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IT-02-54

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A summary of the Vasiljevic Judgement (IT-98-32-A, 25 February 2004) is being prepared. Meanwhile, a press release was published on the day of the Judgement’s delivery: it reproduces the summary read out in Court by Presiding Judge Meron and is available upon request from the Public Information Services or on the Tribunal’s website at [www.un.org/icty](http://www.un.org/icty) (Judgements page).

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## APPEALS CHAMBER

## The Prosecutor v. Slobodan Milosevic

Case No. IT-02-54-AR73.6

Judges Meron [Presiding], Pocar, Shahabuddeen, Mumba and Weinberg de Roca

## “DECISION ON INTERLOCUTORY APPEAL BY THE *AMICI CURIAE* AGAINST THE TRIAL CHAMBER ORDER CONCERNING THE PRESENTATION AND PREPARATION OF THE DEFENCE CASE”

20 JANUARY 2004

### Interlocutory appeals - Role of the *amici curiae*

Not being a party to the proceedings, the *amici curiae* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion.

### Procedural Background

● On 2 September 2003, the Trial Chamber held a Status Conference to discuss the anticipated conclusion of the Prosecution's case and the preparation necessary for the Defence case. The Accused requested a continuance of over two years to prepare his defence, pointing to the fact that he is conducting his own defence, the complexity of the case, the large number of witnesses he intends to call and the extensive material disclosed by the Prosecution which he must examine. The *amici curiae* pointed to the same considerations and seconded the Accused's request for an adjournment of considerable duration without, however, suggesting a specific period.

● On 17 September 2003, the Trial Chamber granted the Accused a period of three months to prepare his defence and ordered that he file a list of the witnesses and exhibits he intends to present, within six weeks of the adjournment.<sup>1</sup>

● On 25 September 2003, the Trial Chamber granted the *amici curiae* certification to appeal the Order Concerning Preparation.<sup>2</sup> It considered that their request was within the scope of the Trial Chamber's instruction that they act in any way they consider appropriate in order to secure a fair trial for the Accused<sup>3</sup> and that this could be construed as a request for certification from the Accused's application for a two-year continuance.

### Decision

The Appeals Chamber dismissed the appeal.

### Reasoning

#### Admissibility of the appeal

The Appeals Chamber recalled that Rule 73, pursuant to which the appeal by the *amici curiae* was brought, entitles a “party” to appeal a decision of a Trial Chamber after having requested and obtained certification. It noted that the Rule “does not confer such right upon an *amicus curiae* appointed by a Trial Chamber” (para. 4) and recalled that the *amici* do not act as

representatives of the Accused at trial but solely as assistants to the Trial Chamber.<sup>4</sup>

It found:

“Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal. The fact that the *amici* were instructed by the Trial Chamber to take all steps they consider appropriate to safeguard a fair trial for the Accused does not alter this conclusion” (para. 4).

The Appeals Chamber then relied on statements by the Accused that he did not accept the ruling of the Trial Chamber and sought its reconsideration.<sup>5</sup> The Appeals Chamber found an “identity of interests” between the *amici* and the Accused and held that its “consideration of this appeal would not infringe his interests”.<sup>6</sup> It further noted that the Prosecution did not oppose consideration of the appeal<sup>7</sup> which would in this case “serve the interests of justice”.<sup>8</sup> It therefore decided to consider the appeal.

### Discussion

The Appeals Chamber pointed out that the Trial Chamber's order could only be overturned if it were proven that it had erred in the exercise of its discretion in setting the time limit.<sup>9</sup> It added that the *amici* had to demonstrate that the Trial Chamber “ha[d] given weight to extraneous or irrelevant considerations, or [...] failed to give weight or sufficient weight to relevant considerations, or [...] made an error as to the facts upon which it [...] exercised its discretion”.<sup>10</sup> It reviewed the approach taken by the Trial Chamber and found that the Trial Chamber had considered all the relevant factors. The issue was therefore whether the Trial Chamber had erred in its analysis of these factors. In this respect

<sup>4</sup> *Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, para. 3, *Judicial Supplement No. 41*.

<sup>5</sup> At the hearing of 17 September 2003, the Accused stated that he “categorically protest[ed]” against the ruling on the preparation and presentation of his defence case and added that “[e]very decision or ruling can be re-examined and abolished, and that is my request and demand, that it be rethought” (Transcripts of the 17 September 2003 Hearing, at 4).

<sup>6</sup> Para. 5.

<sup>7</sup> The Appeals Chamber referred to para. 2 of the Prosecution Response to the Request by the *Amici Curiae* dated 18 December 2003 for a Certificate Pursuant to Rule 73(B), 24 September 2003, in which the Prosecution accepted that the *amici* “may be considered to be a ‘party’ for the purposes of an interlocutory appeal”.

<sup>8</sup> Para. 5.

<sup>9</sup> *Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, paras. 292-293, *Judicial Supplement No. 23*.

<sup>10</sup> *Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5, *Judicial Supplement No. 32*.

<sup>1</sup> *Milosevic*, IT-02-54-T, Order Concerning the Preparation and Presentation of the Defence case, 17 September 2003 (“Order Concerning Preparation”).

<sup>2</sup> *Milosevic*, IT-02-54-T, Decision Granting Request by the *Amici Curiae* for Certification of Appeal against a Decision of the Trial Chamber, 25 September 2003.

<sup>3</sup> Regarding the mandate of the *amici curiae*, see *Milosevic*, IT-02-54-T, Order Inviting Designation of *Amicus Curiae*, 30 August 2001, *Judicial Supplement No. 26*. See also *Milosevic* IT-02-54-T, Order Concerning *Amici Curiae*, 11 January 2002; *Milosevic*, IT-02-54-T, Order on Further Instructions to the *Amici Curiae*, 6 October 2003.

the Appeals Chamber found that the Trial Chamber's Decision was informed "both by sufficient factual information and by the appropriate legal principles, and did not take into account any impermissible factors".<sup>11</sup> It dismissed the appeal.

### Separate Opinion of Judge Shahabuddeen

While Judge Shahabuddeen agreed with the Decision of the Appeals Chamber to dismiss the interlocutory appeal, he did not

<sup>11</sup> Para. 18. The Appeals Chamber found that the Trial Chamber took into account both the necessity to safeguard a fair trial for the Accused and the need to ensure an expeditious trial.

consider that the Appeals Chamber had to go as far as to assess whether the Trial Chamber had correctly exercised its discretion. In his view, there was a preliminary reason for dismissal: the dismissal "should have rested on the more fundamental fact that the interlocutory appeal ha[d] not been brought by a 'party' within the meaning of Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal".<sup>12</sup>

<sup>12</sup> Judge Shahabuddeen examined whether the *amici* can be considered as a party, whether the Accused could have been considered as acting by himself, and whether the appeal could have been considered as being brought by the Accused through the *amici curiae* acting as his counsel.

## APPEALS CHAMBER The Prosecutor v. Vojislav Seselj

Case No. IT-03-67-AR73.2

Judges Meron [Presiding], Pocar, Shahabuddeen, Güney and Weinberg de Roca

# "DECISION ON THE INTERLOCUTORY APPEAL CONCERNING THE DENIAL OF A REQUEST FOR A VISIT TO AN ACCUSED IN THE DETENTION UNIT"

29 JANUARY 2004

### Competent authority for visits to detainees

The matter of determining which visits an accused is allowed to receive while at the Detention Unit falls within the competence of the Registry (of which the Commanding Officer of the Detention Unit is also an officer) and not of the Chambers.

### Procedural Background

- On 12 January 2004, Vojislav Seselj ("Accused") lodged an interlocutory appeal against a decision by Trial Chamber II<sup>1</sup> in which his Request of 9 September 2003 ("Request") to receive a visit from Bishop Filaret of Milesevo had been denied.<sup>2</sup>
- On 22 January 2004, the Prosecution filed its Response.<sup>3</sup>

### Decision

The Appeals Chamber dismissed the interlocutory appeal and instructed the Accused that any request he may have with regard to visits must be addressed by the Registrar.

### Reasoning

#### Competent authority for visits to detainees

The Appeals Chamber referred to Regulation 32 of the United Nations Detention Unit Regulations to Govern the Supervision of Visits to and Communications with Detainees (IT/98/Rev.3) dated July 1999,<sup>4</sup> pursuant to which "[a]ll visitors, other than counsel or a representative of the Tribunal, shall first apply to the Registrar for permission to visit a named detainee". It also referred to Rule 63(A) and (B) of the Rules Governing the

Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal (IT/38/Rev.8) dated 22 November 1999 ("Rules Governing Detention"),<sup>5</sup> which provides respectively that detainees "shall be entitled to receive visits from family, friends and others, subject only to the provisions of Rule 66 and to such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may impose" and that "[t]he Registrar may refuse to allow a person to visit a detainee if he has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media".<sup>6</sup> The Appeals Chamber held:

"[...] the matter of determining which visits an accused is allowed to receive while at the Detention Unit falls within the competence of the Registry (of which the Commanding Officer of the Detention Unit is also an officer) and not of the Chambers".

The Appeals Chamber noted that neither the Accused nor Bishop Filaret had addressed a request to the Registrar.

<sup>1</sup> *Seselj*, IT-03-67-PT, Decision on Motion Number 19, 30 September 2003. The Trial Chamber considered that the right of an accused to access a representative of his own religion is "not an unlimited one and certainly does not encompass the right of an accused to select himself the representative of the Orthodox Christian Church, but rather that he is entitled to establish contacts with 'the ministers or spiritual advisers of the host prison'".

<sup>2</sup> *Seselj*, IT-03-67-PT, Motion Number 27, 14 January 2004.

<sup>3</sup> *Seselj*, IT-03-67-AR73.2, Prosecution's Response to the Accused's Appeal of the Trial Chamber's "Decision on Motion Number 19", 22 January 2004.

<sup>4</sup> This document is available on the Tribunal website at [www.un.org/icty](http://www.un.org/icty) under "Basic Documents/Detention".

<sup>5</sup> *Ibid.*

<sup>6</sup> Regarding the communication restrictions imposed on the Accused Vojislav Seselj, see the 8 January 2004 and 6 February 2004 Decisions of the Registrar, available on the Tribunal website under "Indictments and Proceedings/Seselj/Registry Decisions". See also Press Release No. 814e of 9 January 2004 and Press Release No. 822e of 10 February 2004 (available on the website of the Tribunal under "Latest Developments").



TRIAL CHAMBERS  
The Prosecutor v. Dragan Nikolic

Case No. IT-94-2-S

Trial Chamber II (Judges Schomburg [Presiding], Agius and Mumba)

## “SENTENCING JUDGEMENT”

5 DECEMBER 2003

**Applicability of the principle of *lex mitior* - Position of authority as an aggravating factor - Relation to victims as an aggravating factor - Length of proceedings as a mitigating factor**

**Applicability of the principle of *lex mitior*:** the principle of *lex mitior* applies only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction.

**Position of authority as an aggravating factor:** the Accused's abuse of his superior position in principle aggravates his crimes.

**Relation to victims as an aggravating factor:** under certain circumstances the knowledge of or even the friendship with a victim may amount to an aggravating factor.

**Length of proceedings as a mitigating factor:** neither the length of time between the criminal conduct and the judgement nor the time between arrest and judgement can be considered as a mitigating factor.

### Procedural Background

● On 4 November 1994, Dragan Nikolic (“Accused”) was indicted by the Tribunal.<sup>1</sup> The Indictment charged him with counts of grave breaches of the Geneva Conventions, crimes against humanity and violations of the laws or customs of war<sup>2</sup> for his responsibility as a commander in the Susica detention camp near the town of Vlasenica, Vlasenica municipality, Bosnia and Herzegovina (“BiH”).

● On 16 May 1995, the Trial Chamber initiated proceedings pursuant to Rule 61 of the Rules of Procedure and Evidence (“Rules”)<sup>3</sup> after it proved impossible to serve the Indictment and execute the arrest warrants.<sup>4</sup> It heard 15 *viva voce* witnesses in public hearings between 9 and 13 October 1995. On 20 October 1995, the Trial Chamber issued its decision on the Rule 61 proceedings whereby it determined that there were reasonable grounds to believe that Dragan Nikolic had committed all the crimes in the Indictment.<sup>5</sup> An international arrest warrant was issued against him that same day.<sup>6</sup>

● On or about 20 April 2000, the Accused was apprehended by the multinational Stabilisation Force (“SFOR”) in BiH.<sup>7</sup> He was transferred to the Tribunal the next day.

● At his 28 April 2000 initial appearance, the Accused pleaded not guilty to all 80 counts of the First Amended Indictment of 12 February 1999.

● On 18 March 2002, the Accused pleaded not guilty to the Second Amended Indictment of 15 February 2002.

● At the 27 June 2003 Status Conference, the Accused pleaded not guilty to the Third Amended Indictment.<sup>8</sup>

● On 2 September 2003, the Prosecution and Defence filed a Confidential Joint Plea Agreement Submission (“Plea Agreement”). The factual basis of the Plea Agreement was taken from the Indictment.

● On 4 September 2003, the Plea Hearing took place. The Trial Chamber accepted the Plea Agreement and entered a finding of guilt after Dragan Nikolic pleaded guilty to Counts 1 to 4 of the Indictment.

● The Sentencing Hearing commenced on 3 November 2003 and concluded on 6 November 2003.

### Sentencing Judgement

The Trial Chamber entered a single conviction against Dragan Nikolic under Count 1 of the Indictment, namely persecutions as a crime against humanity, incorporating Count 2 (murder as a crime against humanity), Count 3 (rape as a crime against humanity) and Count 4 (torture as a crime against humanity). It sentenced Dragan Nikolic to 23 years of imprisonment.<sup>9</sup>

### Reasoning<sup>10</sup>

#### Range of sentences

While Article 24 of the Statute<sup>11</sup> and Rule 101 of the Rules

<sup>1</sup> Dragan Nikolic was the first person indicted by the Tribunal.

<sup>2</sup> *Dragan Nikolic, a.k.a. “Jenki” Nikolic*, IT-94-2-1, Review of the Indictment, 4 November 1994. The Indictment did not specify the number of counts against the Accused.

<sup>3</sup> *Dragan Nikolic, a.k.a. “Jenki” Nikolic*, IT-94-2-R61, Order Submitting Indictment to Trial Chamber for Hearing, 16 May 1995. This was the first Rule 61 hearing before the Tribunal. On the Rule 61 proceedings in this case, see the *Dragan Nikolic* case information sheets available on the Tribunal Website at [www.un.org/icty](http://www.un.org/icty) under “The ICTY at a Glance/Case Information Sheets”.

<sup>4</sup> Two arrest warrants had been issued: one to the administration in Pale and the other to the Republic of Bosnia and Herzegovina.

<sup>5</sup> *Dragan Nikolic, a.k.a. “Jenki” Nikolic*, IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, p. 23.

<sup>6</sup> *Dragan Nikolic, a.k.a. “Jenki” Nikolic*, IT-94-2-R61, International Warrant of Arrest and Order for Surrender, 20 October 1995.

<sup>7</sup> The Accused later challenged the legality of his arrest. See *Dragan Nikolic*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, *Judicial Supplement No. 37*. See also *Dragan Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, *Judicial Supplement No. 42*.

<sup>8</sup> The Third Amended Indictment was accepted by the Trial Chamber during the Status Conference and confirmed in a written decision of 30 June 2003 (*Dragan Nikolic*, IT-94-2-PT, Decision on the Prosecution's Motion for Leave to Amend the Second Amended Indictment, 30 June 2003).

<sup>9</sup> Dragan Nikolic was entitled to credit for the time he served from his deprivation of liberty (20 April 2000) to the date of the Sentencing Judgement (3 years, 7 months and 29 days). On 16 January 2004, the Accused filed his notice of appeal against the Judgement.

<sup>10</sup> The procedure for and appropriateness of plea agreements in cases involving serious violations of international humanitarian law were dealt with in *Momir Nikolic*, IT-02-60/1-S, Sentencing Judgement (“*Momir Nikolic* Sentencing Judgement”), 2 December 2003, *Judicial Supplement No. 46*. This summary will therefore only deal with the range of sentences and the sentencing factors.

<sup>11</sup> Article 24 states in relevant part:

“1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.  
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”

of Procedure and Evidence<sup>12</sup> of the Tribunal provide a non-exhaustive list of factors to be taken into account by Trial Chambers in determining the sentence for offences falling within the Tribunal's jurisdiction, neither the Statute nor the Rules provides for a concrete range of penalties. The determination of the appropriate sentence is left to the discretion of the Trial Chamber which has the responsibility to "come as close as possible to justice for both victims and their relatives and the Accused".<sup>13</sup>

On 25 September 2003, the Trial Chamber issued *proprio motu* an order requesting Dr. Ulrich Sieber, Director of the "Max-Planck-Institute für ausländisches und internationales Strafrecht" in Freiburg, Germany, to submit an expert report ("Sentencing Report") on the "range of sentences for the crimes [...] to which the Accused [had] pleaded guilty". This report addressed the sentencing law in the former Yugoslavia, in member States of the Council of Europe and in other major legal systems.

### **Sentencing in the former Yugoslavia<sup>14</sup>**

The Sentencing Report comprised both a normative and an empirical section, the latter being based on semi-standardised interviews with 17 judges from different parts of the former Yugoslavia. It addressed in detail the applicable law in the territory of the former Yugoslavia with regard to the crimes charged in the Indictment. It also addressed the range of sentences available under the laws of BiH when the crimes to which the Accused had pleaded guilty were committed. Under the Federal Criminal Code of 1976/77, the maximum term of imprisonment was 15 years, except for offences punishable with the death penalty, committed under "particularly grave circumstances" or causing "especially grave consequences", in which case the maximum term of imprisonment was 20 years. Murder was punishable with imprisonment of not less than five years and in aggravated cases with imprisonment of no less than 10 years or the death penalty, such as for murder in a cruel way, carried out violently, by endangering the life of others, or by motive of greed. Rape was punishable with between one and 10 years of imprisonment, the lower limit being set at three years in aggravated cases. Grievous bodily injury was punishable with between six months and five years of imprisonment. If committed "in time of war, armed conflict or occupation", such offences were qualified as war crimes and were punishable with imprisonment of a minimum of five years or with the death penalty.

### **Applicability of the principle of *lex mitior***

The issue of the applicability of the principle of *lex mitior* had been raised by the Defence. According to this principle, if a law is amended one or more times after the commission of a given criminal act, the law which is the less severe in relation to the offender should be applied. Following its analysis of the applicable law in the territory of the former Yugoslavia in 2003,<sup>15</sup> the Trial

Chamber noted that were the principle of *lex mitior* to be applied to the present case, the range of sentences would have been restricted to a fixed term of imprisonment of between 20 and 45 years instead of a term up to and including the remainder of the convicted person's life as is provided in Rule 101(A) of the Rules. It found that the principle of *lex mitior* as contained *inter alia* in the International Covenant on Civil and Political Rights of 1966 ("ICCPR") and the American Convention on Human Rights of 1978 ("ACHR")<sup>16</sup> constitutes an "internationally recognised standard" regarding the rights of the accused.<sup>17</sup> Nevertheless, it found that this principle "applies only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction".<sup>18</sup> The Trial Chamber further found that "[i]n the event of concurrent jurisdiction, no state is generally bound to apply the sentencing range or sentencing law of another state where the offence was committed".<sup>19</sup> Indeed, with respect to the concurrent jurisdiction of the Tribunal and jurisdictions in the former Yugoslavia, the Appeals Chamber held in the *Celebici Appeals Judgement* that:

"Trial Chambers are not bound by the practice of courts in the former Yugoslavia in reaching their determination of the appropriate sentence for a convicted person. This principle applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed."<sup>20</sup>

The Trial Chamber concluded that it was not bound to apply the more lenient range of sentences applicable under the law of the Republika Srpska which had only to be taken into consideration as merely "one factor among others when determining sentence".<sup>21</sup>

### **Sentencing in other countries**

In addition to analysing the sentencing procedure applied in the former Yugoslavia with respect to the crimes to which the Accused had pleaded guilty, the Sentencing Report addressed the sentencing ranges in 23 other countries from all around the world. This overview showed that "in most countries a single act of murder attracts life imprisonment or the death penalty, as either an optional or a mandatory sanction".<sup>22</sup> The Trial Chamber found that "[w]hen adopting the Statute in 1993, the Security Council was apparently cognisant of this practise and decided to vest broad discretion to the judges in determining sentences, instead of giving concrete sentencing ranges for specific offences".<sup>23</sup> It further noted that in view of the United Nations' general policy on the abolition of the death penalty, the Security Council had limited the applicable sentences to imprisonment.<sup>24</sup>

Bearing these principles in mind, the Trial Chamber then turned to the gravity of the crime and the aggravating circumstances.

<sup>12</sup> Rule 101 states:

"(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;  
(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;  
(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;  
(iv) 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, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

<sup>13</sup> Sentencing Judgement, para. 4.

<sup>14</sup> Pursuant to Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules, Trial Chambers must take into account the "general practice regarding prison sentences in the courts of the former Yugoslavia" in determining sentence. However it is settled jurisprudence that Trial Chambers are not bound by this "general practice".

<sup>15</sup> The Trial Chamber took into account the new Criminal Code for both entities in the State of BiH and the Brcko District which was enacted by the Office of the High Representative in March 2003, and the March 2003 Criminal Code of the Republika Srpska (see para. 158 of the Sentencing Judgement).

<sup>16</sup> Article 15(1) of the ICCPR states in relevant part: "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby". Article 9 of the ACHR is worded in similar terms.

<sup>17</sup> Sentencing Judgement, para. 160. The Trial Chamber referred to the obligation of the International Tribunal under which it must "fully respect internationally recognised standards regarding the rights of the accused" as set out in para. 106 of the Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993, S/25704, 3 May 1993).

<sup>18</sup> Sentencing Judgement, para. 163.

<sup>19</sup> *Ibid.*, para. 164.

<sup>20</sup> *Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001 ("*Celebici Appeal Judgement*"), para. 816, *Judicial Supplement* No. 23.

<sup>21</sup> Sentencing Judgement, para. 165.

<sup>22</sup> *Ibid.*, para. 172.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Article 24(1) of the Statute.



## Aggravating circumstances

### Position of authority

The Trial Chamber found that, as a commander in the Susica camp, Dragan Nikolic had “an overall responsibility to protect the detainees from abuse and to ensure that the conditions under which they were forced to live were humane” but that he instead chose to “mistreat the detainees, thereby setting an example for the guards to follow and contributing to an environment of impunity”.<sup>25</sup> It found that he had “deliberately and callously committed the crimes in the Indictment”, that he had not been “under any orders from his superiors [or] under any compulsion or pressure to behave in this manner” and that he had used his position of authority to “intimidate the detainees and prevent them from resisting”. Accordingly, the Chamber found that “the Accused’s abuse of his superior position in the camp in principle aggravate[d] his crimes”.<sup>26</sup>

### Vulnerability of the victims

In the *Banovic* Sentencing Judgement, the Trial Chamber ruled that “the position of inferiority and the vulnerability of the victims as well as the context in which the offences were committed [were] relevant factors in assessing the gravity of the crime”.<sup>27</sup> The present Trial Chamber found that the victims had been subjected to a position of special vulnerability and accepted this factor as especially aggravating: “the victims were particularly vulnerable and treated rather as slaves than inmates under the Accused’s supervision”.<sup>28</sup>

### Depravity of the crimes

The Trial Chamber found it “hard to imagine how murder, torture and sexual violence could be committed in a harsher and more brutal way than employed by the Accused, assisted by others”.<sup>29</sup> It considered the depravity of the crimes as an especially aggravating factor. With regard to the beatings (charged in the Indictment as torture), the Trial Chamber considered that, due to their seriousness and the particular viciousness with which they were committed, these crimes amounted to the “highest level of torture” and had “all of the makings of *de facto* attempted murder”.<sup>30</sup>

### Multiplicity of victims

The Trial Chamber found that “[a]lthough most of the detainees were not direct victims of the Accused’s brutal acts of murder, torture and sexual violence [...], each and every detainee of the camp was an immediate victim of the more insidious forms of abuse, specifically the inhumane living conditions and the atmosphere of terror created by the murders, beatings, sexual violence and other mental and physical abuse”.<sup>31</sup> It accepted the multiplicity of victims as an especially aggravating factor.

### Relation to the victims

Muslims from the municipality of Vlasenica, where the Accused had spent most of his life up until the war, accounted for a large proportion of the thousands of detainees that passed through Susica camp. The Trial Chamber found that “under certain circumstances the knowledge of or even the friendship with a victim may amount to an aggravating factor”.<sup>32</sup> However, it stated that it did not have enough “detailed facts about individual relationships” the Accused may have had with the victims and so did not attach any weight to this factor in determining sentence.

Having regard for only the gravity of the crime and the aggravating circumstances, the Trial Chamber found that “no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused’s life”.<sup>33</sup> It then turned to the mitigating circumstances.

## Mitigating circumstances

### Plea agreement and guilty plea

In order to assess the mitigating effect of a guilty plea, the Trial Chamber analysed the Sentencing Report of the Max Plank Institute and found that “there are primarily pragmatic grounds for reducing sentence if a guilty plea results from the willingness of an offender to co-operate in the administration of justice”.<sup>34</sup> It found that further justification for a reduction was provided by: “remorse, acknowledgment of responsibility and sparing the victims from testifying and being cross-examined”.<sup>35</sup> It further held that in considering a reduction of sentence, “the stage of proceedings at which the offender pleads guilty and the circumstances in which the plea is tendered” were relevant factors.<sup>36</sup>

The Trial Chamber then turned to the reasons given in the jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda (“ICTR”) for a guilty plea to be considered in mitigation:

- showing of remorse<sup>37</sup> and repentance;<sup>38</sup>
- contribution to reconciliation<sup>39</sup> and establishing the truth;<sup>40</sup>
- encouragement of other perpetrators to come forth;<sup>41</sup>
- fact that witnesses are relieved from giving evidence in court;<sup>42</sup>
- fact that a guilty plea saves the Tribunal the “effort of a lengthy investigation and trial”.<sup>43</sup>

The Trial Chamber recognised the importance of Dragan Nikolic’s guilty plea as “an expression of his honesty and readiness to take responsibility, and coupled with his expression of remorse and his co-operation with the Prosecution, as a contribution to reconciliation in Vlasenica municipality”.<sup>44</sup>

In determining the sentence, the Trial Chamber attached particular importance to such factors as the guilty plea, the Accused’s genuine expression of remorse, reconciliation and the disclosure of additional information to the Prosecution.<sup>45</sup> It did not attach any weight to the length of the proceedings as a mitigating factor.

### Length of proceedings

The Trial Chamber noted that in keeping with all of the leading decisions by the European Court of Human Rights and the

<sup>25</sup> *Ibid.*, para. 214.

<sup>26</sup> *Ibid.*, para. 228.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Plavsic*, IT-00-39&40/1, Sentencing Judgement (“*Plavsic* Sentencing Judgement”), 27 February 2003, para. 70, *Judicial Supplement* No. 40.

<sup>30</sup> *Ruggiu*, ICTR-97-32-1, Judgement and Sentence, 1 June 2000, para. 55. See also *Jelisić*, IT-95-10-T, Judgement, 14 December 1999, para. 127, *Judicial Supplement* No. 10: “[A]lthough the Trial Chamber considered the accused’s guilty plea out of principle, it must point out that the accused demonstrated no remorse before it for the crimes he committed.

<sup>31</sup> *Plavsic* Sentencing Judgement, para. 70; *Obrenovic*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 111, *Judicial Supplement* No. 46.

<sup>32</sup> *Momir Nikolic* Sentencing Judgement, para. 149.

<sup>33</sup> *Erdemovic*, IT-96-22-Tbis, Sentencing Judgement (“*Erdemovic* 1998 Sentencing Judgement”), 5 March 1998, para. 16.

<sup>34</sup> *Momir Nikolic* Sentencing Judgement, para. 150; *Todorovic*, IT-95-9/1-S, Sentencing Judgement (“*Todorovic* Sentencing Judgement”), 31 July 2001, para. 80, *Judicial Supplement* No. 26.

<sup>35</sup> *Erdemovic* 1998 Sentencing Judgement, para. 16; *Todorovic* Sentencing Judgement, para. 81.

<sup>36</sup> Sentencing Judgement, para. 237.

<sup>37</sup> The Trial Chamber attached importance to the Accused’s co-operation with the Prosecution “especially since the information about Susica camp and Vlasenica municipality was [being] heard for the first time before this Tribunal”. It found that, by giving such information, the Accused had contributed and would further contribute to the fact-finding mission of the Tribunal and the future war crimes chambers in his home country (para. 260).

<sup>25</sup> Sentencing Judgement, para. 179.

<sup>26</sup> *Ibid.*, para. 183.

<sup>27</sup> *Banovic*, IT-02-65/1-S, Sentencing Judgement (“*Banovic* Sentencing Judgement”), 28 October 2003, para. 50.

<sup>28</sup> Sentencing Judgement, para. 213.

<sup>29</sup> *Ibid.*, para. 186.

<sup>30</sup> *Ibid.*, para. 213.

<sup>31</sup> *Ibid.*, para. 206.

<sup>32</sup> *Ibid.*, para. 212.

decisions of several national courts, the disproportionate length of a procedure may be considered as a mitigating factor in sentencing.<sup>46</sup> It noted, however, that in most of the cases, it had been held that, in light of Article 6 (1), sentence 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR"),<sup>47</sup> the "reasonable time" requirement generally comprised solely the time-frame starting from the indictment and/or arrest of the accused and ending with the legally binding, final decision of the court.<sup>48</sup> It further observed that it had been held that the violation of the accused's basic right to a fair and speedy trial should only be remedied and compensated if the perpetrator was not himself responsible for the delay of the proceedings.<sup>49</sup>

The Trial Chamber noted that in the present case the Accused had already been well informed about the Indictment against him by the end of 1994 or the beginning of 1995 but had been apprehended by SFOR only in 2000. It found that the time spent in the United Nations Detention Unit could not be regarded as disproportional, given *inter alia* the lengthy period of time necessary for preparing and deciding his motions on jurisdiction.<sup>50</sup>

The Trial Chamber then referred to a recent decision by the German Federal Supreme Court in which it was emphasised that due to the seriousness of the crimes committed in 1943-44 by a now 90 years former camp commander, extraordinary circumstances mitigating the accused's guilt were not applicable.<sup>51</sup>

The Trial Chamber therefore concluded that "neither the length of time between the criminal conduct and the judgement nor the time between arrest and judgement [could] be considered as a mitigating factor".<sup>52</sup>

## Sentence

Balancing the gravity of the crimes and aggravating factors against the mitigating factors, the Trial Chamber held that it could not follow the Prosecution's recommendation of a term of 15 years of imprisonment.<sup>53</sup> It found that the "brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that recommended unjust" as it believed it "not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties".<sup>54</sup>

The Trial Chamber expressed its awareness that "from a human rights perspective each accused, having served the necessary part of his sentence, ought to have a chance to be reintegrated into society in the event that he no longer pose[d] any danger to society and there [was] no risk that he [would] repeat his crimes". It found however that "at least the term of imprisonment recommended by the Prosecutor would have to be served" before the convicted person was released and reintegrated into society.<sup>55</sup> It concluded that a sentence of 23 years' imprisonment was adequate and proportional. ■

<sup>46</sup> ECHR in *Frydlender v. France*, Application No. 30979/96, § 43, ECHR 2000-VII, and in *Vass v. Hungary*, Application No. 57966/00 of 25 November 2003; U.S. Supreme Court in *Baker v. Wingo*, 407 U.S. 514 (1972); BGH, NSiZ, 1986, pp. 217-218 (footnote 411 of the Sentencing Judgement).

<sup>47</sup> Article 6(1) of the ECHR reads in relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

<sup>48</sup> U.S. Supreme Court in *Doggett v. United States* (90-0857), 505 U.S. 647 (1992); ECHR in *Ferrantelli and Santangelo v. Italy*, Application No. 19874/92 of 7 August 1996; BVerfG, BVerfGE 63, 45 (69); BGH, SiV, 1992, p. 452 (footnote 412 of the Sentencing Judgement).

<sup>49</sup> BVerfG, 2 BvR 153/03, Decision of 25 July 2003, para. 33 at: <http://www.bverfg.de> (footnote 413 of the Sentencing Judgement).

<sup>50</sup> Sentencing Judgement, para. 271.

<sup>51</sup> BGH, 1 SiR 538/01, Judgement of 21 February 2002, II, 4b, p. 13 at: <http://www.bundesgerichtshof.de> (footnote 417 of the Sentencing Judgement).

<sup>52</sup> Sentencing Judgement, para. 273.

<sup>53</sup> The Defence concurred with the sentence proposed by the Prosecution.

<sup>54</sup> Sentencing Judgement, para. 281.

<sup>55</sup> *Ibid.*, paras. 281-282.



TRIAL CHAMBERS  
The Prosecutor v. Slobodan Milosevic

Case No. IT-02-54-T

Trial Chamber III (Judges May [Presiding], Robinson and Kwon)

**“DECISION ON PROSECUTION'S MOTION  
UNDER RULE 73(A) FOR A RULING  
ON THE COMPETENCE OF THE *AMICI CURIAE*  
TO PRESENT A MOTION FOR  
JUDGEMENT OF ACQUITTAL UNDER RULE 98 *BIS*”**

5 FEBRUARY 2004

**Filing by the *amici curiae* of a motion pursuant to Rule 98 *bis***

The filing by the *amici curiae* of a motion pursuant to Rule 98 *bis* does not in any way prejudice the Prosecution, does not infringe the interests of the Accused, and it is in the interests of justice as a whole for such motion to be brought.

## Procedural Background

● On 4 February 2004, the Prosecution sought reconsideration of the order of the Trial Chamber of 27 June 2003<sup>1</sup> to the effect that the *amici curiae* may file a motion pursuant to Rule 98 *bis*.<sup>2</sup>

## Decision

The Trial Chamber dismissed the motion.

## Reasoning

The Trial Chamber noted that under Rule 73(C) the Prosecution should have filed its request for certification to appeal the Chamber's order of 27 June 2003 within seven days of its filing but that it only sought certification following the Separate Opinion of Judge Shahabuddeen in a recent Appeals Chamber's decision in the same case.<sup>3</sup>

However, it held that “the filing by the *amici curiae* of a Motion pursuant to Rule 98 *bis* does not in any way prejudice the Prosecution, does not infringe the interests of the Accused, and that it is in the interests of justice as a whole for the Motion to be brought”.<sup>4</sup> ■

<sup>1</sup> *Milosevic*, IT-02-54-T, Order on *Amici Curiae* Request Concerning the Manner of their Future Engagement and Procedural Directions Under Rule 98 *bis*, 27 June 2003.

<sup>2</sup> *Milosevic*, IT-02-54-T, Prosecution's Motion under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal Under Rule 98 *bis*.

<sup>3</sup> *Milosevic*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (“Appeals Chamber Decision”), 20 January 2004, present issue of the *Judicial Supplement*.

<sup>4</sup> For similar arguments, see the Appeals Chamber Decision, para. 5.

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20/01/04	MILOSEVIC	IT-02-54-AR73.6	DECISION ON THE INTERLOCUTORY APPEAL BY THE <i>AMICI CURIAE</i> AGAINST THE TRIAL CHAMBER ORDER CONCERNING THE PRESENTATION AND PREPARATION OF THE DEFENCE CASE
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05/02/04	MILOSEVIC	IT-02-54-T	DECISION ON PROSECUTION'S MOTION UNDER RULE 73 (A) FOR A RULING ON THE COMPETENCE OF THE <i>AMICI CURIAE</i> TO PRESENT A MOTION FOR JUDGEMENT OF ACQUITTAL UNDER RULE 98 <i>BIS</i>
09/02/04	MILOSEVIC	IT-02-54-T	DECISION (COMMUNICATION)
09/02/04	SESELJ	IT-03-67-PT	DECISION (COMMUNICATIONS)
16/02/04	SESELJ	IT-03-67-PT	DECISION (ON STANDBY COUNSEL)
25/02/04	MILOSEVIC	IT-02-54-T	ORDER RESCHEDULING AND SETTING THE TIME AVAILABLE TO PRESENT THE DEFENCE CASE
25/02/04	MILOSEVIC	IT-02-54-T	DECISION ON NOTIFICATION OF THE COMPLETION OF PROSECUTION CASE AND MOTION FOR THE ADMISSION OF EVIDENCE IN WRITTEN FORM
27/02/04	HADZIHASANOVIC <i>ET AL.</i>	IT-01-47-T	DECISION ON JUDICIAL NOTICE OF ADJUDICATED FACTS