-60/1-A  
Date: 8 March 2006  
Original: English

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**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 8 March 2006

**PROSECUTOR**

v.

**MOMIR NIKOLIĆ**

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**JUDGEMENT ON SENTENCING APPEAL**

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**Counsel for the Appellant:**

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Mr. R J. Livingston

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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 (“International Tribunal”) is seised of an appeal from the Sentencing Judgement rendered by Trial Chamber I, Section A, on 2 December 2003 in the case of *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S (“Sentencing Judgement”).<sup>1</sup>

2. The events giving rise to this appeal took place in Eastern Bosnia and Herzegovina after the fall of the enclave of Srebrenica. Between 6 and 11 July 1995, the enclave of Srebrenica was shelled and attacked by units of the Drina Corps,<sup>2</sup> and “[i]n the several days following this attack on Srebrenica, VRS forces captured, detained, summarily executed, and buried over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave, and forcibly transferred the Bosnian Muslim women and children of Srebrenica out of the enclave.”<sup>3</sup> According to the count of the Indictment to which Momir Nikolić (“Appellant”) pleaded guilty, “the crime of persecutions was perpetrated, executed, and carried out by and through the following means: (a) the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons; (b) the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potočari and in detention facilities in Bratunac and Zvornik; (c) the terrorising of Bosnian Muslim civilians in Srebrenica and at Potočari; (d) the destruction of personal property and effects belonging to the Bosnian Muslims; and (e) the forcible transfer of Bosnian Muslims from the Srebrenica enclave.”<sup>4</sup>

3. In the Plea Agreement,<sup>5</sup> the parties, *inter alia*, agreed that the Appellant would plead guilty to Count 5 of the Indictment, namely persecutions, a crime against humanity, punishable under Article 5(h) of the Statute of the International Tribunal. In return, the Prosecution would move to dismiss all remaining counts of the Indictment, which included genocide, or in the alternative, complicity to commit genocide; extermination, a crime against humanity; murder, a crime against humanity; murder, a violation of the laws or customs of war; and inhumane acts (forcible transfer),

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<sup>1</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 (“Sentencing Judgement”).

<sup>2</sup> *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić and Momir Nikolić*, Case No. IT-02-60-PT, Amended Joinder Indictment, 27 May 2002 (“Indictment”), para. 25. The facts in this paragraph of the Indictment were admitted as true and correct and not disputed by the Appellant, *Prosecutor v. Momir Nikolić*, Case No. IT-02-60-PT, Annex “A” to the Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor – Amended Plea Agreement, 7 May 2003 (“Plea Agreement”), para. 7.

<sup>3</sup> Indictment, para. 26. The facts in this paragraph of the Indictment were admitted as true and correct and not disputed by the Appellant, Plea Agreement, para. 7.

<sup>4</sup> Indictment, para. 59. The facts in this paragraph of the Indictment were admitted as true and correct and not disputed by the Appellant, Plea Agreement, para. 7.

<sup>5</sup> Attached to the Plea Agreement, as well as to the Sentencing Judgement as Annex B, are further facts acknowledged by the Appellant, that is, the Statement of Facts and Acceptance of Responsibility, Tab A to Plea Agreement, 6 May 2003 (“Statement of Facts”).

a crime against humanity.<sup>6</sup> At the Plea Hearing, the Appellant pleaded guilty to Count 5 of the Indictment.<sup>7</sup> The Trial Chamber found that the facts of the Plea Agreement and the attached Statement of Facts provided a sufficient factual basis for a finding of guilt.<sup>8</sup> Accordingly, it entered a finding of guilt and convicted Momir Nikolić on Count 5 of the Indictment, namely for the crime of persecutions, a crime against humanity.<sup>9</sup>

4. The Sentencing Hearing lasted three days, from 27 to 29 October 2003.<sup>10</sup> In the Plea Agreement, the parties agreed that the Prosecution would recommend to the Trial Chamber a sentence within the range of 15 to 20 years and the Defence would recommend a sentence of 10 years.<sup>11</sup> The Appellant agreed not to appeal the sentence imposed by the Trial Chamber unless the sentence was above the range recommended by the Parties.<sup>12</sup> The Trial Chamber found that it could not accept the sentences recommended by either the Defence or the Prosecution;<sup>13</sup> rather it sentenced the Appellant to 27 years' imprisonment.<sup>14</sup>

5. The Appellant filed an initial notice of appeal on 30 December 2003,<sup>15</sup> amending it on 26 October 2004.<sup>16</sup> He filed an initial brief on appeal on 24 May 2004,<sup>17</sup> to which the Prosecution responded on 5 July 2004;<sup>18</sup> the Appellant filed his initial brief in reply on 20 August 2004.<sup>19</sup> On 7 February 2005, the Appellant's assigned lead counsel on appeal submitted a request to withdraw her assignment and recommended Mr. Rock Tansey as replacement counsel; the Registrar decided to withdraw the assignment of former lead counsel and to assign Mr. Rock Tansey as lead counsel to

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<sup>6</sup> *Prosecutor v. Blagojević et. al.*, Case No. IT-02-60-PT, Prosecution's Motion to Dismiss Charges Against Accused Momir Nikolić, 8 May 2003. The Trial Chamber granted the motion on 12 May 2003, *Prosecutor v. Momir Nikolić*, Case No.: IT-02-60-PT, Decision on Motion to Dismiss Charges Against Accused Momir Nikolić, 12 May 2003.

<sup>7</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60-PT, Plea Hearing, 7 May 2003 ("Plea Hearing"), T. 293.

<sup>8</sup> The Trial Chamber noted with regard to the factual basis of the Appellant's conviction the following: "In the Amended Plea Agreement, the Parties specified those paragraphs of the Indictment upon which the guilty plea is based. Furthermore, Momir Nikolić specified, *inter alia*, his acts and conduct in the joint criminal enterprise for which he was charged, as part of the Amended Plea Agreement. The 'Statement of Facts and Acceptance of Responsibility' is attached to the Judgement as Annex B. It was based upon the factual allegations in the Indictment, which Momir Nikolić acknowledged as true and correct in the Amended Plea Agreement, and the Statement of Facts that the Trial Chamber found that a sufficient factual basis for the crime of persecutions existed to accept the guilty plea. A detailed account of the facts upon which the conviction is based can be found in these two documents; below is a summary of the factual basis." Sentencing Judgement, para. 27.

<sup>9</sup> Plea Hearing, T. 294.

<sup>10</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Hearing, 27-29 October 2003 ("Sentencing Hearing").

<sup>11</sup> Plea Agreement, para. 4 (a).

<sup>12</sup> *Ibid.*, para. 14.

<sup>13</sup> Sentencing Judgement, para. 180.

<sup>14</sup> *Ibid.*, para. 183.

<sup>15</sup> Momir Nikolić's Notice of Appeal, 30 December 2003.

<sup>16</sup> Momir Nikolić's Amended Notice of Appeal, 26 October 2004.

<sup>17</sup> Momir Nikolić's Opening Brief on Appeal, confidentially filed 24 May 2004. A public redacted version of this brief was filed on 21 September 2004.

<sup>18</sup> Prosecution Response Brief on Appeal, confidentially filed 5 July 2004; corrigenda were filed 30 July 2004 and 2 November 2004.

<sup>19</sup> Appellant's Reply Brief on Appeal, confidentially filed 20 August 2004; a corrigendum was filed 1 September 2004; a public redacted version was filed 17 January 2005.

the Appellant on 14 February 2005.<sup>20</sup> After the assignment of the new defence counsel, the Appellant re-filed a Notice of Appeal on 22 July 2005, amending the references to the Sentencing Judgement in ground 1B, which were adjusted to reflect the relevant passages in the Sentencing Judgement<sup>21</sup> and a revised Appellant's Brief on 29 July 2005.<sup>22</sup> The Prosecution filed its Respondent's Brief on 26 August 2005.<sup>23</sup> A Brief in Reply was filed on 21 September 2005.<sup>24</sup> The Appellant filed motions seeking the admission of additional evidence and on judicial notice, which the Appeals Chamber did not grant<sup>25</sup> or which the Appellant eventually did not pursue.<sup>26</sup> The hearing on appeal took place on 5 December 2005.<sup>27</sup>

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<sup>20</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision [of the Deputy Registrar], 14 February 2005.

<sup>21</sup> Momir Nikolić's Re-Amended Notice of Appeal, 22 July 2005 ("Notice of Appeal").

<sup>22</sup> Revised Appellant's Brief on Appeal Against Sentence, 29 July 2005 ("Appellant's Brief"). The Appeals Chamber notes that the Appellant's Brief does not conform to the Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002. The arguments in the Appellant's Brief are not set out and numbered in the same order as in the Appellant's Notice of Appeal and no variation was sought (*see* Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4 *ad finem*).

<sup>23</sup> Prosecution's Response to Revised Appellant's Brief on Appeal Against Sentence ("Respondent's Brief"), 26 August 2005.

<sup>24</sup> Reply to Prosecution's Response to Revised Appellant's Brief on Appeal against Sentence ("Brief in Reply"), 21 September 2005.

<sup>25</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Motion for Judicial Notice, 30 September 2004; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, Confidential, 9 December 2004, a public redacted version was filed the same day; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Motion for Leave to Supplement Conformed and Supplemented Motion to Admit Additional Evidence, 9 December 2004, a public redacted version was filed the same day; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005.

<sup>26</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Request to withdraw previous motions, to revise Appellant's Brief and to amend Notice of Appeal, 19 July 2005.

<sup>27</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Appeal Hearing, 5 December 2005 ("Appeal Hearing").

## II. STANDARD OF REVIEW

6. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”). Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber that amount to an obligation to take into account the following factors in sentencing: the gravity of the offence, 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.<sup>28</sup>

7. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*;<sup>29</sup> they are of a corrective nature and are not trials *de novo*.<sup>30</sup> 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.<sup>31</sup> These criteria are well established in the jurisprudence of the International Tribunal<sup>32</sup> and the International Criminal Tribunal for Rwanda.<sup>33</sup>

8. 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.<sup>34</sup> 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.<sup>35</sup> It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.<sup>36</sup>

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<sup>28</sup> *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.

<sup>29</sup> *Mucić et al.* Judgement on Sentence Appeal, para. 11.

<sup>30</sup> *Kupreškić et al.* Appeal Judgement, para. 408; *Čelebići* Appeal Judgement, para. 724.

<sup>31</sup> *Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203; *Mucić et al.* Judgement on Sentence Appeal, para. 11; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8.

<sup>32</sup> *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, paras 434-435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras 35-48; *Vasiljević* Appeal Judgement, paras 4-12; *Kvočka et al.* Appeal Judgement, para. 14.

<sup>33</sup> *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.

<sup>34</sup> *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 9; *Babić* Judgement on Sentencing Appeal, para. 7; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8.

<sup>35</sup> *Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Kupreškić et al.* Appeal Judgement, para. 408; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8.

<sup>36</sup> *Čelebići* Appeal Judgement, para. 725.

### III. GROUNDS OF APPEAL 1, 1A, AND 1B: WHETHER THE TRIAL CHAMBER VENTURED OUTSIDE THE FACTS OF THE GUILTY PLEA WHEN ASSESSING THE GRAVITY OF THE OFFENCE

9. In these grounds of appeal,<sup>37</sup> the Appellant submits that the Trial Chamber erred by venturing outside the facts of the guilty plea when assessing the gravity of the offence.<sup>38</sup> The Appellant claims that a Trial Chamber cannot look “outside the facts of the guilty plea”<sup>39</sup> and must rely only upon the facts mentioned in the Statements of Facts annexed to the guilty plea.<sup>40</sup> The Appellant draws the Appeals Chamber’s attention to specific paragraphs of the Sentencing Judgement, concerning (1) the events in Zvornik,<sup>41</sup> (2) the meetings at the Hotel Fontana,<sup>42</sup> and (3) the Trial Chamber’s overstatement of his rank.<sup>43</sup> He concludes that if the Trial Chamber was not willing to limit itself to the facts found in the Statement of Facts, it should have refused to accept the Amended Plea Agreement.<sup>44</sup>

#### A. Preliminary issue

10. The Appellant first argues that the Trial Chamber erred “if by saying in paragraph 69 [of the Sentencing Judgement] that the principal consideration is the gravity of the offence and not the guilty plea, the Trial Chamber meant that it was entitled to look in deciding the gravity of the offence *outside the facts of the guilty plea*”.<sup>45</sup>

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<sup>37</sup> The Appeals Chamber notes that the Appellant jointly addresses grounds of appeal 1, 1A, and 1B as set out in the Notice of Appeal, *see* Appellant’s Brief, paras 15-30.

<sup>38</sup> Appellant’s Brief, paras 5(c), (d).

<sup>39</sup> *Ibid.*, para. 16.

<sup>40</sup> *Ibid.*, para. 17; *see also* Brief in Reply, para. 13.

<sup>41</sup> Appellant’s Brief, paras 18-22.

<sup>42</sup> *Ibid.*, paras 23-26.

<sup>43</sup> *Ibid.*, paras 27-28.

<sup>44</sup> Appellant’s Brief, para. 29. The Appeals Chamber concurs with the Prosecution that it is not clear from the Appellant’s Brief whether the Appellant alleges an error in this regard and thus challenges the Plea Agreement or the Trial Chamber’s acceptance of the Plea Agreement (*see* Respondent’s Brief, para. 58). The Appeals Chamber notes that in paragraph 5(e) of the Appellant’s Brief, the Appellant alleges a discernible error in this regard and refers to Ground of Appeal 1B. The Appeals Chamber considers, however, that (1) this allegation is not further developed in the Appellant’s Brief, and (2) ground of appeal 1B, as set out in the Notice of Appeal, does not include a challenge to the Plea Agreement but instead refers to the alleged statement of the Trial Chamber that the Appellant was at the centre of criminal activity in Zvornik. In any case, in the Brief in Reply, the Appellant makes it clear that there is no challenge to the Plea Agreement, *see* Brief in Reply, para. 13.

<sup>45</sup> Appellant’s Brief, para. 16 (emphasis in original).

11. The Appellant has misinterpreted the Trial Chamber's statement. Paragraph 69 of the Sentencing Judgement is within the context of the Trial Chamber's discussion of the possible benefits of guilty pleas at the International Tribunal.<sup>46</sup> This paragraph, in its relevant part, reads:

Persons who plead guilty are convicted upon the acceptance of the guilty plea. Upon conviction, a trial chamber will determine an appropriate sentence and will take as its principal consideration, as will be discussed below, the gravity of the offence – and not the guilty plea – in determining an appropriate sentence. Thus, a guilty plea leads directly to the fulfilment of a fundamental purpose of this Tribunal.<sup>47</sup>

The Appeals Chamber concurs with the Prosecution that the Trial Chamber merely reiterates well established jurisprudence in this paragraph.<sup>48</sup> The gravity of the offence is the primary consideration when imposing a sentence<sup>49</sup> and is the “litmus test” for determining an appropriate sentence.<sup>50</sup> The fact that the Appellant pleaded guilty is not the principal consideration in sentencing, although it can be taken into account as a mitigating circumstance.<sup>51</sup>

12. Although there can be exceptions,<sup>52</sup> Trial Chambers are in principle limited to the factual basis of the guilty plea, set forth in such documents as the indictment, the plea agreement and a written statement of facts. The Trial Chamber was cognisant of this general rule, as evidenced by the fact that, when handing down the Sentencing Judgement, the Trial Chamber noted that the Appellant's sentence was based upon the facts of the Indictment and the Statement of Facts.<sup>53</sup>

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<sup>46</sup> The Trial Chamber held that “[h]aving raised some issues of concern in cases where guilty pleas emanated from plea agreements, the Trial Chamber will now turn to some of the possible benefits of guilty pleas, including those resulting from plea agreements, and consider these in light of the purposes and mandate of the Tribunal”: Sentencing Judgement, para. 68.

<sup>47</sup> Sentencing Judgement, para. 69.

<sup>48</sup> See Respondent's Brief, paras 60-61.

<sup>49</sup> *Čelebići* Appeal Judgement, para. 731; *Kupreškić et al.* Appeal Judgement, para. 442.

<sup>50</sup> *Čelebići* Trial Judgement, para. 1225, cited with approval by *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Krstić* Appeal Judgement, fn. 431.

<sup>51</sup> See *Jelisić* Appeal Judgement, para. 122; *Erdemović* 1998 Sentencing Judgement, para. 16 (ii); *Plavšić* Sentencing Judgement, para. 65; *Banović* Sentencing Judgement, para. 68; *Dragan Nikolić* Sentencing Judgement, para. 232; *Jokić* Sentencing Judgement, paras 76, 78; *Deronjić* Sentencing Judgement, para. 276; *Mrda* Sentencing Judgement, para. 79.

<sup>52</sup> For example, the Appeals Chamber held in the *Deronjić* case that, “[b]ecause the Trial Chamber found discrepancies with the Factual Basis, it was appropriate and indeed necessary under the plain language of Rule 62bis(iv) of the Rules for the Trial Chamber to look 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”, *Deronjić* Judgement on Sentencing Appeal, para. 16. Moreover, the Appeals Chamber also held in the same case that “the Trial Chamber did not err in determining the Appellant's sentence by considering all relevant information it had before it, including the evidence submitted by the Appellant himself”, *Deronjić* Judgement on Sentencing Appeal, para. 19.

<sup>53</sup> See *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Hearing for Delivery of Sentencing Judgement, 2 December 2003, T. 1684: “[Judge Liu] A written factual basis for the crime and for Mr. Nikolic's participation in it was filed with the plea agreement. The factual basis and the indictment, which Mr. Nikolic acknowledged to be true, forms the factual basis upon which the Trial Chamber will determine sentence.”

## **B. The facts that allegedly are outside the guilty plea**

13. The Appeals Chamber will address the alleged errors concerning (1) the operation in Zvornik, (2) the meetings at the Hotel Fontana, and (3) the alleged overstatement of the Appellant's military rank.

### **1. The operation in Zvornik**

14. The Appellant submits that the Trial Chamber's references to the operation in Zvornik are "[o]f particular concern"<sup>54</sup> and specifically refers to paragraphs 31, 32, and 36 of the Sentencing Judgement,<sup>55</sup> in which the Trial Chamber mentions the area of the Zvornik municipality. The Appellant also argues that, in the paragraphs of the Sentencing Judgement laying out facts on which the sentencing determination would be based, the Trial Chamber erroneously stated that he was "at the centre" of the crimes committed in Zvornik.<sup>56</sup>

15. The Appeals Chamber will consider (a) whether the references in paragraphs 31, 32, and 36 of the Sentencing Judgement were outside the facts acknowledged by the Appellant, and (b) whether the Trial Chamber erroneously stated the facts in its sentencing considerations, i.e. in paragraphs 176 and 177 of the Sentencing Judgement, and was thereby influenced to the detriment of the Appellant.

#### **(a) Whether the references to the events in the municipality in Zvornik were outside of the acknowledged facts**

16. The Appellant argues that paragraph 31 of the Sentencing Judgement "strongly suggests" that the Trial Chamber understood the Appellant's plea to Count 5 of the Indictment to include "persecutions carried out, *inter alia*, in Zvornik".<sup>57</sup>

17. In paragraph 31 of the Sentencing Judgement the Trial Chamber noted that the crime of persecutions was carried out, *inter alia*, by the following means: "(b) the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potočari and in detention facilities in Bratunac *and* Zvornik".<sup>58</sup> Similarly, paragraph 36 of the Sentencing Judgement states

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<sup>54</sup> Appellant's Brief, para. 18.

<sup>55</sup> *Ibid.*, paras 18-20.

<sup>56</sup> *Ibid.*, paras 21-22.

<sup>57</sup> Brief in Reply, para. 18 (emphasis in original).

<sup>58</sup> Sentencing Judgement, para. 31 (emphasis added).

that “Bosnian Muslim men who were detained in Bratunac and Zvornik were subjected to cruel and inhumane treatment.”<sup>59</sup>

18. The Appeals Chamber observes that the Trial Chamber in paragraphs 31 and 36 of the Sentencing Judgement merely recited paragraph 59 of the Indictment, which states, in relevant part, that the crime of persecutions was carried out by the means of “the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potočari and in detention facilities in Bratunac and Zvornik”.<sup>60</sup> Paragraph 59 of the Indictment is inserted among those paragraphs which set out the acknowledged and admitted conduct by the Appellant,<sup>61</sup> and which include the facts that the Appellant agreed to be “true and correct and not disputed by [him]”.<sup>62</sup> Although the Appellant explicitly made some corrections to the Indictment, he did not seek to correct paragraph 59 of the Indictment.<sup>63</sup> Thus, the Trial Chamber, in paragraphs 31 and 36 of the Sentencing Judgement, stated the facts as acknowledged by the Appellant.

19. In paragraph 32 of the Sentencing Judgement, the Trial Chamber stated that “[w]ithin a five-day period, approximately 6,000 Bosnian Muslim men who were escaping in 'the column' from Srebrenica were captured, detained and executed in various locations in the Bratunac and Zvornik municipalities.”<sup>64</sup> Although the Appellant did not plead guilty to the opportunistic killings in the Zvornik Brigade Zone,<sup>65</sup> he acknowledged as true the organised mass executions in Orahovac (near Lažete), at the Petkovci school, in Petkovci, at Pilica school, at the Branjevo Military Farm, at the Pilica Cultural Centre and in Kozluk,<sup>66</sup> places that are all within the Zvornik municipality. Therefore, the Trial Chamber’s reference in paragraph 32 of the Sentencing Judgement to executions “in various locations in the Bratunac and Zvornik municipalities” is in accordance with the facts acknowledged by the Appellant.

20. The Appeals Chamber concludes that the Trial Chamber’s references to the events in the municipality in Zvornik were not outside the scope of the acknowledged facts.

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<sup>59</sup> *Ibid.*, para. 36 (emphasis added).

<sup>60</sup> Indictment, para. 59(b). The Trial Chamber referred to Indictment, para. 59, *see* Sentencing Judgement, fn. 62.

<sup>61</sup> Plea Agreement, para. 5.

<sup>62</sup> *Ibid.*, para. 7.

<sup>63</sup> The Appellant agreed with the Prosecution to make corrections to paragraphs 31, 39, and 45 of the Indictment, *see* Plea Agreement, para. 5. He also made corrections to paragraphs 9, 10, 11, 45, and 46.6 to the Indictment, *see* Statement of Facts, para. 15 *ad finem*.

<sup>64</sup> Sentencing Judgement, para. 32 (emphasis added).

<sup>65</sup> Alleged in paragraphs 47.6-50 of the Indictment. These paragraphs of the Indictment were not included in the Plea Agreement, *see* Plea Agreement, paras 5, 7.

<sup>66</sup> Plea Agreement, para. 7 referring to the facts set out, *inter alia*, in paragraphs 46.6-46.12 of the Indictment.

(b) Whether the Trial Chamber wrongly stated the facts in its sentencing considerations and took them into account

21. The Appellant argues that paragraphs 176 and 177 of the Sentencing Judgement “suggest that [he] was involved in the crimes actually committed in Zvornik and was 'at the centre' of the same.”<sup>67</sup> He further contends that the only reference to the crimes in Zvornik contained in the Statement of Facts relates to his role in passing a message from Colonel Beara to Drago Nikolić, the Zvornik Brigade Security Officer, which stated that thousands of Muslim prisoners would be sent from Bratunac to Zvornik.<sup>68</sup>

22. Paragraphs 176 and 177 of the Sentencing Judgement, which are found in the Trial Chamber’s conclusion on the determination of the Appellant’s sentence, read in part:

176. Momir Nikolić was an active participant in the crimes committed in Potočari, Bratunac and Zvornik. He did not try to avoid his official duties during those fateful days or remain on the sidelines; by his own account, he appears to have taken a very active – even pro-active – role in ensuring that the operation went forward and was “successful”.

177. Momir Nikolić was not unaware of the crimes unfolding following the fall of Srebrenica. Rather, Mr. Nikolić appears to be right at the centre of criminal activity as the operation spread from Potočari, to Bratunac and on to Zvornik. [...]

23. At the outset, the Appeals Chamber recalls that the Appellant acknowledged the Indictment’s allegations concerning the mass executions in the Zvornik municipality as true and correct,<sup>69</sup> although the Indictment does not allege that he was personally involved in those mass executions.<sup>70</sup> The Appeals Chamber therefore acknowledges that the Appellant did not plead guilty to having directly participated in the crimes committed in Zvornik.<sup>71</sup> Rather, the Appellant acknowledged and admitted his role as a participant in a joint criminal enterprise,<sup>72</sup> the common purpose of which was, *inter alia*, the following:

[...] to capture, detain, summarily execute by firing squad, bury and rebury thousands of Bosnian Muslim men and boys aged 16 to 60 from the Srebrenica enclave from 12 July 1995 until and about 19 July 1995. [...] The initial plan was to summarily execute more than 1000 Bosnian Muslim men and boys, aged 16 to 60, who were separated from the group of Bosnian Muslims in Potočari on 12 and 13 July. On 12 July, this plan was broadened to include the summary execution of over 6000 men and boys, aged 16 to 60, who were captured from the column of Bosnia Muslim men escaping the Srebrenica enclave on 12 July through about 19 July 1995. [...] While the Joint Criminal Enterprise contemplated organised and systematic executions, it was foreseeable to [*inter alia* the Appellant] that opportunistic criminal acts, such as those described in this Amended Joinder Indictment, would be carried out by VRS and MUP forces during and after the Joint

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<sup>67</sup> Appellant’s Brief, para. 22.

<sup>68</sup> *Ibid.*

<sup>69</sup> Plea Agreement, para. 7.

<sup>70</sup> See Indictment, paras 46.6-46.12, in which the participation of Vidoje Blagojević, Dragan Obrenović and Dragan Jokić is alleged.

<sup>71</sup> Cf. Appellant’s argument in his Brief in Reply, para. 19.

<sup>72</sup> Plea Agreement, para. 5 referring to Indictment, paras 30-33.

Criminal Enterprise. [...] The implementation of this Joint Criminal Enterprise resulted in the summary execution of approximately 7000 Bosnian Muslim men and boys from the Srebrenica enclave.<sup>73</sup>

The common purpose of the joint criminal enterprise included the organised and systematic execution of the Muslim men and boys trying to escape from the Srebrenica enclave and was not limited to mass executions in certain municipalities.

24. It cannot be inferred from the Trial Chamber's statement in paragraph 176 of the Sentencing Judgement that the Appellant was directly involved in the crimes committed in Zvornik. In paragraph 176 of the Sentencing Judgement, the Trial Chamber did not purport to determine in which municipality the Appellant actually participated in the crimes. Rather, the Trial Chamber emphasised the fact that through his participation in the furtherance of the common purpose of the joint criminal enterprise the Appellant actively ensured the success of the operation that followed the fall of Srebrenica: the Trial Chamber characterised his participation not only as active but as "very active – even pro-active".<sup>74</sup>

25. Furthermore, the Trial Chamber did not make a finding in paragraph 177 of the Sentencing Judgement to the effect that the Appellant was at the centre of the crimes in Zvornik. Rather, the Trial Chamber found that the Appellant appeared to have been at the centre of criminal activity as the operation *spread* from Potočari, to Bratunac and on to Zvornik. It cannot be inferred from this that the Appellant was in any way, other than his participation in the joint criminal enterprise, involved in the crimes actually committed in Zvornik. Moreover, the Appeals Chamber considers that the facts contained in paragraph 177 of the Sentencing Judgement support the Trial Chamber's finding. These facts include his presence at the Hotel Fontana, his knowledge of the plan to deport Muslim women and children to Muslim held territory and to separate, detain, and ultimately kill the Muslim men, his lack of objection to this plan, his recommendation of possible detention and execution sites, and his presence in Potočari where the separation of men from their families took place.

26. The Trial Chamber therefore did not erroneously state the facts concerning the Appellant's involvement in the events in Zvornik. This part of the ground of appeal is accordingly dismissed.

## 2. The meetings at the Hotel Fontana

27. The Appellant argues that the Trial Chamber erred in holding that "[he] was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed

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<sup>73</sup> Indictment, para. 30 (emphasis added).

<sup>74</sup> Sentencing Judgement, para. 176.

and decided.”<sup>75</sup> He argues that this statement is contrary to the Statement of Facts since it implies that he was present at the three meetings in question.<sup>76</sup> In his view, the Trial Chamber failed to differentiate between the three meetings.<sup>77</sup> In particular he argues that (1) he only attended two meetings and not three,<sup>78</sup> (2) “it is plain” that the fate of the Muslim population was not decided and discussed at these meetings since the Dutch Battalion representatives were present, and (3) it was only after the third meeting that he was told to coordinate the transportation of the Muslim inhabitants and the separation of the able-bodied Muslim men.<sup>79</sup> The Prosecution acknowledges that the Appellant was not present at the third meeting, but argues that the Trial Chamber’s findings are consistent with this fact.<sup>80</sup>

28. The Appeals Chamber recalls paragraph 177 of the Sentencing Judgement, which reads:

Momir Nikolić was not unaware of the crimes unfolding following the fall of Srebrenica. Rather, Mr. Nikolić appears to be right at the centre of criminal activity as the operation spread from Potočari, to Bratunac and on to Zvornik. Momir Nikolić was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed and decided. He did not raise any objections to what he was told was the plan: to deport Muslim women and children to Muslim held territory, and to separate, detain, and ultimately kill the Muslim men. Rather than resist, Momir Nikolić recommended possible detention and execution sites. On 12 July 1995, Momir Nikolić was in Potočari – he saw with his own eyes the separation of men from their families; he heard the cries of children as they saw their fathers taken away; he saw the fear in the eyes of the women pushed on to buses as they knew that the fate of their fathers, husbands and sons was beyond their control. He has described himself as the co-ordinator of various units operating in Potočari, but he did nothing to stop the beatings, the humiliation, the separations or the killings.<sup>81</sup>

29. In contrast to the Appellant’s assertion,<sup>82</sup> the Trial Chamber did not state that the Appellant attended all three meetings at the Hotel Fontana. Rather, it found that he was present at the Hotel Fontana at the time the meetings were held.<sup>83</sup> This finding was correct. According to the Statement of Facts, the Appellant attended two of the three meetings at the Hotel Fontana on 11 July 1995.<sup>84</sup> Prior to the third meeting, he met with two persons outside the Hotel Fontana.<sup>85</sup> He waited nearby the Hotel until the conclusion of the third meeting and then met with a person outside the Hotel.<sup>86</sup>

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<sup>75</sup> Sentencing Judgement, para. 177 referred to in Appellant’s Brief, para. 23.

<sup>76</sup> Appellant’s Brief, para. 24.

<sup>77</sup> Brief in Reply, para. 20.

<sup>78</sup> Appellant’s Brief, para. 25 referring to Statement of Facts, para. 3; Brief in Reply, para. 20.

<sup>79</sup> Appellant’s Brief, para. 25 citing Statement of Facts, para. 5.

<sup>80</sup> Respondent’s Brief, paras 81-84.

<sup>81</sup> Sentencing Judgement, para. 177.

<sup>82</sup> Appellant’s Brief, para. 24. The Appeals Chamber notes that the Prosecution also stated in its Respondent’s Brief, para. 82 that “the Chamber stated at para. 177 that Nikolić was present at the three meetings”.

<sup>83</sup> The Appeals Chamber notes that the French translation of paragraph 177 of the Sentencing Judgement reads “a assisté aux trois réunions à l’hôtel Fontana”. The French text seemingly implies that the Appellant was a participant in the meetings which is contrary to the English text. However, the Appeals Chamber recalls that the English version of the Sentencing Judgement is the authoritative text.

<sup>84</sup> Statement of Facts, para. 3.

<sup>85</sup> *Ibid.*, para. 4.

<sup>86</sup> *Ibid.*, para. 5.

30. With respect to the Appellant's argument that the fate of the Muslim population was not discussed and decided at these meetings, the Appeals Chamber does not find the Trial Chamber's approach erroneous. The Appellant acknowledged that "[d]uring the meetings at the Hotel Fontana from the evening of 11 July to the early morning of 12 July 1995, the plan to transport the civilian refugee population from Potočari was developed"<sup>87</sup> and that Ratko Mladić warned the Bosnian Muslim representatives in the second meeting that their people could either "survive or disappear".<sup>88</sup> Furthermore, during the third meeting at the Hotel Fontana, Ratko Mladić explained that he would supervise the "evacuation" of refugees from Potočari and that he wanted to see all military-aged Bosnian Muslim men so that "they could be screened as possible war criminals".<sup>89</sup> Moreover, the Appellant acknowledged that it was also at the Hotel Fontana that he learned of the decision that "thousands of Muslim women and children would be transported out of Potočari toward Muslim-held territory near Kladanj and that the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd, detained temporarily in Bratunac, and killed shortly thereafter."<sup>90</sup> It was again at the Hotel Fontana that he was told "to coordinate the transportation of all the women and children and the separation of the able-bodied Muslim men."<sup>91</sup> In stating that "Momir Nikolić was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed and decided",<sup>92</sup> the Trial Chamber highlighted the fact that the Appellant was present at the very place where the Bosnian Serb leadership convened and where the decision regarding the fate of the Muslim population was conveyed to the Appellant. The Appellant has failed to demonstrate that the Trial Chamber committed an error in this respect.

31. Furthermore, the Appeals Chamber sees no contradiction between the Appellant's claim that it was only after the third meeting that he received his orders<sup>93</sup> and the Trial Chamber's statement that "[he] was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed and decided."<sup>94</sup> The Appellant in general argues that at the time of the third meeting "[he] was outside the Hotel Fontana and was not privy to whatever was discussed inside."<sup>95</sup> However, the Trial Chamber did not make a statement to the contrary. As noted above, it did correctly state that he was present at the Hotel during the three meetings,<sup>96</sup> and it did not state that he attended the third meeting, nor that he knew what was discussed during that

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<sup>87</sup> Indictment, para. 39; Plea Agreement, para. 7.

<sup>88</sup> *Ibid.*; see also Statement of Facts, para. 3.

<sup>89</sup> Indictment, para. 39; Plea Agreement, para. 7.

<sup>90</sup> Statement of Facts, para. 4.

<sup>91</sup> *Ibid.*, para. 5.

<sup>92</sup> Sentencing Judgement, para. 177.

<sup>93</sup> Appellant's Brief, para. 25.

<sup>94</sup> Sentencing Judgement, para. 177 referred to in Appellant's Brief, para. 23.

<sup>95</sup> Appellant's Brief, para. 26.

<sup>96</sup> Sentencing Judgement, para. 177.

meeting. In fact, it is clear from the very next sentence in paragraph 177 of the Sentencing Judgement that he did not participate in deciding on the plan since the Trial Chamber expressly stated that he was *told* of the plan.<sup>97</sup>

32. For the foregoing reasons, this part of the present ground of appeal is dismissed.

### 3. Overstatement of Appellant's rank

33. The Appellant contends that the Trial Chamber overstated his rank as Captain First Class when he was simply a Captain.<sup>98</sup> He argues that the Trial Chamber specifically took into account the Appellant's position of authority as a significant factor in determining the gravity of the offence and that it is "in fact, impossible to say without speculation, what effect giving the Appellant an elevated rank may have had on its assessment of the gravity of the offence."<sup>99</sup>

34. The Appeals Chamber notes that the Appellant made a correction to paragraphs 9 and 10 of the Indictment in his Statement of Facts to the effect that "Captain First Class" should be replaced by "Captain".<sup>100</sup> The Trial Chamber nevertheless introduced the Appellant in the second paragraph of its Sentencing Judgement as Captain First Class in the VRS.<sup>101</sup>

35. It is clear that the Trial Chamber's misstatement of the Appellant's rank affected neither its consideration of the gravity of the crime nor its consideration of the aggravating circumstances; rather, the Trial Chamber's statement occurred in its introductory remarks on the Appellant. This is an indication that the Trial Chamber did not consider the rank of "Captain First Class", in comparison to the Appellant's rank of "Captain", as a factor aggravating the sentence. The Appeals Chamber finds that, even though the Trial Chamber erroneously stated his rank in the introductory part of the Sentencing Judgement, the Appellant has failed to demonstrate how this influenced the Trial Chamber in its sentencing considerations.

36. For the foregoing reasons, grounds of appeal 1, 1A and 1B are dismissed.

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<sup>97</sup> *Ibid.*: "Momir Nikolić was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed and decided. He did not raise any objections to what *he was told was the plan*: to deport Muslim women and children to Muslim held territory, and to separate, detain, and ultimately kill the Muslim men. Rather than resist, Momir Nikolić recommended possible detention and execution sites." (Emphasis added).

<sup>98</sup> Appellant's Brief, paras 27-28.

<sup>99</sup> Brief in Reply, para. 16.

<sup>100</sup> Statement of Facts, para. 15 *ad finem*.

<sup>101</sup> Sentencing Judgement, para. 2.

#### IV. SECOND AND TWELFTH GROUND OF APPEAL: CONSISTENCY OF SENTENCING PRACTICE

37. In his second and twelfth ground of appeal, the Appellant asserts that the Trial Chamber erred when it imposed a sentence of 27 years' imprisonment on him since this sentence is inconsistent with the sentences imposed in other cases with "not dissimilar backgrounds".<sup>102</sup> The Appellant draws the Appeals Chamber's attention to the cases of Radislav Krstić, Dragan Obrenović, Vidoje Blagojević, and Dario Kordić.<sup>103</sup> In the view of the Appellant his sentence is "manifestly excessive"<sup>104</sup> and he submits that if his sentence is not reduced he will be "left with a grave sense of injustice" when comparing his sentence to defendants similarly situated.<sup>105</sup> The Prosecution generally acknowledges that the *Krstić*, *Obrenović*, and *Blagojević* cases are related to the crimes committed in the aftermath of the fall of the Srebrenica enclave and that the disparity in the range of sentences may warrant review by the Appeals Chamber.<sup>106</sup> A comparison with the sentence in the *Kordić* case, however, is, in the view of the Prosecution, of limited assistance as the facts of that case are not related to the events at Srebrenica and therefore the case is not comparable to the case at hand.<sup>107</sup>

##### A. The law on the comparability of sentences and the consistency of sentencing practice

38. The Appeals Chamber recalls that "[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances".<sup>108</sup> However, the Appeals Chamber also reiterates that "while [it] does not discount the assistance that may be drawn from previous decisions rendered, it also concludes that this may be limited."<sup>109</sup> The reason for this limitation is that, when comparing a case to the same offence committed in substantially similar circumstances, the Trial Chamber still has an overriding obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused, which include the consideration of both aggravating and mitigating circumstances.<sup>110</sup>

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<sup>102</sup> Appellant's Brief, para. 5(b).

<sup>103</sup> *Ibid.*, paras 13-14.

<sup>104</sup> Brief in Reply, para. 3; *see also* Notice of Appeal, para. 12; AT. 44.

<sup>105</sup> Brief in Reply, para. 11.

<sup>106</sup> Respondent's Brief, paras 39, 45, 50, respectively.

<sup>107</sup> *Ibid.*, paras 53-54.

<sup>108</sup> *Furundžija* Appeal Judgement, para. 250; *Čelebići* Appeal Judgement, para. 720.

<sup>109</sup> *Čelebići* Appeal Judgement, para. 721.

<sup>110</sup> *Ibid.*, para. 717. *See also* para. 719: "[T]he Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the

39. With respect to the issue of the excessiveness of a sentence, the Appeals Chamber, as noted by the Trial Chamber in the present case,<sup>111</sup> held in the *Jelisić* case that

a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules.<sup>112</sup>

## **B. The cases related to the crimes committed after the fall of Srebrenica**

### **1. The case of Dragan Obrenović**

40. The Appellant submits that Dragan Obrenović pleaded guilty to the same count of persecutions in the Indictment as did the Appellant, but was only sentenced to 17 years' imprisonment.<sup>113</sup> He asserts that Dragan Obrenović was of a higher rank and a career officer, and was the acting commander of the Zvornik Brigade during the two days when many of the executions took place in the Zvornik municipality.<sup>114</sup> The Appellant submits that he, in contrast, was only a reserve officer and not a commanding officer,<sup>115</sup> and had no subordinates.<sup>116</sup> The Appellant argues that their cases are in many respects comparable as Dragan Obrenović had also co-operated substantially with the Prosecution and had mitigating circumstances "not dissimilar" to those of the Appellant.<sup>117</sup>

41. At the outset, the Appeals Chamber notes that the Appellant and Dragan Obrenović were jointly indicted, and convicted and sentenced by the same Trial Chamber in judgements rendered on 2 and 10 December 2003 respectively. Therefore, the Trial Chamber was in the best position to assess the similarities and differences between the cases and to individualise the penalties of each accused.

42. The guilty pleas of the Appellant and Dragan Obrenović only partially encompassed the same crimes. The Appellant, when pleading guilty to Count 5 of the Indictment, specifically acknowledged and admitted his conduct related to the opportunistic killings in Potočari and Bratunac mentioned in paragraphs 43-45 of the Indictment, all the organised mass executions listed in paragraphs 46.1-46.12 of the Indictment, and the opportunistic killings that occurred in the

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differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results."

<sup>111</sup> Sentencing Judgement, fn. 195.

<sup>112</sup> *Jelisić* Appeal Judgement, para. 96; confirmed in *Babić* Judgement on Sentencing Appeal, para. 33.

<sup>113</sup> AT. 59.

<sup>114</sup> AT. 59. Appellant's Brief, para. 13(b).

<sup>115</sup> AT. 47, 59.

<sup>116</sup> AT. 59.

<sup>117</sup> Appellant's Brief, para. 13(b).

Bratunac Brigade Zone listed in paragraphs 47, 47.2-47.5 of the Indictment.<sup>118</sup> Dragan Obrenović, on the other hand, when pleading guilty to Count 5 of the Indictment, acknowledged and admitted his conduct related to the opportunistic killings in Bratunac listed in paragraph 45 of the Indictment, the organised mass executions that occurred in the Zvornik municipality listed in paragraphs 46.6-46.12 of the Indictment and the opportunistic killings in the Zvornik Brigade Zone listed in paragraphs 47.6-47.8 of the Indictment.<sup>119</sup> However, the Appeals Chamber acknowledges that both sentencing judgements concerned crimes occurring after the fall of Srebrenica, both accused pleaded guilty to being members of, and knowingly participating in, the same joint criminal enterprise,<sup>120</sup> and both accused agreed to plead guilty to Count 5 of the Indictment, that is, to the crime of persecutions on political, racial and religious grounds, a crime against humanity under Article 5(h) of the Statute.<sup>121</sup> The Appeals Chamber therefore concludes that the cases of the Appellant and Dragan Obrenović are in general comparable.

43. In both cases, the Trial Chamber decided that the starting point of the sentencing range was 20 years' imprisonment. However, in the Appellant's case, it decided that the maximum sentence would be life imprisonment, whereas in the *Obrenović* case, it set the maximum at 40 years' imprisonment. This may be explained, as pointed out by the Appellant,<sup>122</sup> by the fact that the Trial Chamber in the *Obrenović* case had characterised Dragan Obrenović's participation in the commission of the crimes as being foremost one of inaction and a failure to prevent his subordinates from participating in the crimes or the failure to punish them.<sup>123</sup> In contrast thereto, the Trial Chamber in the present case held that the Appellant had an active role in furthering the commission of the crimes and was a "pro-active" participant in them.<sup>124</sup> In any case, it is clear that the Trial Chamber considered the participation of the Appellant and Dragan Obrenović in the crimes to be dissimilar.

44. With respect to the aggravating circumstances, the Trial Chamber in both cases accepted the vulnerability of the victims as an aggravating circumstance.<sup>125</sup> Regarding the position of authority of the accused, the Appeals Chamber notes that Dragan Obrenović, in contrast to the Appellant,

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<sup>118</sup> See Plea Agreement, para. 5.

<sup>119</sup> See also *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60-PT, Annex "A" to the Joint Motion for Consideration of Plea Agreement between Dragan Obrenović and the Office of the Prosecutor – Plea Agreement, 20 May 2003, ("Obrenović Plea Agreement"), para. 5.

<sup>120</sup> Plea Agreement, para. 5; and Obrenović Plea Agreement, para. 5 referring to paragraph 30 of the Indictment.

<sup>121</sup> Plea Agreement, para. 5; and Obrenović Plea Agreement, para. 5.

<sup>122</sup> Appellant's Brief, para. 13(b): [Obrenović's] responsibility lay largely in *his failure to prevent* his subordinates from participating in the detention, murder and burial of Bosnian Muslim men, being aware of the murder operation taking place." (Emphasis added).

<sup>123</sup> *Obrenović* Sentencing Judgement, para. 151; see also *ibid.*, para. 88.

<sup>124</sup> Sentencing Judgement, para. 176, see also para. 123, in which the Trial Chamber characterises Momir Nikolić as "active and willing participant".

<sup>125</sup> *Ibid.*, paras 137, 139. *Obrenović* Sentencing Judgement, paras 102, 103.

additionally pleaded guilty to being responsible under Article 7(3) of the Statute.<sup>126</sup> In *Obrenović*, the Trial Chamber found that abuse of authority was part of the crime, and thus should be considered as an aspect of the gravity of the offence; it therefore did not consider it again as an aggravating circumstance.<sup>127</sup> In the Appellant's case, by contrast, it accepted the abuse of his position of authority as an aggravating circumstance.<sup>128</sup>

45. With respect to mitigating circumstances, the Trial Chamber accorded more weight to remorse and co-operation with the Prosecution in Dragan Obrenović's case than in the Appellant's.<sup>129</sup> According to the Trial Chamber, Dragan Obrenović's co-operation with the Prosecution was a significant mitigating circumstance,<sup>130</sup> whereas in the Appellant's case the Trial Chamber had some reservations about the Appellant's credibility which, in its view, undermined the value of such co-operation.<sup>131</sup> Regarding the mitigating circumstance of sincere remorse, the Trial Chamber considered Dragan Obrenović's remorse to be a substantial mitigating factor,<sup>132</sup> whereas the Trial Chamber in the Appellant's case decided not to give substantial weight to this factor.<sup>133</sup>

46. The Appeals Chamber also notes that the Trial Chamber in the *Obrenović* case found the character of the accused to be an "important mitigating factor",<sup>134</sup> whereas in the Appellant's case, the Trial Chamber found it only to be "a factor in mitigation of sentence."<sup>135</sup> In both cases the Trial Chamber took into account the fact that the accused did not discriminate against anybody prior to the war and that they were respected members of the community.<sup>136</sup> However, in the case of Dragan Obrenović, the Trial Chamber additionally found that "even during the war Dragan Obrenović provided help on [an] ongoing basis to several Muslims whom he previously had not known."<sup>137</sup> Moreover, the Trial Chamber in the *Obrenović* case found the accused's affirmative steps toward rehabilitation to be a factor in mitigation of his sentence,<sup>138</sup> but no such finding was made in the Appellant's case.

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<sup>126</sup> Indictment, para. 29; *Obrenović* Sentencing Judgement, para. 40.

<sup>127</sup> *Obrenović* Sentencing Judgement, paras 85-87, 99.

<sup>128</sup> Sentencing Judgement, paras 135, 139.

<sup>129</sup> Respondent's Brief, para. 42.

<sup>130</sup> *Obrenović* Sentencing Judgement, para. 129.

<sup>131</sup> Sentencing Judgement, para. 156. The Appeals Chamber notes that the findings on the Appellant's credibility with respect to his co-operation is appealed by the Appellant, *see* seventh ground of appeal, *infra*, chapter VIII. The issue at hand, however, is the question of whether the Trial Chamber erred, based on its findings in the respective judgements, in treating similar cases differently.

<sup>132</sup> *Obrenović* Sentencing Judgement, para. 121.

<sup>133</sup> Sentencing Judgement, para. 161. The Appeals Chamber notes that this has been appealed by the Appellant, *see* eighth ground of appeal, *infra*, chapter IX.

<sup>134</sup> *Obrenović* Sentencing Judgement, para. 134.

<sup>135</sup> Sentencing Judgement, para. 164.

<sup>136</sup> *Ibid.*, para. 164; *Obrenović* Sentencing Judgement, para. 134.

<sup>137</sup> *Obrenović* Sentencing Judgement, para. 134.

<sup>138</sup> *Ibid.*, para. 146.

47. In conclusion, the Appeals Chamber considers that these cases are comparable with respect to the number and type of crimes, both accused being responsible for persecutions as a crime against humanity in the context of the fall of Srebrenica. As shown above, however, the Trial Chamber established several differences between the two cases, namely, in relation both to the respective level of participation in the commission of the crime and to the factors it took into account in mitigation. When the Trial Chamber finds that the level of participation in the commission of a crime and mitigating factors differ, different penalties are justified. Thus, the Appellant has failed to show that the relationship between his sentence and that of Dragan Obrenović reveals error in the Trial Chamber's Sentencing Judgement in this case.

## 2. The case of Radislav Krstić

48. The Appellant argues that a reduction of his sentence is warranted when comparing his case to that of Radislav Krstić, who received a sentence of 35 years, 8 years more than the Appellant. He points to the fact that Radislav Krstić was General-Major in the VRS and Commander of the Drina Corps at the time the crimes were committed after the fall of the Srebrenica and that Radislav Krstić was convicted for aiding and abetting genocide and his responsibility for the crimes of murder, persecutions, and extermination. The Appellant submits that he had a considerably lower position of authority than Radislav Krstić and that Radislav Krstić neither pleaded guilty nor substantially cooperated with the Prosecution.<sup>139</sup>

49. The Appeals Chamber considers that the crimes that were committed in the cases of the Appellant and Radislav Krstić may, in general, be comparable since both were found guilty for crimes that occurred in relation to the fall of Srebrenica. However, it is necessary to compare the number and type of crimes and also how the individual participated in the crimes as well as their individual circumstances.

50. Radislav Krstić was originally sentenced to 46 years' imprisonment; the sentence was subsequently reduced to 35 years on appeal. The Sentencing Judgement in the Appellant's case was rendered in between the Trial Judgement and the Appeal Judgement in the *Krstić* case, and the Trial Chamber took the initial sentence of Radislav Krstić into account when considering the sentencing practices of the International Tribunal.<sup>140</sup> In contrast to Radislav Krstić, the Appellant pleaded guilty to committing the crimes through his participation in a joint criminal enterprise,<sup>141</sup> underlined by the Trial Chamber's finding that the Appellant's role was active and that he was not merely

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<sup>139</sup> Appellant's Brief, para. 13(a).

<sup>140</sup> Sentencing Judgement, fn. 195.

<sup>141</sup> Indictment, paras 27, 30.

following orders.<sup>142</sup> The Trial Chamber moreover found that “by his own account, [Momir Nikolić] appears to have taken a very active – even pro-active – role in ensuring that the operation went forward and was 'successful'”,<sup>143</sup> and concluded that “[he] was an integral part of the implementation of the plan, in order that the aims of the operation were achieved.”<sup>144</sup> Mitigating circumstances were found in both cases, specific to each accused. Whereas Radislav Krstić was given credit for various facts, including a written order to treat Muslims humanely,<sup>145</sup> the Appellant was given credit for accepting his responsibility and pleading guilty, co-operating with the Prosecution, and expressing remorse. The Appeals Chamber finds that the participation of the Appellant compared to that of Radislav Krstić and the relevant mitigating circumstances are not similar. In sum, the Appellant has failed to show that the relationship between his sentence and that of Radislav Krstić reveals error in the Trial Chamber’s Sentencing Judgement in his case.

### 3. The case of Vidoje Blagojević

51. The Appeals Chamber notes the Prosecution’s argument that Vidoje Blagojević received, from the same Trial Chamber, a sentence of 18 years’ imprisonment after a lengthy trial without guilty plea or co-operation with the Prosecution.<sup>146</sup> As the sentence in the case of *Blagojević* is pending appeal and thus has not yet been the object of final consideration,<sup>147</sup> the Appeals Chamber cannot engage in a comparison between the sentence of Vidoje Blagojević and that of the Appellant.<sup>148</sup>

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<sup>142</sup> Sentencing Judgement, para. 123 citing Statements of Facts, paras 4, 6, 9, 13.

<sup>143</sup> Sentencing Judgement, para. 176.

<sup>144</sup> *Ibid.*, para. 178.

<sup>145</sup> *Krstić* Appeal Judgement, paras 272-273.

<sup>146</sup> Respondent’s Brief, paras 46-51; AT. 67-68. The Appeals Chamber also notes the Appellant’s submission in this regard, Appellant’s Brief, para. 13(c).

<sup>147</sup> Both parties in the *Blagojević* case have appealed the Trial Judgement. In particular, the Prosecution alleges in that case in its fourth ground of appeal that “[t]he Trial Chamber erred in imposing a sentence on Blagojević which was, in the circumstances manifestly inadequate and by, *inter alia*, failing to find that Blagojević’s superior position was an aggravating factor [...], and taking into account Blagojević’s work in de-mining a mitigating factor [...]”, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Prosecution’s Notice of Appeal, 23 February 2005, para. 15. Vidoje Blagojević also appealed his sentence as his eighth ground of appeal, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Defence of Accused Mr. Vidoje Blagojević Notice of Appeal, public redacted version, 31 May 2005, para. 28.

<sup>148</sup> The Appellant recognises that the Appeals Chamber’s powers of review to compare his case to the *Blagojević* case is “somewhat restricted” since the Prosecution appealed Vidoje Blagojević’s sentence, Brief in Reply, para. 10. He argues, however, that “even if the Appeals Chamber were to increase the sentences imposed by the Trial Chamber, any increases would presumably have to be moderated by a 'double jeopardy' argument, they previously having been sentenced to lower sentences at first instance”, Brief in Reply, para. 10(c). The Appeals Chamber fails to see how the argument that the accused cannot be convicted twice for the same conduct (*ne bis in idem*) is related to a decision of the Appeals Chamber to increase the sentence on appeal.

### C. The case of Dario Kordić

52. The Appellant submits that the sentence imposed on Dario Kordić is also instructive since the case involved unlawful killings, murders and inhumane acts as a crime against humanity and “persecution” of the Muslim community in Central Bosnia.<sup>149</sup> He acknowledges that “the killings were not perhaps on the same sheer scale as those in Srebrenica”, but notes that Dario Kordić was convicted as a responsible regional politician who planned and instigated these crimes and that the sentence was passed after “a very lengthy trial”.<sup>150</sup> He argues further that there was no guilty plea and no co-operation with the Prosecution and that Dario Kordić received a sentence of 25 years’ imprisonment, and therefore the 27 year sentence of the Appellant “is manifestly excessive and out of keeping with Tribunal sentencing”.<sup>151</sup>

53. As conceded by the Appellant himself, “the killings were not perhaps on the same sheer scale as those in Srebrenica”. As Dario Kordić was not convicted for the same offences as those of the Appellant, the Appeals Chamber concludes that the two cases are not comparable.

54. In conclusion, for the foregoing reasons, the Appeals Chamber dismisses grounds of appeal 2 and 12.

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<sup>149</sup> Appellant’s Brief, para 14.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

## V. THIRD AND FOURTH GROUND OF APPEAL: GRAVITY OF THE OFFENCE AND AGGRAVATING CIRCUMSTANCES

### A. Alleged insufficient credit for the fact that the Appellant did not order, plan, or instigate the crimes

55. The Appellant submits that, when considering the gravity of the offence, “the Trial Chamber gave him insufficient credit for the fact that [he] did not order, plan or in any way instigate the killings at Srebrenica nor actually kill anyone himself.”<sup>152</sup> He acknowledges that he was convicted for his involvement in a joint criminal enterprise but argues that the Trial Chamber “wrongly exercised its discretion in relation to the weight to be given to his specific role in the ‘joint enterprise’.”<sup>153</sup> He argues that this “may have been part of the reason why the Trial Chamber imposed a sentence of 27 years”.<sup>154</sup>

56. Contrary to the Appellant’s assertion that the Trial Chamber should have given him credit for the fact that he did not order, plan or instigate the crimes, the Appeals Chamber finds that Trial Chambers, when assessing the gravity of the offence, have no obligation to take into account what the accused did *not* do. Here, the Trial Chamber accurately stated what the Appellant *did* do – that is, his mode of liability for the crimes – in determining the gravity of the offence. Moreover, although the Appellant did not order, plan or instigate the crimes, it is noted that, by his own admission, he did have a very significant involvement in the commission of serious crimes. Because of the form and level of his involvement, the fact that the Appellant did not order, plan or instigate these crimes does not in any way diminish the gravity of the crimes for which he admitted guilt and that, therefore, the Appellant failed to show a discernible error on the part of the Trial Chamber. For these reasons, the Appellant’s argument is dismissed.

### B. Whether the Trial Chamber considered some factors twice to aggravate the Appellant’s sentence

57. The Appellant argues that the Trial Chamber considered both his role and the vulnerability of the victims in the gravity of the offence and again as a separate aggravating circumstance.<sup>155</sup> In

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<sup>152</sup> Appellant’s Brief, para. 30.

<sup>153</sup> Brief in Reply, para. 22.

<sup>154</sup> *Ibid.*

<sup>155</sup> Appellant’s Brief, paras 33-34 referring to Sentencing Judgement, paras 121, 123, which are part of the Trial Chamber’s assessment of the gravity of the offence; and referring to Sentencing Judgement, paras 135, 137, in which the Trial Chamber addressed the aggravating circumstances. *See also* AT. 71-73, in which Defence counsel refers to paragraphs 103, 114, and 124 of the Sentencing Judgement.

the Appellant's view, the Trial Chamber therefore double-counted each of these factors.<sup>156</sup> The Prosecution responds that the Trial Chamber's analysis was consistent with the jurisprudence of the International Tribunal and was not in error.<sup>157</sup>

58. The Appeals Chamber recalls that factors taken into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*.<sup>158</sup> In turn, the Appeals Chamber considers whether the Trial Chamber double-counted (1) the Appellant's role in the crime and (2) the vulnerability of the victims.

1. Third Ground of Appeal: The Appellant's position of authority and his role in the commission of the crime of persecutions

59. The Appellant argues that the Trial Chamber took his role in the commission of the crime into account as an element of the gravity of the crime as well as when making a finding on the aggravating circumstance of his position of authority and role.<sup>159</sup> He further asserts that, in relation to the gravity of the offence, the Trial Chamber specifically took note of the Prosecution's submission that he committed the crime of persecutions in the position of a brigade level Security and Intelligence officer.<sup>160</sup> The Prosecution responds that the Trial Chamber distinguished between "two very separate issues", namely, the Trial Chamber considered within the gravity of the crime the conduct of the accused in the crimes and the role he played in relation to the other participants, and as an aggravating circumstance the Appellant's abuse of power.<sup>161</sup>

60. With regard to the findings on the gravity of the offence, the Sentencing Judgement reads:

The Trial Chamber recalls the Statement of Facts, which forms the basis of Momir Nikolić's conviction, as outlined above in Section II. The Trial Chamber finds that Momir Nikolić was not simply "following orders" as the Defence submits. Rather, Momir Nikolić took an active role in furthering the commission of the crime. Specifically, the Trial Chamber finds that Momir Nikolić: was in Potočari on 12 July "co-ordinating" activities including the transportation of women and children to Kladanj and the separation and detention of able-bodied Muslim men; "directed" the work of the forces present in Potočari on 13 July; identified specific locations in and around Bratunac both for the detention and execution of Muslim men; and, in the fall of 1995, co-ordinated the exhumation and re-burial of Muslim bodies. Thus, the Trial Chamber must conclude that Momir Nikolić was an active and willing participant in the massive criminal operation carried out in the days and months following the fall of Srebrenica.<sup>162</sup>

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<sup>156</sup> Appellant's Brief, para. 35.

<sup>157</sup> Respondent's Brief, para. 92.

<sup>158</sup> *Deronjić* Judgement on Sentencing Appeal, para. 106. The Appeals Chamber notes that the Trial Chamber expressly abided by this principle in relation to the "depravity" of the crime, *see* Sentencing Judgement, para. 136: "The Trial Chamber finds that the depravity of the crimes is subsumed in the overall gravity of the offence, and has already been addressed above. Therefore, the Trial Chamber does not consider this separately as an aggravating factor."

<sup>159</sup> Appellant's Brief, paras 33-34 referring to Sentencing Judgement, paras 123, 135.

<sup>160</sup> Appellant's Brief, para. 32 referring to Sentencing Judgement, para. 116.

<sup>161</sup> Respondent's Brief, paras 94-96.

<sup>162</sup> Sentencing Judgement, para. 123 (footnotes omitted, the footnotes referred to Statement of Facts, paras 4, 6, 9, 13).

The Trial Chamber additionally found the following to be elements of a separate aggravating circumstance:

The Trial Chamber finds that Momir Nikolić was in a position of authority as Assistant Commander and Chief of Security and Intelligence. While his tasks largely consisted of implementing rather than giving orders, Momir Nikolić directed the military police of the Bratunac Brigade, as well as co-ordinated other units; this was of significance to the implementation and completion of the underlying criminal acts committed following the attack on Srebrenica. The role that Nikolić played and the functions that he performed, while not in the capacity of a commander, were of significant importance to the overall “murder operation” that was ongoing. Therefore, the Trial Chamber finds his position and role to be aggravating factors.<sup>163</sup>

61. The Appeals Chamber agrees with the Appellant that the Trial Chamber used the word “role” when considering both the gravity of the offence and the aggravating circumstance. Upon a review of the above cited paragraphs of the Sentencing Judgement,<sup>164</sup> the Appeals Chamber considers that the Trial Chamber took into account the Appellant’s active role in the crime in its assessment of the gravity of the offence, and his position of authority and the role he played in the crime as a separate aggravating circumstance. The Appeals Chamber is not satisfied that the Appellant’s role taken into account by the Trial Chamber when considering the gravity of the offence and his “role” taken into account in addition to his position of authority as an aggravating factor correspond to different aspects of the role in question. There is no identifiable difference in the facts cited that would lead to such a conclusion; both paragraphs address as a general matter the Appellant’s role in the murder operation. Double-counting the Appellant’s role in the crimes is impermissible as doing so allows the same factor to detrimentally influence the Appellant’s sentence twice. However, although the Trial Chamber therefore erred in its double-counting of the Appellant’s “role” in the offence, the Appeals Chamber notes that the Trial Chamber’s reference to the Appellant’s “position of authority” in paragraph 135 of the Sentencing Judgement did not amount to double counting. The Appellant’s abuse of his position of authority is distinct from his role in the crimes, and the Trial Chamber referred to the former only as an aggravating factor.

62. The Appeals Chamber concludes that the Trial Chamber committed a discernible error in taking into account twice in sentencing the role the Appellant played in the commission of the crimes. As it impacted on the Trial Chamber’s determination of the sentence, the Appeals Chamber will take this error into account when revising the Appellant’s sentence.

63. The Appellant’s third ground of appeal is accordingly upheld.

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<sup>163</sup> *Ibid.*, para. 135.

<sup>164</sup> *Ibid.*, paras 123, 135. The Appeals Chamber further notes that the Trial Chamber explicitly stated again in paragraph 139 of the Sentencing Judgement that it considered not only his position of authority but also his role as an aggravating circumstance: “In summary, the Trial Chamber finds that the following aggravating circumstances have been proven beyond reasonable doubt: the position of authority and role of Momir Nikolić [...]”.

## 2. Fourth Ground of Appeal: The vulnerability of the victims

64. The Appellant submits that the Trial Chamber considered the vulnerability of the victims as a factor contributing to the gravity of the offence as well as an aggravating circumstance.<sup>165</sup> The Prosecution contends that the Trial Chamber, considering different factors in each case, distinguished between the impact of the crimes and the victims' particular vulnerability,<sup>166</sup> and thus did not engage in double-counting.<sup>167</sup>

65. The Appeals Chamber recalls the passages of the Sentencing Judgement, which, in the view of the Appellant, demonstrate that the Trial Chamber double-counted the vulnerability of the victims. In its findings on the gravity of the offence, the Trial Chamber, *inter alia*, stated that:

Furthermore, the majority of the population of the municipality of Srebrenica was deported and made refugees. Over eight years later, the impact of the crimes committed after the fall of Srebrenica continue to be felt upon the women, children and men who survived the horrific events – many of whom continue to live as refugees due to their forcible displacement from their homes.<sup>168</sup>

Additionally, in the context of the aggravating circumstances, the Trial Chamber held:

The Trial Chamber takes particular note of the vulnerability of the victims, who included women, children and the elderly, as well as captured men. They were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating factor in the commission of the crimes.<sup>169</sup>

66. A thorough reading of these paragraphs of the Sentencing Judgement shows that the Trial Chamber did not take the same factors into account when assessing the gravity of the crime and the aggravating circumstances. In its finding on the gravity of the offence, the Trial Chamber considered the *impact* of the crimes on the people who survived the horrific events at Srebrenica. In contrast, it considered the position of vulnerability and the helplessness of the victims as an aggravating circumstance. The Appeals Chamber therefore finds that the Trial Chamber did not take into account the same consideration twice.

67. The Appellant's fourth ground of appeal is accordingly dismissed.

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<sup>165</sup> Appellant's Brief, paras 33-34. The Appellant refers to paragraph 121 (gravity of the offence) and to paragraph 137 of the Sentencing Judgement (aggravating circumstance).

<sup>166</sup> Respondent's Brief, para. 104.

<sup>167</sup> *Ibid.*, paras 109-110.

<sup>168</sup> Sentencing Judgement, para. 121.

<sup>169</sup> *Ibid.*, para. 137.

## VI. FIFTH GROUND OF APPEAL: THE MISTRANSLATION OF THE DEFENCE COUNSEL'S CLOSING ARGUMENTS

68. As his fifth ground of appeal, the Appellant claims that “[t]he Trial Chamber erred in fact when it relied upon a mistranslation of [l]ead [d]efence [c]ounsel’s closing arguments in weighing Appellant’s sentence, resulting in a miscarriage of justice”.<sup>170</sup> The Prosecution argues in its Respondent’s Brief that this ground of appeal should be treated as waived since no arguments were put forward to support it.<sup>171</sup>

69. The Appeals Chamber notes that the Appellant has not pursued this ground of appeal in his Appellant’s Brief.<sup>172</sup> Although the Appellant mentions the fifth ground of appeal in the heading “The Gravity of the Offence and Aggravating Circumstances – Grounds of Appeal 2, 3, 4, 5”, he does not substantiate it.<sup>173</sup> During the Appeal Hearing, however, both parties addressed the mistranslation issue on the merits, and the Prosecution did not renew its request that the fifth ground of appeal be treated as waived.<sup>174</sup> Therefore, the Appeals Chamber will consider the mistranslation argument raised in the fifth ground of appeal.

70. The relevant statement of the Trial Chamber reads as follows:

The Trial Chamber has examined the crime of persecutions for which Momir Nikolić has admitted responsibility. The Trial Chamber was shocked to hear the Nikolić Defence state that “only” 7,000 men – “only” Muslim men (as opposed to all non-Serbs) – from “only” one municipality were murdered. The comparison is not helpful to assess the gravity of the offence, and the use of the term “only” in relation to the number of persons murdered is shameful.<sup>175</sup>

The Appeals Chamber acknowledges that in Appendix C of the initial opening brief on appeal, the Appellant submits an internal memorandum dated 27 January 2004, in which the Interpretation Unit of the International Tribunal confirmed that the defence counsel at trial did not say “only 7,000 persons were killed in this campaign” but “around 7,000 men were killed”.<sup>176</sup> In contrast, there was no error in the translation of the defence counsel’s reference to the victims’ ethnicity and geographic provenance; the Trial Chamber was correct in stating that the defence counsel argued that “‘only’ Muslim men (as opposed to all non-Serbs) from ‘only’ one municipality were

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<sup>170</sup> Notice of Appeal, para. 5.

<sup>171</sup> Respondent’s Brief, para. 91.

<sup>172</sup> The Appeals Chamber, however, notes that the Appellant puts forward an argument in his eighth ground of appeal that the mistranslation had an influence on the Trial Chamber’s assessment of the mitigating circumstance of his remorse (Appellant’s Brief, para. 70). This argument will be addressed in the Appellant’s eighth ground of appeal.

<sup>173</sup> Appellant’s Brief, para. 31.

<sup>174</sup> AT. 61-62, 73-74.

<sup>175</sup> Sentencing Judgement, para. 122.

<sup>176</sup> Appendix C of Momir Nikolić’s Opening Brief on Appeal, confidentially filed 24 May 2004, a public redacted version was filed on 21 September 2004.

murdered”.<sup>177</sup> However, the Trial Chamber used the description “shameful” specifically in reference to the “use of the term ‘only’ in relation to the number of persons murdered”, not in reference to counsel’s other uses of the term “only”.

71. The Appeals Chamber notes the comments of the counsel for the Prosecution during the Appeal Hearing that “[the mistranslation] is worth considering, particularly since the [...] Trial Chamber was specifically disturbed by the use of the phrase, and I believe all parties are of agreement that that was a translation or interpretation error that was very unfortunate and may have had an influence on the Trial Chamber’s assessment of not only the facts, the admissions, but also the sentence.”<sup>178</sup> Similarly, the Appellant argues that “it may be that this misinterpretation created a sense of hostility and anger towards the Nikolić Defense, and it may well have affected their judgement as well in determining the sentence imposed upon [the Appellant].”<sup>179</sup>

72. The Appeals Chamber agrees with the parties’ submissions. The Appeals Chamber first notes that the Trial Chamber expressed its stance in very strong words (“shocked”, “shameful”). The Appeals Chamber considers that, even though the Trial Chamber directed these words against the Appellant’s counsel, the Trial Chamber must have thought that counsel’s statement was made with the assent of the Appellant as he did not oppose his counsel’s remarks.<sup>180</sup> Moreover, the above statement of the Trial Chamber was made in the chapter of the Sentencing Judgement regarding its findings on the gravity of the offence,<sup>181</sup> which, the Appeals Chamber recalls, is “the most important consideration, which may be regarded as the litmus test for the appropriate sentence”.<sup>182</sup> In light of the position of the statement in the Sentencing Judgement and the harshness of the words used by the Trial Chamber, the Appeals Chamber concludes that the Trial Chamber took this factor into account to the detriment of the Appellant when assessing his sentence. That being so, the Appeals Chamber will take this error into account in revising the Appellant’s sentence.

73. The Appellant’s fifth ground of appeal is accordingly upheld.

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<sup>177</sup> The relevant part of the transcript (corrected version) reads: “The persecution campaign in the Plavšić case included the persecution of Bosnian Muslims, Bosnian Croats, and other non-Serbs in 37 municipalities in Bosnia and Herzegovina. The persecution campaign in the Nikolić case relates only to the Muslims of Srebrenica and to only one municipality, the Srebrenica municipality. In the persecution campaign in the Plavšić case, at least 50.000 persons were killed, while in the Nikolić case around 7,000 persons were killed. In the Plavšić case, the persecution campaign lasted longer, from the 1st of July, 1991 to the 30th of December, 1992, while in the Nikolić case it lasted from the 4th of July, 1995 to the 1st of November, 1995.”

<sup>178</sup> AT. 62.

<sup>179</sup> AT. 74.

<sup>180</sup> The Appellant could not have intervened since he heard the untranslated version of the closing remarks of his counsel.

<sup>181</sup> Chapter IV. C. 2. (a) of the Sentencing Judgement.

## VII. SIXTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER GAVE INSUFFICIENT CREDIT FOR THE APPELLANT'S GUILTY PLEA

74. In this ground of appeal, the Appellant in general submits that the Trial Chamber failed to give sufficient credit to the guilty plea as a mitigating circumstance.<sup>183</sup> In particular, he argues that (1) the Trial Chamber had reservations about the value of plea agreements;<sup>184</sup> and that (2) the Trial Chamber did not give enough weight to the fact that (a) his guilty plea, before the start of the trial, saves the resources of the International Tribunal,<sup>185</sup> and that (b) he was the first Bosnian Serb to publicly admit his guilt in relation to the Srebrenica massacre.<sup>186</sup>

75. The Appeals Chamber recalls that in determining a sentence, a Trial Chamber shall take into account “any mitigating circumstances”.<sup>187</sup> The admission of guilt or a guilty plea has previously been taken into account by the International Tribunal as a mitigating circumstance.<sup>188</sup>

### A. The reservations of the Trial Chamber

76. The Appellant argues that although the Trial Chamber found his guilty plea to be an important mitigating circumstance, this must be assessed in light of “the clear reservations that the Trial Chamber had about the value of plea agreements in the sort of cases that came before the [International] Tribunal.”<sup>189</sup> The Appellant specifically refers to the reservations the Trial Chamber expressed in paragraph 61 of the Sentencing Judgement.<sup>190</sup>

77. The Appeals Chamber notes that the Trial Chamber addressed the reservations referred to by the Appellant when considering the general question of whether plea agreements were appropriate in cases involving serious violations of international humanitarian law.<sup>191</sup> The Trial Chamber gave no indication that it considered those reservations when determining the effect of the guilty plea on

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<sup>182</sup> *Aleksovski* Appeal Judgement, para. 182; *see also* *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101; *Dragan Nikolić* Sentencing Appeal Judgement, para. 18. This was also recognised by the Trial Chamber, *see* Sentencing Judgement, para. 102.

<sup>183</sup> Appellant's Brief, para. 5(a).

<sup>184</sup> *Ibid.*, paras 6-7.

<sup>185</sup> *Ibid.*, paras 8-10.

<sup>186</sup> *Ibid.*, para. 11.

<sup>187</sup> Rule 101(B)(ii) of the Rules. As stated in the *Serushago* Sentencing Appeal Judgement, para. 22, Trial Chambers are “required as a matter of law to take account of mitigating circumstances.” *See also* *Musema* Appeal Judgement, para. 395. The mitigating circumstances have to be taken into account if proven on a balance of probabilities, i.e., the circumstance in question must have existed or exist “more probably than not”, *Čelebići* Appeal Judgement, para. 590.

<sup>188</sup> *Jelisić* Appeal Judgement, para. 122.

<sup>189</sup> Appellant's Brief, paras 6-7.

<sup>190</sup> *Ibid.*, para. 7.

<sup>191</sup> Sentencing Judgement, paras 57-73; the Trial Chamber concluded in para. 73: “The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant

the Appellant's sentence. Indeed, the Trial Chamber acknowledged without reservation that the Appellant's guilty plea was an important factor in mitigation of the sentence.<sup>192</sup>

### **B. The contribution to saving International Tribunal resources**

78. The Appellant submits that the Trial Chamber erred by giving "little weight"<sup>193</sup> to the fact that a guilty plea can save the resources of the International Tribunal.<sup>194</sup> He further asserts that the Trial Chamber "in effect rejected" the submissions of both parties in this regard.<sup>195</sup> He argues that, contrary to the Trial Chamber's view, the benefit of saving resources is not to be considered any differently at the International Tribunal than in national jurisdictions, since the cases before the International Tribunal are "in general very time-consuming [and] expensive", and that the International Tribunal's mandate is limited by its completion strategy.<sup>196</sup> The Prosecution responds that the Trial Chamber gave all relevant factors associated with a guilty plea, including the saving of resources, appropriate weight.<sup>197</sup>

79. The Appeals Chamber considers that a guilty plea obviates a lengthy trial and therefore saves International Tribunal resources. The Appeals Chamber notes that in the *Erdemović* case, the Trial Chamber held the following:

[The] voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.<sup>198</sup>

In the *Dragan Nikolić* case, the Appeals Chamber elaborated upon this issue, noting that "the avoidance of a lengthy trial, while an element to take into account in sentencing, should not be given undue weight."<sup>199</sup> The Appeals Chamber finds that the Appellant has not shown that the Trial Chamber committed a discernible error in finding, in accordance with the jurisprudence of the Appeals Chamber, that "little weight" only could be allocated to the fact that the Appellant's guilty plea saved International Tribunal resources.<sup>200</sup>

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to the Statute of the Tribunal, the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice."

<sup>192</sup> Sentencing Judgement, para. 149. *See also* Sentencing Judgement, para. 171, 145.

<sup>193</sup> Sentencing Judgement, para. 151.

<sup>194</sup> Appellant's Brief, para. 8. AT. 50.

<sup>195</sup> Appellant's Brief, para. 8.

<sup>196</sup> *Ibid.*, para. 9. *See also* AT. 50.

<sup>197</sup> Respondent's Brief, para. 16.

<sup>198</sup> *Erdemović* 1998 Sentencing Judgement, para. 16(ii).

<sup>199</sup> *Dragan Nikolić* Judgement on Sentencing Appeal, para. 51. The Appeals Chamber notes that the Trial Chamber also considered that "the saving of resources cannot be given undue consideration or importance", *see* Sentencing Judgement, para. 67. The Appellant agreed with that statement, *see* AT. 50.

<sup>200</sup> The Appeals Chamber also notes that the International Tribunal's completion strategy is not a factor to be taken into account in sentencing.

**C. The fact that the Appellant was the first Bosnian Serb to admit responsibility  
for his part in the events that took place at Srebrenica**

80. The Appellant submits that “the Trial Chamber failed to give him sufficient credit for his guilty plea particularly bearing in mind that he was the first Bosnian Serb to stand up publicly and admit responsibility for his part in the terrible events which occurred at Srebrenica.”<sup>201</sup> He argues that his guilty plea required courage in light of the then prevailing and contrary views widely held in Serbia and Republika Srpska.<sup>202</sup> The Appellant acknowledges that the Trial Chamber found his guilty plea to be a factor which contributed to establishing the truth and to promoting reconciliation. Nonetheless he further submits that the Trial Chamber should have given him greater credit for his guilty plea.<sup>203</sup>

81. The Prosecution responds that the Trial Chamber noted the parties’ submissions that the Appellant was the first Serb to acknowledge criminal responsibility for the crimes committed after the fall of Srebrenica.<sup>204</sup> The Prosecution argues that the Trial Chamber found the guilty plea to be a “significant” contribution to the fulfilment of the International Tribunal’s mandate of restoring peace and reconciliation in the former Yugoslavia,<sup>205</sup> and that it found the plea to be an important factor in mitigation of the sentence.<sup>206</sup> The Prosecution emphasises, however, that the fact that the Appellant was the first Serb to stand up publicly and admit that the Srebrenica massacre happened was very important for the people of Bosnia.<sup>207</sup>

82. At the outset, the Appeals Chamber recalls that the Statute and Rules leave it open to consider the mitigating effect of a guilty plea on the basis that the mitigating weight to be attached to the plea lies in the discretion of the Trial Chamber.<sup>208</sup> For the reasons set out in the following paragraphs, the Appeals Chamber finds that the Trial Chamber did not err in exercising its discretion.

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<sup>201</sup> Appellant’s Brief, para. 5(a); *see also* para. 11; AT. 45-46.

<sup>202</sup> Appellant’s Brief, para. 11. *See also* AT. 46, 48.

<sup>203</sup> Appellant’s Brief, para. 11.

<sup>204</sup> Respondent’s Brief, para. 21 referring to Sentencing Judgement, para. 142.

<sup>205</sup> *Ibid.*, referring to Sentencing Judgement, para. 145.

<sup>206</sup> *Ibid.*, para. 22 referring to Sentencing Judgement, para. 149.

<sup>207</sup> AT. 70: “[Peter McCloskey:] I’ll end briefly by emphasising a point that has already been made. Captain Nikolić was the first VRS officer to stand up in front of the world and admit Srebrenica happened and admit his responsibility in it and take responsibility for it. Obrenović came afterward, and I can tell you Obrenović was influenced by the fact that Mr. Nikolić got up and did this. And when you look at the record, especially the Muslims, Mr. Nikolić has taken responsibility at this time in history for this institution and for himself, helped the reconciliation of many, many Muslims that I know personally suffered as a result of this. People came up to me constantly, repeatedly, saying that now they could go home, now they have this incredible relief. There’s an article of one such Muslim that was written in the “New York Times,” that’s part of the record. Read that. You’ll get the feeling for how important Mr. Nikolić’s plea was to this institution, to this case, to Bosnia, and to reconciliation. And I say that in all candour and honesty, and I’ll

83. The Appeals Chamber notes that the Trial Chamber explicitly referred to the parties' submissions that "[t]his is the first time that a Serb has acknowledged criminal responsibility in relation to the events at Srebrenica, the largest single murder operation in Europe since World War II."<sup>209</sup> Here, in light of the Sentencing Judgement's consideration of certain documents submitted by the Defence, it is clear that the Trial Chamber took the parties' submissions on this point into account. In particular, when considering the Appellant's guilty plea, the Trial Chamber explicitly cited (1) an article tendered by the Defence in which the author stated that "until the moment Mr. Nikolić confessed, I had never heard a Bosnian Serb admit that the massacre even happened"<sup>210</sup> and (2) a letter from the mayor of the Srebrenica municipality, in which the mayor writes that "Momir Nikolić is the first officer of the Serbian Army who found the strength and courage to confess the crimes and his participation in them."<sup>211</sup> Thus, the Trial Chamber was cognisant of the fact that the Appellant was the first Serb officer to admit responsibility for these crimes.

84. Moreover, the Trial Chamber implicitly considered the fact that he was the first Serbian officer to acknowledge the VRS's involvement in the events after the fall of Srebrenica to be significant since his guilty plea contributed to, *inter alia*, restoring peace, providing a basis for reconciliation, and precluding revisionism. The Appeals Chamber notes the Appellant's submission in his Sentencing Brief in this regard:

Mr. Nikolić's plea demonstrates his honesty and candour and deserves special attention, since he was the first Serbian officer to come forth to acknowledge the VRS's involvement and his personal responsibility with regard to the events after the fall of the Srebrenica enclave in July 1995. His acknowledgement of the crimes and his personal accountability will contribute to rendering justice to victims, to deterring others, to providing a basis for reconciliation and to preclude revisionism. This extends to the core mission of this Tribunal — to restore peace and security to the region through accountability and reconciliation.<sup>212</sup>

The Appeals Chamber considers that the Trial Chamber's findings in the Sentencing Judgement mirror the Appellant's arguments regarding the contribution he provided when acknowledging the crimes:

The Trial Chamber finds that Momir Nikolić's guilty plea is significant and can contribute to fulfilling the Tribunal's mandate of restoring peace and promoting reconciliation.<sup>213</sup>

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look in each one of your eyes, there is no question that what he did was very important for this case and the people of Bosnia. Thank you."

<sup>208</sup> *Jelisić* Appeal Judgement, para. 121.

<sup>209</sup> Sentencing Judgement, para. 142.

<sup>210</sup> Sentencing Judgement, para. 146 citing "Truth at The Hague", Emir Suljagić, *New York Times*, 1 June 2003, Defence Ex. DS-18.

<sup>211</sup> Sentencing Judgement, para. 147 citing an "Open Letter" from the mayor of the Srebrenica municipality, dated 8 October 2003, Defence Ex. DS-17.

<sup>212</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Momir Nikolić's Sentencing Brief, (Partly Confidential), 14 July 2003, para. 28.

<sup>213</sup> Sentencing Judgement, para. 145.

The Trial Chamber accepts the Defence submissions that a guilty plea can contribute to precluding revisionism.<sup>214</sup>

[T]he Trial Chamber finds that Momir Nikolić's guilty plea is an important factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Momir Nikolić's acceptance of his individual criminal responsibility for his role in the crime of persecutions.<sup>215</sup>

85. Thus, the Trial Chamber considered the fact that the Appellant was the first Serb officer to acknowledge his guilt in relation to the Srebrenica massacre. Moreover, the Trial Chamber qualified the Appellant's guilty plea as "significant"<sup>216</sup> and as an "important factor in mitigation of the sentence".<sup>217</sup> The Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in the weight it attached to his guilty plea. For the foregoing reasons, the Appellant's sixth ground of appeal is dismissed.

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<sup>214</sup> *Ibid.*, fn. 229.

<sup>215</sup> *Ibid.*, para. 149.

<sup>216</sup> *Ibid.*, para. 145.

<sup>217</sup> *Ibid.*, para. 149.

## VIII. SEVENTH GROUND OF APPEAL: THE APPELLANT'S SUBSTANTIAL CO-OPERATION WITH THE PROSECUTION

86. The Appellant submits that the Trial Chamber erred in failing to recognise his full co-operation with the Prosecution.<sup>218</sup> He submits that the Prosecution accepted that he had co-operated fully and argues that the Trial Chamber should not substitute its own evaluation for the Prosecution's assessment.<sup>219</sup> Moreover, in the view of the Appellant, the Trial Chamber gave inadequate grounds for not giving him full credit for his co-operation.<sup>220</sup>

87. The Prosecution confirms that the Appellant provided substantial co-operation at trial, that he co-operated fully, and that his testimony on key issues and events is credible and reliable.<sup>221</sup>

88. The Appeals Chamber identifies two issues in the Appellant's arguments, namely, (1) whether it is for the Trial Chamber to assess the Appellant's co-operation with the Prosecution and (2) whether the Trial Chamber's assessment of the Appellant's co-operation was correct.

### **A. Whether it is for the Trial Chamber to assess the Appellant's co-operation with the Prosecution**

89. The Appellant submits that a Trial Chamber should accept the Prosecution's assessment of the level and value of such co-operation and not substitute its own view.<sup>222</sup> He argues that despite the Prosecution's submission to the Trial Chamber that he had co-operated fully providing valuable information regarding both the events in and about Srebrenica as well as events beyond the scope of the Plea Agreement, the Trial Chamber "seems far from convinced" as to the degree of his co-operation.<sup>223</sup> He contends that, in the absence of any dispute between the parties, the Trial Chamber should not have intervened by substituting its own view but should have accepted the Prosecution's view, since the Prosecution is in the best position to judge whether the information provided by him was credible and valuable.<sup>224</sup>

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<sup>218</sup> Appellant's Brief, para. 39.

<sup>219</sup> *Ibid.*, paras 5(f), 39.

<sup>220</sup> *Ibid.*, para. 49.

<sup>221</sup> Respondent's Brief, para. 114.

<sup>222</sup> Appellant's Brief, paras 5(f), 39.

<sup>223</sup> *Ibid.*, paras 37-38.

<sup>224</sup> *Ibid.*, para. 39.

90. The Prosecution argues that, even though it may be in the best position to assess the level and value of co-operation, it is ultimately for the Trial Chamber to determine whether the mitigating factor is present for sentencing purposes.<sup>225</sup>

91. The Appeals Chamber acknowledges that the Prosecution is in a position to accurately assess the co-operation of an accused. However, the evaluation of the extent and nature of the Appellant's co-operation, and thus the weight, if any, to be given to this mitigating circumstance, is within the discretion of the Trial Chamber.<sup>226</sup>

92. In this respect, the Appeals Chamber notes that the Appellant agreed in his Plea Agreement with the Prosecution that it is for the Trial Chamber to evaluate the nature and extent of his co-operation with the Prosecution:

The Prosecution and Mr. Nikolić also agree that they will jointly recommend to the Trial Chamber that sentencing of Mr. Nikolić in this matter not be set until after Mr. Nikolić has testified in the upcoming trial, in order that *the full nature and scope of Mr. Nikolić's co-operation may be seen and evaluated by the Trial Chamber* prior to sentencing.<sup>227</sup>

93. The Appeals Chamber finds, therefore, that the Trial Chamber had the right to conduct its own assessment of the Appellant's co-operation with the Prosecution.

**B. Whether the Trial Chamber correctly assessed the Appellant's co-operation with the Prosecution**

94. At the outset the Appeals Chamber notes that the Trial Chamber found the Appellant's co-operation to be a mitigating circumstance.<sup>228</sup> The present ground of appeal is therefore limited to the weight given to this mitigating circumstance.

95. The Appeals Chamber recalls that an appellant challenging the weight given by a Trial Chamber to a particular mitigating circumstance bears "the burden of demonstrating that the Trial Chamber abused its discretion".<sup>229</sup> The Appeals Chamber has previously held that "[t]he Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations,

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<sup>225</sup> Respondent's Brief, para. 123, *see also* para. 133.

<sup>226</sup> *Jelisić* Appeal Judgement, para. 126: "The Appeals Chamber notes that the determination of whether the cooperation should be considered as substantial and therefore whether it constitutes a mitigating factor is for the Trial Chamber to determine." *See also ibid.*, para. 124: "What constitutes 'substantial cooperation' is not defined in the Rules and is left to the discretion of the Trial Chamber. It was for the Trial Chamber to weigh the circumstances relating to any cooperation." The Appeals Chamber also held that, if the Trial Chamber deemed itself not able to assess the relevance and value of the information provided by the accused, it was within the discretion of a Trial Chamber to rely on the Prosecution's assessment of the co-operation, *see Dragan Nikolić* Judgement on Sentencing Appeal, paras 61-63.

<sup>227</sup> Plea Agreement, para. 10 (emphasis added).

<sup>228</sup> Sentencing Judgement, para. 171. The Appeals Chamber notes that the substantial co-operation with the Prosecution is explicitly mentioned as a mitigating circumstance in Rule 101(B)(ii) of the Rules.

failed to give weight or sufficient weight to relevant considerations, [that it] 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."<sup>230</sup>

96. With respect to the mitigating circumstance of the accused's co-operation with the Prosecution, the Appeals Chamber considers that the Trial Chamber should take into account the Prosecution's assessment of this co-operation because, as noted above, the Prosecution is in a favourable position to make an assessment of it. Moreover, considering that the Trial Chamber has a general obligation to set out a reasoned opinion pursuant to Article 23(2) of the Statute, the Appeals Chamber finds that, if the Trial Chamber disagrees with the Prosecution's assessment of the accused's co-operation, it has a duty to provide sufficient reasons for not following the Prosecution's assessment. Only a reasoned opinion, one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute, allows the Appeals Chamber to carry out its function pursuant to Article 25 of the Statute by understanding and reviewing findings of a Trial Chamber.<sup>231</sup>

97. The Appeals Chamber notes that the Trial Chamber took the Prosecution's assessment into account since it acknowledged, in its discussion on the nature and extent of the Appellant's co-operation, that in the view of the Prosecution the Appellant had co-operated fully.<sup>232</sup> The Appellant nonetheless argues that the Trial Chamber gave unreasoned or inadequate grounds for not giving him full credit for his co-operation.<sup>233</sup> Bearing the above requirements in mind, the Appeals Chamber will address the Trial Chamber's four reservations, contested by the Appellant. The Appellant identified the Trial Chamber's reservations as follows: (1) that he had been evasive on a number of occasions during his testimony in the *Blagojević* trial, (2) that prior to signing the Plea Agreement, he had falsely confessed to ordering mass executions in Kravica and Sandići, (3) that his testimony was not as detailed as it could have been in certain areas,<sup>234</sup> and (4) that, if he was

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<sup>229</sup> *Babić* Judgement on Sentencing Appeal, para. 44 referring to *Kayishema and Ruzindana* Appeal Judgement, para. 366; *Niyitegeka* Appeal Judgement, para. 266.

<sup>230</sup> *Babić* Judgement on Sentencing Appeal, para. 44.

<sup>231</sup> See *Kunarac et al.* Appeal Judgement, para. 41: "Pursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion. In the *Furundžija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted. Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence." (Footnote omitted).

<sup>232</sup> Sentencing Judgement, para. 155.

<sup>233</sup> Appellant's Brief, para. 49.

<sup>234</sup> *Ibid.*, para. 40.

sincere about co-operating, he would have been more open in all aspects of his testimony and more forthright in his responses to the Trial Chamber.<sup>235</sup>

1. The fact that the Appellant was evasive on a number of occasions during his testimony in the *Blagojević* case

98. The Appellant submits that the Trial Chamber only cited one example to corroborate his alleged evasiveness during the *Blagojević* trial, which involved an allegation that he had improperly sought rent money from a Dutchbat officer.<sup>236</sup> First, he argues that this was “very much a collateral issue which was not of central importance to any of the allegations in the [I]ndictment”.<sup>237</sup> Second, he submits that he had no advance warning that this collateral issue might arise in cross-examination in the *Blagojević* case, but during the Sentencing Hearing in his own case he had thought about it further and thus was able to provide more details on his role in the financial dealings between Dutchbat and the owner of the Hotel Fontana. The Appellant further notes that he proffered to the Trial Chamber four documents on this issue but it refused to accept them into evidence.<sup>238</sup> Third, the Appellant argues that, notwithstanding the evidence given in the *Blagojević* case, he was as forthcoming as possible in the Sentencing Hearing; thus his behaviour cannot be described as evasive.<sup>239</sup> Last, he argues that the Trial Chamber should have indicated with sufficient clarity the grounds on which it based its decision.<sup>240</sup>

99. The Prosecution acknowledges that the issue of the rent money is not of central importance to the allegations in the Indictment; nor is it a “crucial aspect going to [the Appellant’s] credibility”.<sup>241</sup> Nevertheless, in the view of the Prosecution, it was relevant to the general issue of credibility and could thus be considered as pertinent to the value of his testimony.<sup>242</sup> The Prosecution further argues that the subsequent explanation by the Appellant at the Sentencing Hearing is simply a matter for the Trial Chamber to consider when assessing his overall credibility.<sup>243</sup> Moreover, even after his explanation at the Sentencing Hearing, discrepancies remained between the Appellant’s testimony and that of the Dutchbat officer.<sup>244</sup>

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<sup>235</sup> AT. 52.

<sup>236</sup> Appellant’s Brief, para. 41. AT. 53-54.

<sup>237</sup> Appellant’s Brief, para. 41.

<sup>238</sup> *Ibid.*, referring to Sentencing Hearing, T. 1670-1673 (the four documents mentioned consist of three orders and one letter).

<sup>239</sup> *Ibid.*, para. 42.

<sup>240</sup> AT. 53. *See also* Appellant’s Brief, para. 45.

<sup>241</sup> Respondent’s Brief, para. 127.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, para. 128.

<sup>244</sup> *Ibid.*

100. The Trial Chamber held the following within the findings on the Appellant's co-operation with the Prosecution:

However, it is for the Trial Chamber to make an assessment of the credibility of Momir Nikolić, which ultimately impacts upon the value of such co-operation. Of primary importance to the Trial Chamber is the truthfulness and veracity of the testimony of Momir Nikolić in the *Blagojević* Trial, as well as how forthcoming the information was. The Trial Chamber takes into consideration numerous instances where the testimony of Momir Nikolić was evasive and finds this to be an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge.<sup>245</sup>

In the footnote to the aforementioned paragraph the Trial Chamber stated the following:

The Trial Chamber notes, for example, the apparent discrepancy in the testimony of Momir Nikolić and Col. Franken, in relation to the demand for payment of rent for the United Nations Military Observer's by the Dutch Battalion. (*Blagojević* Trial, Witness Robert Franken, BT. 1557-1560).<sup>246</sup>

101. As a preliminary issue, the Appeals Chamber finds that, with respect to the mitigating circumstance of his co-operation with the Prosecution, the Trial Chamber did not err when it took into account the truthfulness of the Appellant's testimony in the *Blagojević* trial. The Trial Chamber was in a favourable position to assess the truthfulness of the Appellant's testimony in the *Blagojević* case as it consisted of the same bench that heard this testimony. Furthermore, the Appeals Chamber notes that, in the Plea Agreement's section regarding his co-operation with the Prosecution, the Appellant agreed "to testify truthfully in the trial of the co-Accused in this case before the [International] Tribunal and in any other trials, hearings or other proceedings before the [International] Tribunal as requested by the Prosecution."<sup>247</sup> Furthermore, the Appellant agreed with respect to his co-operation with the Prosecution "that all information and testimony provided by Mr. Nikolić must be absolutely truthful."<sup>248</sup> Moreover, as agreed by the parties, the sentencing proceedings were postponed until after he had given testimony in the upcoming trial in order for the Trial Chamber to evaluate the nature and scope of the Appellant's co-operation.<sup>249</sup> Therefore, the Trial Chamber did not err in considering in its assessment of the Appellant's co-operation with the Prosecution whether or not he had been truthful in his testimony during the *Blagojević* trial.

102. The Appeals Chamber considers that the Trial Chamber likewise did not err when it took into account the discrepancy between the Appellant's and the Dutchbat officer's testimony in the

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<sup>245</sup> Sentencing Judgement, para. 156 (footnotes omitted).

<sup>246</sup> *Ibid.*, fn. 252.

<sup>247</sup> Plea Agreement, para. 9.

<sup>248</sup> *Ibid.*, para. 11.

<sup>249</sup> *Ibid.*, para. 10.

*Blagojević* case.<sup>250</sup> The Appellant's explanation at the Sentencing Hearing does not change the fact that notable discrepancies existed.<sup>251</sup>

103. However, while the Trial Chamber indicated that there were "numerous instances" where the Appellant's testimony had been evasive,<sup>252</sup> it only refers to the aforementioned example.<sup>253</sup> In this particular case, the only argument the Appellant can put forward to discharge his burden to demonstrate an error is that the "numerous instances" do not exist. If a Trial Chamber considers a fact to lessen the weight given to a mitigating circumstance, it must be supported in a way so as to ensure that the accused has the possibility to provide arguments in case he seeks to disturb the finding on appeal. The Trial Chamber failed to support its finding of numerous instances of evasiveness and therefore failed to provide a reasoned opinion in this respect. The Appeals Chamber concludes, therefore, that the Trial Chamber committed a discernible error.

## 2. The Appellant's false confession prior to the conclusion of the Plea Agreement

104. The Appellant submits that he admitted to having lied prior to the conclusion of the Plea Agreement but that this did not prevent the Prosecution from submitting that the Appellant had fully co-operated with it.<sup>254</sup> The Appellant further compares his case to that of Miroslav Deronjić, who also acknowledged that he had provided partially untrue statements in his interviews with the

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<sup>250</sup> The Dutchbat officer Franken stated that the Appellant came on the 14<sup>th</sup> or the 15<sup>th</sup> July to the Dutch camp and asked for the payment of a bill for the building the UN Military Observers rented as well as for the payment for the POWs the Bosnian Serb army took (*Blagojević* Trial, BT. 1557-1559). This passage of the transcript was read out to the Appellant during his testimony (*Blagojević* Trial, BT. 2224) by Mr. Karnavas, counsel for Vidoje Blagojević, and the Appellant answered: "What you have read, Mr. Karnavas, never happened. And I never had any obligation or duty to ask for any kind of rent. [...] I never asked anything like that of Mr. Franken, nor did I discuss any such thing with him. As for the prisoners and their status and payment for them, absolutely not, except for the physical security of the prisoners by the Dutch Battalion, I had nothing to do with their stay there, their status, their departure from there or anything else in that connection": *Blagojević* Trial, BT. 2225. Furthermore, the discussion between the counsel of Vidoje Blagojević and the Appellant concluded as follows: "Mr. Karnavas: Do you recall showing up with a blue Toyota that belonged to Rizo with Rizo in the car trying to collect rent from Colonel Franken? Major at the time. Do you recall that? A. No, Mr. Karnavas. I do not recall that, nor did that happen. That is not true": *Blagojević* Trial, BT. 2227. Furthermore, *Blagojević* Trial, BT. 2229 reads as follows: "Mr. Karnavas: [...] Did you ever show up and meet with Colonel or Major Franken on the 14th or 15th in Mr. Rizo's blue Toyota? A. No. In that period of time, I know for certain that I did not meet with Mr. Franken."

<sup>251</sup> During the Sentencing Hearing, the Appellant stated: "Before me I have some documents on the basis of which the Trial Chamber can see that by an order from the corps commander, General Zivanovic, I was designated as the controlling organ for all the payments made to that company, all the trade to that company, and that concerned all transactions with the Dutch Battalion and all the organisations which traded with the Podrinje company from Bratunac, that is to say, with the hotel in Bratunac. [...] I am supposed to control these transactions. [...] And before this Trial Chamber, I would like to state that it is possible that at the time when I had contact, when I contacted the representative of the Dutch Battalion, I requested that the debts be paid, the debts for staying in the Hotel Fontana and for being -- and for food consumed in the Hotel Fontana. But I would like to claim that I never asked anyone -- I never asked any Dutch battalion members for funds for my personal use. Only what I have mentioned is possible, because these documents that I have before me provide proof -- these documents have been stamped, and they prove that the Dutch would pay in cash and that the military observers would pay in the way that I have explained to you." (Sentencing Hearing, T. 1671-1672).

<sup>252</sup> Sentencing Judgement, para. 156.

<sup>253</sup> *Ibid.*, fn. 252.

<sup>254</sup> Appellant's Brief, para. 43.

Prosecution; the Trial Chamber in that case nevertheless attributed “significant weight” to Miroslav Deronjić’s co-operation with the Prosecution.<sup>255</sup> Moreover, the Appellant argues that the Sentencing Judgement failed to mention that it was not the Prosecution that found out that he had lied but that he himself went back and brought this false confession to the attention of the Prosecution.<sup>256</sup>

105. The Prosecution agrees that the Appellant’s admission to having falsely confessed to other crimes does reduce any negative impact on the assessment of his co-operation. It further acknowledges that his subsequent co-operation was substantial.<sup>257</sup>

106. The Appeals Chamber is of the view that sentencing decisions are discretionary and turn on the particular circumstances of each case. Thus, the mere fact that the *Deronjić* Trial Chamber gave significant weight to the accused’s co-operation notwithstanding certain false statements does not illustrate that the Trial Chamber in this case abused its discretion in reaching a different result.

107. The Appeals Chamber notes that it is undisputed that the Appellant had told lies to the Prosecution when confessing to crimes he had not committed. However, the Appeals Chamber considers that, in the specific circumstances of this case, any negative impact or confusion that such false confessions may have caused on the value of his co-operation had been cured. First, it was on the Appellant’s initiative that he went back to the Prosecution, apologised, and corrected his statement.<sup>258</sup> Second, as acknowledged by the Prosecution, the Appellant showed his full willingness to co-operate with the Prosecution by openly admitting to having rendered false confessions. The Trial Chamber did not take account of these actions of the Appellant in assessing the value of his co-operation. For these reasons, the Appeals Chamber finds that the Trial Chamber committed a discernible error in this regard.

### 3. The lack of detail in certain areas of the Appellant’s testimony

108. In relation to the Trial Chamber’s finding regarding the lack of detail in his testimony in the *Blagojević* case, the Appellant submits that “it is unclear what the Trial Chamber had in mind because it gives no examples”<sup>259</sup> and claims that the reasoned opinion requirement was violated.<sup>260</sup>

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<sup>255</sup> *Ibid.*, referring to *Deronjić* Sentencing Judgement, paras 252, 260.

<sup>256</sup> AT. 54.

<sup>257</sup> Respondent’s Brief, para. 132. The Prosecution notes that this is only valid with the exception of aspects noted in the Prosecution’s Supplemental Submissions concerning credibility, Respondent’s Brief, fn. 115.

<sup>258</sup> See argument of Appellant’s counsel during the Appeal Hearing in this regard, AT. 54: “But what the [Sentencing Judgement] fails to state is that it was Mr. Nikolić himself, who shortly having made the statements told the Prosecution – it was not the Prosecution finding out and in that way he then changed. [...] He brought it to the attention of the Prosecution and not the other way around.” The Prosecution agreed to counsel’s statement of events, AT. 61: “And in respect of the submissions by [counsel of Defense] on Mr. Nikolić’s behalf, there is nothing he has said which I take issue with.”

<sup>259</sup> Appellant’s Brief, para. 44.

He submits that he was “very candid” during his testimony in the *Blagojević* case and that his contribution was “enormous”.<sup>261</sup> Additionally, the Appellant argues that the Trial Chamber called witnesses *proprio motu* in order to assess whether he testified truthfully at the *Blagojević* trial,<sup>262</sup> but the Trial Chamber did not mention these witnesses again in its Sentencing Judgement and that, in fact, the witnesses corroborated the Appellant’s testimony.<sup>263</sup>

109. The Prosecution agrees that the Trial Chamber improperly failed to provide sufficient reasoning for its holding that the Appellant’s testimony had been inadequately detailed, and that this failure may have affected its judgement.<sup>264</sup> With respect to the witnesses called *proprio motu* by the Trial Chamber, the Prosecution submits that the Appellant failed to demonstrate any prejudice.<sup>265</sup>

110. The Trial Chamber, when discussing the credibility of the Appellant, held the following:

Additionally, while recognising that Mr. Nikolić was testifying about events which occurred over eight years ago, the Trial Chamber found that his testimony was not as detailed as it could have been in certain areas. This is an indicator of the character and a certain lack of candour on the part of Momir Nikolić, which the Trial Chamber has taken into consideration in its overall evaluation.<sup>266</sup>

The Appeals Chamber notes that no reference was given to support the Trial Chamber’s finding.

111. The Appeals Chamber has scrutinised the Appellant’s testimony in the *Blagojević* case, but it could not find an instance in which the Trial Chamber asked for more details. It is unclear what facts the Trial Chamber relied upon when coming to the conclusion that the “[Appellant’s] testimony was not as detailed as it could have been in certain areas”. The Appeals Chamber finds that the Trial Chamber failed to support its finding and in this respect failed to provide a reasoned opinion. The Appeals Chamber concludes that the Trial Chamber committed a discernible error.

#### 4. The lack of openness in his testimony and lack of forthrightness in his responses

112. The Appellant challenges the Trial Chamber’s holding that, “[h]ad he been completely sincere about co-operating, Momir Nikolić would have been more open in all aspects of his testimony and been more forthright in his responses before, and to, the Trial Chamber.”<sup>267</sup>

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<sup>260</sup> *Ibid.*, para. 45 referring to Article 6 (1) of the European Convention of Human Rights and Freedoms. *See also* AT. 53, 55.

<sup>261</sup> Appellant’s Brief, para. 46.

<sup>262</sup> *Ibid.*, para. 47 referring to Sentencing Judgement, para. 25.

<sup>263</sup> *Ibid.*, para. 48.

<sup>264</sup> Respondent’s Brief, paras 136-138.

<sup>265</sup> *Ibid.*, para. 139.

<sup>266</sup> Sentencing Judgement, para. 156.

<sup>267</sup> AT. 52, 54-55.

113. Again, the Trial Chamber did not refer to any evidence corroborating the statement. For the same rationale considered above in relation to the numerous instances of evasiveness and the lack of detail in certain areas of the Appellant's testimony, the Trial Chamber failed to support its finding and in this respect failed to provide a reasoned opinion. The Appeals Chamber concludes that the Trial Chamber committed a discernible error in this respect.

#### 5. Conclusion

114. The Appeals Chamber finds that the Trial Chamber committed several discernible errors when assessing the Appellant's co-operation with the Prosecution. The Appeals Chamber considers that these errors led the Trial Chamber to attach insufficient weight to the mitigating circumstance of his co-operation with the Prosecution. The Appeals Chamber will take this into account in revising the Appellant's sentence.

115. For the foregoing reasons, the Appeals Chamber allows the Appellant's seventh ground of appeal in part.

## **IX. EIGHTH GROUND OF APPEAL: THE APPELLANT'S REMORSE**

116. In his eighth ground of appeal, the Appellant alleges that the Trial Chamber erred by failing to give him sufficient credit for his expression of remorse.<sup>268</sup> He submits in general that his statements at the Sentencing Hearing “should have been accepted as a sincere expression of remorse and that the Trial Chamber erred in finding that it could not give substantial weight to this factor”.<sup>269</sup>

### **A. Whether the Trial Chamber accepted the Appellant's statement at the Sentencing Hearing as a sincere expression of remorse**

117. The Appellant puts forward the argument that the Trial Chamber did not accept his statement at the Sentencing Hearing “as a sincere expression of remorse”.<sup>270</sup> The Appeals Chamber notes that the expression of remorse has been recognised as a mitigating factor<sup>271</sup> if the remorse is real and sincere.<sup>272</sup> The Trial Chamber expressed no reservations with respect to the sincerity of the Appellant's remorse. In fact, the Trial Chamber found the Appellant's expression of remorse to be a mitigating factor.<sup>273</sup> This finding is in itself a confirmation that the Trial Chamber considered the Appellant's remorse to be sincere, as only a “real and sincere” expression of remorse constitutes a mitigating circumstance.<sup>274</sup> The Appellant therefore has failed to demonstrate an error on the part of the Trial Chamber in this regard.

### **B. Whether the Trial Chamber correctly found that it could not afford substantial weight to the Appellant's remorse**

118. The Trial Chamber decided that it could not “afford substantial weight” to the Appellant's remorse.<sup>275</sup> The Appellant challenges the three reasons put forward by the Trial Chamber to justify its decision.<sup>276</sup> The Appeals Chamber will address the Appellant's arguments to the effect that (1)

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<sup>268</sup> Appellant's Brief, para. 5(g). AT. 55-56.

<sup>269</sup> Appellant's Brief, para. 51.

<sup>270</sup> *Ibid.*: “It is submitted that this statement [at the Sentencing Hearing] should have been accepted as a sincere expression of remorse and that the Trial Chamber erred in finding that it could not give substantial weight to this factor [...]”

<sup>271</sup> *Todorović* Sentencing Judgement, para. 89; *Erdemović* 1998 Sentencing Judgement, para. 16(ii); *Blaškić* Trial Judgement, para. 775; *Serushago* Sentencing Judgement, paras 40-41; *Ruggiu* Trial Judgement, paras 69-72; *Simić* Sentencing Judgement, para. 92; *Banović* Sentencing Judgement, para. 71; *Dragan Nikolić* Sentencing Judgement, paras 241-242; *Jokić* Sentencing Judgement, para. 89; *Deronjić* Sentencing Judgement, para. 264; *Babić* Sentencing Judgement, para. 84.

<sup>272</sup> *Vasiljević* Appeal Judgement, para. 177; *Blaškić* Appeal Judgement, para. 705; *Kvočka et al.* Appeal Judgement, para. 715.

<sup>273</sup> Sentencing Judgement, para. 161.

<sup>274</sup> *Blaškić* Appeal Judgement, para. 705; *Kvočka et al.* Appeal Judgement, para. 715; *see also Vasiljević* Appeal Judgement, para. 177: “in order for remorse to be considered as a mitigating factor it has to be sincere.”

<sup>275</sup> Sentencing Judgement, para. 161.

<sup>276</sup> Appellant's Brief, para. 52.

the Trial Chamber placed improper weight on the Appellant's reasons for entering into a Plea Agreement and for giving untruthful statements to the Prosecutor during the plea negotiations,<sup>277</sup> (2) the Trial Chamber placed improper weight on the timing of the guilty plea,<sup>278</sup> and (3) the mistranslation of the counsel's statement in the closing arguments may have impacted on the decision not to give appropriate weight to his remorse.<sup>279</sup>

1. The Trial Chamber's assessment of the Appellant's reasons for entering into a Plea Agreement and for giving untruthful statements to the Prosecutor during the plea negotiations

119. The Appellant argues that the Trial Chamber's reasons for giving little weight to his expression of remorse are, *inter alia*, (1) his explanation as to why he pleaded guilty,<sup>280</sup> and (2) the false information he provided to the Prosecution during the plea negotiations in order to obtain a plea agreement.<sup>281</sup> The Appellant acknowledges that self-interest played an important part in his decision to enter into a plea agreement with the Prosecution; however, in the view of the Appellant, "it is equally clear that the pain which memory of the events in Srebrenica brought to him, through a realisation of the horrors that occurred also played a major part in [his] thought process."<sup>282</sup> Additionally, the Appellant submits that the Trial Chamber failed to sufficiently consider "the sheer difficulty" that he, as a Serb, encountered when talking about the events in Srebrenica and confessing his guilt, particularly in light of the fact that, at the time of his confession, denial of responsibility for these events prevailed in Serbia and Republika Srpska.<sup>283</sup> The Appellant also acknowledges that he told lies to the Prosecution during the plea negotiations. He argues, however, that he soon afterwards admitted his lies and apologised for them and it was thus "harsh to hold these lies (which actually implicated him more rather than less) against him to as significant an extent as the Trial Chamber seems to have done."<sup>284</sup>

120. The Trial Chamber, in its finding on the Appellant's remorse, stated:

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<sup>277</sup> *Ibid.*, paras 52 (a), (b), 53-64.

<sup>278</sup> *Ibid.*, paras 52(c), 65-68.

<sup>279</sup> *Ibid.*, para. 70.

<sup>280</sup> *Ibid.*, paras 52(a), 53.

<sup>281</sup> Appellant's Brief, paras 52(b), 64. AT. 58.

<sup>282</sup> Appellant's Brief, para. 61. *See also* AT. 56-57. The Appellant also argues that the fact that he did not discriminate against different ethnic groups is an aspect of his remorse (AT. 57; *see also* Appellant's Brief, paras 59-60). The Appeals Chamber notes however, that he pleaded guilty to the crime of persecutions and that his "conduct was committed on political, racial, or religious grounds, and was committed with requisite discriminatory intent" (Indictment, para. 58(c)). In relation to his conduct prior to the war, the Trial Chamber explicitly found that he did "not discriminate prior to the war", *see* Sentencing Judgement, para. 164.

<sup>283</sup> Appellant's Brief, para. 62. AT. 49-50.

<sup>284</sup> Appellant's Brief, para. 64.

The Trial Chamber recalls Momir Nikolić's explanation of his reasons for pleading guilty, as well as his related reason for providing the Prosecution with false information during the plea negotiations.<sup>285</sup>

121. The Appellant does not argue that these considerations should not have been taken into account by the Trial Chamber. He merely argues that it was "harsh to hold these lies [...] against him to as significant an extent as the Trial Chamber *seems* to have done".<sup>286</sup> But the Trial Chamber did not take into account within its assessment of the Appellant's remorse evidence that he had provided the Prosecution with false information. Rather, the Trial Chamber took into account the *reasons* why he provided the Prosecution with false information.<sup>287</sup> The Appellant has failed to put forward any argument as to why the Trial Chamber should not have taken those reasons into account. When arguing that there were also other reasons – apart from self-interested motives – that "played a major part in the Appellant's thought process" in reaching the Plea Agreement,<sup>288</sup> the Appellant fails to see that the Trial Chamber in fact took those other reasons into account as it expressly cited in the Sentencing Judgement the Appellant's relevant statement at the Sentencing Hearing.<sup>289</sup>

122. With respect to the Appellant's argument that the Trial Chamber failed to sufficiently take into account the difficulty he, as a Serb, had in talking about the events in Srebrenica and confessing his guilt, in particular regarding the fact that, at the time of his confession, denial of responsibility for these events prevailed in Serbia and Republika Srpska,<sup>290</sup> the Appeals Chamber

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<sup>285</sup> Sentencing Judgement, para. 160 referring to *Blagojević* Trial, 19 September 2003, BT. 1595 and 29 September 2003, BT. 2133-35, 2145-47.

<sup>286</sup> Appellant's Brief, para. 64 (emphasis added).

<sup>287</sup> The Appeals Chamber notes that that the Appellant during the proceeding in *Blagojević* gave the following explanation why he falsely admitted to a crime he had not committed: "Once the agreements with the Prosecution had already advanced, I came to the decision that there would be no agreement, and I really wanted to obtain an agreement. I made a mistake. I admitted something I hadn't done because I wanted to obtain such an agreement. I accepted responsibility for something that I had not done. I accepted a greater degree of responsibility." *Blagojević* Trial Hearing 19 September 2003, BT. 1595, referred to in Sentencing Judgement, fn. 257.

<sup>288</sup> Appellant's Brief, para. 61.

<sup>289</sup> Sentencing Judgement, para. 158 citing Sentencing Hearing, T. 1681-1682. The Appeals Chamber notes, however, that the reference of the Trial Chamber is erroneous, the cited statement can rather be found in Sentencing Hearing, T. 1676-1677. The relevant part of the Sentencing Hearing, as expressly cited by the Trial Chamber in paragraph 158 of the Sentencing Judgement, reads: "I sincerely wish before this Chamber and before the public, especially the Bosniak public, to express my deep and sincere remorse and regret because of the crime that occurred and to apologise to the victims, their families, and the Bosniak people for my participation in this crime. I am aware that I cannot bring back the dead, that I cannot mitigate the pain of the families by my confession, but I wish to contribute to the full truth being established about Srebrenica and the victims there and for the government organs of Republika Srpska, and all the individuals who took part in these crimes should follow in my footsteps and admit to their participation and their guilt, that they should give themselves in and be held responsible for what they have done. By my guilty plea, I wanted to help the Tribunal and the Prosecutors to arrive at the complete and full truth and the victims, their brothers, mothers, and sisters should -- I wanted to avoid their being subjected to additional suffering and not to remind them of this terrible tragedy. Your Honours, I feel that my confession is an important step toward the rebuilding of confidence and coexistence in Bosnia and Herzegovina, and after my guilty plea and sentencing, after I have served my sentence, it is my wish to go back to my native town of Bratunac and to live there with all other peoples in peace and harmony, such as prevailed before the outbreak of the war."

<sup>290</sup> Appellant's Brief, para. 62.

concur with the Prosecution that this factor was taken into account by the Trial Chamber.<sup>291</sup> In its discussion on the mitigating circumstance of a guilty plea, the Trial Chamber considered this factor and explicitly referred to evidence supporting this factor.<sup>292</sup> The Appeals Chamber finds that it was within the Trial Chamber's discretion to consider these factors within its assessment of the Appellant's guilty plea; the Trial Chamber was not obliged to consider them again when assessing the Appellant's remorse.<sup>293</sup>

123. The Appeals Chamber concludes that the Appellant has failed to demonstrate that the Trial Chamber gave improper weight to the Appellant's reasons for entering into a Plea Agreement and for providing untruthful statements to the Prosecutor during the plea negotiations.

## 2. The Trial Chamber's assessment of the timing of the guilty plea

124. The Appellant asserts that the Trial Chamber "placed great weight" upon the fact that he pleaded guilty one year after the full disclosure of the case against him.<sup>294</sup> The Appellant argues that he is under no obligation to plead guilty and "he was simply exercising a fundamental right guaranteed under the [International] Tribunal's Statute."<sup>295</sup> He submits that the taking into account of this factor was "unfair".<sup>296</sup>

125. The Appeals Chamber notes that the Trial Chamber made the following statement in a footnote:

The Trial Chamber further recalls that while Momir Nikolić pled guilty before any evidence had been presented by the Prosecution at a public hearing, his guilty plea came after one year of full disclosure by the Prosecution of its case against him.<sup>297</sup>

126. The Appeals Chamber acknowledges that the timing of the Appellant's guilty plea cannot be considered as an aggravating circumstance by the Trial Chamber to the detriment of the accused.<sup>298</sup>

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<sup>291</sup> Respondent's Brief, para. 179.

<sup>292</sup> Sentencing Judgement, paras 146-147. The Trial Chamber refers to an article from Emir Suljagić and explicitly cited the statement that the detailed confession "punches a big hole in the Bosnian Serb wall of denial" and the relief of the author of that article that "[w]e Bosnian Muslims no longer have to prove we were victims." (*ibid.*, para. 146.) Also, the Trial Chamber explicitly cites the "open letter" of the mayor of the Srebrenica municipality to the effect that he believes that "not only Momir Nikolić and others confessing their personal responsibility, but the clarification of the role of others in the Serbian Army and officials of the Serbian people, will force the RS authorities to finally admit that a crime occurred in Srebrenica, perpetrated by individuals and groups from the ranks of the Serbian people." (*ibid.* para. 147.).

<sup>293</sup> *Cf. Miodrag Jokić* Judgement on Sentencing Appeal, para. 82: "The Appeals Chamber finds that it was within the Trial Chamber's discretion to consider these factors as indications of the Appellant's remorse and his substantial cooperation with the International Tribunal; the Trial Chamber was not bound to consider these factors when assessing the Appellant's good character as well." *See also ibid.*, para. 79: "The Appeals Chamber finds that it was within the Trial Chamber's discretion to assess the testimony of Mr. Stefanović as evidence of the Appellant's remorse; the Trial Chamber was not bound to consider this factor when assessing the Appellant's good character as well."

<sup>294</sup> Appellant's Brief, para. 65. *See also* AT, 58.

<sup>295</sup> Appellant's Brief, para. 69, referring in paras 66 and 67 of the Appellant's Brief to *Banović* Sentencing Judgement, para. 72 and *Dragan Nikolić* Sentencing Judgement, para. 234.

<sup>296</sup> AT, 48.

The accused has a fundamental right to be presumed innocent until proven guilty<sup>299</sup> and, therefore, is under no obligation to plead guilty.<sup>300</sup> The Appeals Chamber notes that this right has been recognised by the Trial Chamber in the present case.<sup>301</sup> The Appeals Chamber further notes that there is an absolute prohibition against considering the silence of the accused in the determination of guilt or innocence, as well as in the determination of the sentence.<sup>302</sup>

127. With respect to the consideration of an accused's silence, the Prosecution submits that the prohibition is certainly applicable to the assessment of whether a "late" guilty plea can be considered as an aggravating factor. However, in the opinion of the Prosecution, it is not applicable if this factor is taken into account as diminishing the weight given to a mitigating factor since, in this way, it is "not a detriment, but the reduction of a benefit."<sup>303</sup>

128. In this case, the Appeals Chamber considers that the Trial Chamber did not err in referring to the timing of the guilty plea when assessing the weight to accord the Appellant's remorse. Rather, the Trial Chamber considered the timing of the Appellant's plea as evidence about the extent to which the plea was motivated by remorse, as opposed to self-interest. Where, as here, a Trial Chamber merely considers a plea's timing as evidence about the extent to which it was motivated by remorse, the Trial Chamber does not infringe the accused's rights. The Trial Chamber did not detract from the weight to accord this mitigating factor because the Appellant, for a time, exercised his right to plead not guilty.

3. The Appellant's allegation that the mistranslation of the counsel's statement in the closing arguments may have adversely impacted the decision not to give appropriate weight to his remorse

129. The Appellant argues that with respect to the weight given to his remorse it is not clear whether the Trial Chamber held the mistranslation of the former counsel's closing arguments against him.<sup>304</sup> He contends that there is "at least a perception that the [Trial] Chamber's attitude to the Appellant and the extent of his real remorse and rehabilitation may have been coloured by his

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<sup>297</sup> Sentencing Judgement, fn. 257.

<sup>298</sup> *Dragan Nikolić* Sentencing Judgement, para. 234.

<sup>299</sup> *Banović* Sentencing Judgement, para. 71. Article 21(3) of the Statute of the International Tribunal provides: "The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

<sup>300</sup> *Dragan Nikolić* Sentencing Judgement, para. 234.

<sup>301</sup> Sentencing Judgement, para. 148: "Of course, under the Statute of the Tribunal, an accused has the right to be presumed innocent, to have a fair and public trial and to not be compelled to confess guilt."

<sup>302</sup> *Čelebići* Appeal Judgement, para. 783.

<sup>303</sup> Respondent's Brief, para. 164.

<sup>304</sup> Appellant's Brief, para. 70.

counsel's language".<sup>305</sup> He concludes that if counsel's language was an influential factor, this mistranslation would be "wholly unfair".<sup>306</sup>

130. The Appeals Chamber already addressed the impact of the – mistranslated – statement on the Trial Chamber's assessment of the gravity of the offence in relation to the Appellant's fifth ground of appeal.<sup>307</sup> The Trial Chamber did not refer to or consider the mistranslated statement when discussing the weight given to the Appellant's remorse.<sup>308</sup> The Appellant has failed to demonstrate that the Trial Chamber did take this factor into account when assessing the weight given to the Appellant's remorse. In any case, as held in the fifth ground of appeal, the Appeals Chamber considers that the Trial Chamber took this element erroneously into account when assessing the gravity of the offence.

#### 4. Conclusion

131. The Appeals Chamber finds that the Trial Chamber took all the relevant elements of the Appellant's remorse into account.<sup>309</sup> The Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in the weight it afforded to the mitigating circumstance of remorse.

132. For the foregoing reasons, the Appellant's eighth ground of appeal is dismissed.

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<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> *Supra*, chapter VI.

<sup>308</sup> *See* Sentencing Judgement, paras 157-161.

<sup>309</sup> The Appeals Chamber notes that the Appellant reiterated his remorse in his personal address at the end of the Appeal Hearing, *see* AT. 74: "Your Honours, I would, with this address, like to express my sincere remorse and regret about the awful crimes that took place after the fall of Srebrenica. I would like to express particular respect towards the victims because of the terrible crimes against their families, their brothers, sisters, friends, who have to now live without these people and whose suffering will never end."

## **X. NINTH, TENTH, AND ELEVENTH GROUND OF APPEAL**

133. The Appellant did not put forward any arguments in his Appellant's Brief substantiating his ninth, tenth, and eleventh grounds of appeal, and furthermore made no reference to these grounds at the Appeal Hearing. The Appeals Chamber agrees with the Prosecution<sup>310</sup> that these grounds should therefore be dismissed.

134. For the foregoing reasons, the Appellant's ninth, tenth, and eleventh ground of appeal are dismissed.

## **XI. FINAL CONCLUSIONS**

135. The Appeals Chamber recalls that it has upheld the Appellant's third and fifth ground of appeal, as well as his seventh ground of appeal in part, and has dismissed all the other grounds of appeal. The Appeals Chamber stresses that under Rules 62ter(B) and 62ter(A) of the Rules, which apply to appeal proceedings by virtue of Rule 107 of the Rules, it is not bound by the sentencing range recommended by either party.<sup>311</sup> The Appeals Chamber considers that the errors identified by the Appeals Chamber warrant a reduction of the sentence of 20 imprisonment.

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<sup>310</sup> Respondent's Brief, para. 186.

<sup>311</sup> See *Dragan Nikolić* Judgement on Sentencing Appeal, para. 89; *Babić* Judgement on Sentencing Appeal, para. 30.

## XII. 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 hearing of 5 December 2005;

**SITTING** in open session;

**ALLOWS** the Appellant's third and fifth ground of appeal, as well as his seventh ground of appeal in part; and **DISMISSES** all the other grounds of appeal;

**REVISES** the sentence;

**SENTENCES** the Appellant to 20 years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention;

**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 8<sup>th</sup> day of March 2006 at The Hague, The Netherlands.

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Judge Fausto Pocar  
Presiding

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Judge Mohamed Shahabuddeen

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Judge Mehmet Güney

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Judge Andréia Vaz

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Judge Theodor Meron

[ Seal of the International Tribunal ]

### **XIII. 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-S, Sentencing Judgement, 29 June 2004  
("Babić Sentencing Judgement")

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

###### **BANOVIĆ**

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

###### **BLAŠKIĆ**

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000  
("Blaškić Trial Judgement")

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004  
("Blaškić 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-T, Judgement, 16 November 1998  
("Čelebići Trial Judgement")

*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")

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

###### **DERONJIĆ**

*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004  
("Deronjić Sentencing Judgement")

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

###### **ERDEMOVIĆ**

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

**FURUNDŽIJA**

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

**JELISIĆ**

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

**M. JOKIĆ**

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

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

**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")

**MRĐA**

*Prosecutor v. Darko Mrda*, Case No. IT-02-59-S, Sentencing Judgement, 31 March 2004  
("Mrda Sentencing Judgement")

**D. NIKOLIĆ**

*Prosecutor v. Dragan Nikolić*, Case No. IT-94-02-S, Sentencing Judgement, 18 December 2003  
("Dragan Nikolić Sentencing Judgement")

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

**OBRENOVIĆ**

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

**PLAVŠIĆ**

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

**M. SIMIĆ**

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

**D. TADIĆ**

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

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

**TODOROVIĆ**

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

**VASILJEVIĆ**

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

**2. ICTR****AKAYESU**

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

**KAYISHEMA AND RUZINDANA**

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

**MUSEMA**

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

**NIYITEGEKA**

*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004  
 (“*Niyitegeka* Appeal Judgement”)

**RUGGIU**

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

**SERUSHAGO**

*Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999  
 (“*Serushago* Sentencing Judgement”)

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

## **B. List of Abbreviations, Acronyms and Short References**

*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.*

Appeal Hearing	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Appeal Hearing, 5 December 2005
Appellant	Momir Nikolić
Appellant's Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Revised Appellant's Brief on Appeal Against Sentence, 29 July 2005
AT.	Transcript page from Appeal Hearing 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 that of the final transcripts released to the public. In case of doubt the video-tape of a hearing is to be revisited.
Brief in Reply	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Reply to Prosecution's Response to Revised Appellant's Brief on Appeal against Sentence, 21 September 2005.
BT.	Transcript page from hearings in the case <i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No, IT-02-60-T. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise.
fn.	footnote
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
Indictment	<i>Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić and Momir Nikolić</i> , Case No. IT-02-60-PT, Amended Joinder Indictment, 27 May 2002
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
MUP	Ministry of the Interior Police

Notice of Appeal	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Momir Nikolić's Re-Amended Notice of Appeal, 22 July 2005
Obrenović Plea Agreement	<i>Prosecutor v. Dragan Obrenović</i> , Case No. IT-02-60-PT, Annex "A" to the Joint Motion for Consideration of Plea Agreement between Dragan Obrenović and the Office of the Prosecutor – Plea Agreement, 20 May 2003
Plea Agreement	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60-PT, Annex "A" to the Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor – Amended Plea Agreement, 7 May 2003
Plea Hearing	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60-PT, Plea Hearing, 7 May 2003
Prosecution	Office of the Prosecutor
Respondent's Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Prosecution's Response to Revised Appellant's Brief on Appeal Against Sentence, 26 August 2005
Rules	Rules of Procedure and Evidence of the International Tribunal
Sentencing Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Momir Nikolić's Sentencing Brief, (Partly Confidential), 14 July 2003
Sentencing Hearing	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Sentencing Hearing, 27-29 October 2003
Sentencing Judgement	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003
Statement of Facts	Statement of Facts and Acceptance of Responsibility, Tab A to Annex A to the Joint Motion for Consideration of Plea Agreement Between Momir Nikolić and the Office of the Prosecutor, 6 May 2003; also attached to the Sentencing Judgement as Annex B
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings before the Trial Chamber 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 that of the final transcripts released to the public. In case of doubt the video-tape of a hearing is to be revisited.
VRS	Army of the Republika Srpska