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International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

(Exclusively for the use of the media. Not an official document)

APPEALS CHAMBER

The Hague, 8 March 2005

SUMMARY OF APPEALS JUDGEMENT FOR MOMIR NIKOLIĆ

Please find below the summary of the Appeals judgement today read out by Judge Pocar:

As the Registrar announced, the case on our agenda is Prosecutor versus Momir Nikolić. In accordance with the scheduling order issued on 2 March 2006, today the Appeals Chamber will deliver its Judgement on Sentencing Appeal.

After having entered into a Plea Agreement with the Prosecution, Momir Nikolić pleaded guilty to count 5 of the Indictment on 7 May 2003. Count 5 of the Indictment, which relates to events which took place in Eastern Bosnia and Herzegovina after the fall of the enclave of Srebrenica in July 1995, reads “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.”

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. Accordingly, the Trial Chamber entered a conviction against Momir Nikolić for count 5 of the Indictment, namely, for the crime of persecutions, a crime against humanity under Article 5(h) of the Statute of this Tribunal.

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. Finding that it could not accept the sentences recommended by either party, the Trial Chamber sentenced the Appellant to 27 years’ imprisonment.

Mr. Momir Nikolić has appealed against the Sentencing Judgement issued by Trial Chamber I of this Tribunal on 2 December 2003. The Prosecution has not appealed the Sentencing Judgement. The hearing on appeal took place on 5 December 2005.

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

The Appellant initially raised 12 grounds of appeal but has failed to put forward any arguments in his Brief substantiating his ninth, tenth, and eleventh grounds of appeal, and furthermore made no reference to these grounds at the Appeal Hearing. These grounds of appeal are accordingly dismissed.

I will briefly address the remaining nine grounds of appeal in turn.

Under his first ground of appeal the Appellant submits that the Trial Chamber erred by venturing outside the facts of the guilty plea when assessing the gravity of the offence. The Appellant draws the Appeals Chamber’s attention to specific paragraphs of the Sentencing Judgement, concerning (1) the events in Zvornik, (2) the meetings at the Hotel Fontana, and (3) the Trial Chamber’s statement of his rank.

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Media Office/Communications Service

Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands

Tel.: +31-70-512-5343; 512-5356 Fax: +31-70-512-5355

The Appeals Chamber agrees with the Appellant that 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. However, after comparing the facts as stated by the Trial Chamber with the facts acknowledged by the Appellant, the Appeals Chamber finds that the Trial Chamber did not err in stating the facts concerning the events in Zvornik or his involvement in the meetings at the Hotel Fontana. Regarding the overstatement of the Appellant's rank, 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.

The Appellant's first ground of appeal, including sub-grounds 1A and 1B, are accordingly dismissed.

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. The Appellant draws the Appeals Chamber's attention to the cases of Radislav Krstić, Dragan Obrenović, Vidoje Blagojević, and Dario Kordić.

The Appeals Chamber has previously held that "[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances". 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." 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.

It is in the light of those criteria that the Appeals Chamber has reviewed the Appellant's case with the cases of Dragan Obrenović, Radislav Krstić, Vidoje Blagojević, and Dario Kordić.

With respect to the case of Dragan Obrenović, the Appeals Chamber considers that the cases of Obrenović and the Appellant 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. 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 level of participation in the commission of a crime and mitigating factors differ, different penalties are justified. Therefore, 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.

In relation to Radislav Krstić, who received a sentence of 35 years' imprisonment, the Appeals Chamber considers that the crimes committed 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 individuals participated in the crimes and their individual circumstances. The Appeals Chamber finds that the participation of the Appellant compared to that of Radislav Krstić and the respective 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.

With respect to the case of Vidoje Blagojević, the Appeals Chamber notes that the sentence in the case of Blagojević is pending appeal and thus has not yet been the object of final consideration. Therefore, the Appeals Chamber cannot engage in a comparison between the sentence of Vidoje Blagojević and that of the Appellant.

With respect to the sentence given to Dario Kordić, the Appeals Chamber finds that, as conceded by the Appellant himself, the killings were not on the same 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.

For the foregoing reasons, the Appeals Chamber dismisses the second and twelfth ground of appeal.

Under his third ground of appeal, the Appellant argues that the Trial Chamber considered his role in the crimes both in the gravity of the offence and again as a separate aggravating circumstance.

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. 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 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 the paragraph concerning the gravity of the crime and the paragraph concerning the aggravating circumstance address as a general matter the Appellant's role in the murder operation. 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. 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. 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. Accordingly, the Appellant's third ground of appeal is upheld.

Similar to the foregoing ground of appeal, the Appellant alleges in his fourth ground of appeal that the Trial Chamber considered the vulnerability of the victims as a factor contributing both to the gravity of the offence and to an aggravating circumstance. However, in this instance, 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 and dismisses the fourth ground of appeal.

Under his fifth ground of appeal the Appellant claims that the Trial Chamber erred in fact when it relied upon a mistranslation of defence counsel's closing arguments at trial in weighing the Appellant's sentence.

The Appeals Chamber acknowledges that the defence counsel at trial did not say "only 7.000 persons were killed in this campaign" but he said "around 7.000 men were killed". Therefore the Trial Chamber relied on a falsely translated statement of defence counsel at trial. The Prosecution argued during the Appeal Hearing that "[the mistranslation] is worth considering, particularly since the [...] Trial Chamber was specifically disturbed by the use of the phrase". The Prosecution agreed with the Appellant that this translation error "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."

The Appeals Chamber agrees with the parties' submissions. The Appeals Chamber first notes that the Trial Chamber expressed its stance in very strong words, namely, the Trial Chamber stated that it was "shocked" to hear the Nikolić Defence make this statement. Furthermore, it stated that the use of the term "only" in relation to the number of persons murdered was "shameful". 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, which, the Appeals Chamber has previously emphasised, is "the most important consideration, which may be regarded as the litmus test for the appropriate sentence". 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. For the foregoing reasons, the Appeals Chamber allows the Appellant's fifth ground of appeal.

In his sixth ground of appeal, the Appellant submits that the Trial Chamber failed to give sufficient credit to the guilty plea as a mitigating circumstance. He first argues that the Trial Chamber had reservations about the value of plea agreements in general.

The Appeals Chamber notes that the Trial Chamber addressed its reservations when considering the general question of whether plea agreements were appropriate in cases involving serious violations of international humanitarian law. The Trial Chamber gave no indication that it considered those reservations when determining the effect of the guilty plea on 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. This argument is accordingly dismissed.

Moreover, the Appellant argues that the Trial Chamber did not give enough weight to the fact that (1) his guilty plea, before the start of the trial, saves the resources of the International Tribunal, and that (2) he was the first Bosnian Serb to publicly admit his guilt in relation to the Srebrenica

massacre. The Appeals Chamber first finds that it is in accordance with the jurisprudence of this Tribunal to allocate “little weight” only to the fact that the Appellant’s guilty plea saved International Tribunal resources. In relation to his second argument, the Appeals Chamber finds that 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 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 also notes that the Trial Chamber qualified the Appellant’s guilty plea as “significant” and as an “important factor in mitigation of the sentence”. For all the foregoing reasons, the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in the weight it attached to his guilty plea. The Appellant’s sixth ground of appeal is accordingly dismissed.

The Appellant submits in his seventh ground of appeal that the Trial Chamber erred in failing to recognise his full co-operation with the Prosecution.

The Appeals Chamber finds that the Trial Chamber, when assessing the mitigating circumstance of the accused’s co-operation with the Prosecution, should take into account the Prosecution’s assessment of this co-operation. 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.

Based on this premise, the Appeals Chamber has found several discernible errors in the Trial Chamber’s assessment of Momir Nikolić’s co-operation with the Prosecution.

(1) The Trial Chamber has found that there were “numerous instances” where the Appellant’s testimony had been evasive. However, it refers to one example only. The Appeals Chamber finds that 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. Therefore, the Appeals Chamber concludes that the Trial Chamber failed to support its finding of the Appellant’s “numerous instances of evasiveness” and therefore failed to provide a reasoned opinion in this respect.

(2) The Trial Chamber also erred in taking into account the fact that the Appellant had told lies to the Prosecution when confessing to crimes he had not committed. 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. Second, as acknowledged by the Prosecution, the Appellant showed his full willingness to co-operate with the Prosecution by openly admitting to have rendered false confessions. The Trial Chamber did not appear to have taken account for these actions of the Appellant in assessing the value of his cooperation. For these reasons, the Appeals Chamber finds that the Trial Chamber committed a discernible error in this regard.

(3) Also, it is not clear what facts the Trial Chamber relied upon when coming to the conclusion that the Momir Nikolić’s testimony in the Blagojević case “was not as detailed as it could have been in certain areas”. 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. The Appeals Chamber finds that the Trial Chamber failed to support its finding and in this respect failed to provide a reasoned opinion.

(4) The Trial Chamber also did not substantiate its finding that “[h]ad [Momir Nikolić] been completely sincere about co-operating, [he] would have been more open in all aspects of his testimony and been more forthright in his responses before, and to, the Trial Chamber” and the Appeals Chamber finds again that the Trial Chamber failed to provide a reasoned opinion in this regard.

The Appeals Chamber has therefore identified several discernible errors committed by the Trial Chamber 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.

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

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.

The Trial Chamber decided that it could not "afford substantial weight" to the Appellant's remorse. The Appellant challenges the three reasons put forward by the Trial Chamber to justify its decision. Momir Nikolić alleges that (1) 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, (2) the Trial Chamber placed improper weight on the timing of the guilty plea, and (3) the mistranslation of the Appellant's Counsel statement in the closing arguments may have impacted the decision not to give appropriate weight to his remorse.

The Appeals Chamber could not find an error by the Trial Chamber. In particular, the Trial Chamber did not err in taking into account Momir Nikolić's reasons for entering a Plea Agreement and his reasons for giving untruthful statements to the Prosecution. The Appellant has failed to put forward any argument 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, 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. 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.

With respect to the timing of the guilty plea, the Appeals Chamber acknowledges that the timing of the Appellant's guilty plea cannot be considered by the Trial Chamber as an aggravating circumstance. 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.

Regarding the mistranslation of the defence counsel's statement in his closing arguments at trial, the Appeals Chamber has already addressed this under the fifth ground of appeal. In relation to the eighth ground of appeal, the Appeals Chamber finds that the Trial Chamber did not refer to or consider the mistranslated statement when discussing the weight given to the Appellant's remorse.

For the foregoing reasons, the Appeals Chamber concludes that 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. The Appellant's eighth ground of appeal is accordingly dismissed.

Let me now recall the final conclusions of the Appeals Chamber. The Appeals Chamber 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. The Appeals Chamber considers that the errors identified by the Appeals Chamber warrant a reduction of the sentence of 7 years of imprisonment.

I shall now read the operative paragraph of the Appeals Chamber Judgement. Mr. Nikolić, would you please stand.

For the foregoing reasons, the Appeals Chamber, pursuant to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

Noting the respective written submissions of the parties and the arguments they presented at the hearing of 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 Momir Nikolić 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.

Mr. Nikolić, you may be seated.

Mister Registrar, would you please deliver copies of the judgement to the parties.

The Appeals Chamber stands adjourned.
