

**UNITED  
NATIONS**

---

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-98-32/1-R77.2-A

Date: 16 March 2012

---

**IN THE APPEALS CHAMBER**

**Before:**

Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Arlette Ramaroson  
Judge Andréia Vaz  
Judge Khalida Rachid Khan

**Registrar:**

Mr. John Hocking

**THE PROSECUTOR**

v.

**JELENA RAŠIĆ**

***PUBLIC WITH CONFIDENTIAL ANNEX***

---

**PROSECUTION APPEAL BRIEF**

---

**The Office of the Prosecutor:**

Mr. Paul Rogers

**Counsel for the Respondent:**

Ms. Mira Tapušković

<b>I. OVERVIEW .....</b>	<b>2</b>
<b>II. GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW IN PARTIALLY SUSPENDING EIGHT MONTHS OF RAŠIĆ'S 12-MONTH SENTENCE.....</b>	<b>3</b>
A. SUB-GROUND 1: THE TRIAL CHAMBER ERRED IN IMPOSING A SENTENCE THAT WAS PARTIALLY CUSTODIAL AND PARTIALLY SUSPENDED.....	3
B. SUB-GROUND 2: THE TRIAL CHAMBER ERRED IN SUSPENDING RAŠIĆ'S SENTENCE BASED ON MITIGATION FACTORS IT HAD REJECTED.....	4
1. The Trial Chamber properly rejected as mitigation the factors it later relied upon for suspension.....	5
2. The Trial Chamber took out of context the Prosecution's arguments regarding execution of sentence.....	7
C. SUB-GROUND 3: THE TRIAL CHAMBER ERRED IN RELYING ON <i>EX PARTE</i> MEDICAL REPORTS AS A BASIS FOR SUSPENDING RAŠIĆ'S SENTENCE.....	7
<b>III. CONCLUSION.....</b>	<b>9</b>
<b>RULE 111 DECLARATION .....</b>	<b>10</b>
<b>PROSECUTION'S GLOSSARY.....</b>	<b>1</b>

## I. OVERVIEW

1. The Trial Chamber committed a series of errors in deciding to impose a partially suspended sentence on Jelena Rašić. First, the partial suspension has the effect of releasing Rašić only one-third into her sentence of 12 months' imprisonment. This is a power reserved to the President of the Tribunal.

2. Second, the Trial Chamber suspended Rašić's sentence based on her medical condition, a factor which it had rejected as mitigation. Further, by requiring Rašić to continue to serve the remaining one third of the sentence, it undermined its own justification for suspension. In addition, the Trial Chamber wrongly relied upon what it called the "quasi-solitary" nature of her confinement and its alleged impact on her health as a reason to reduce her sentence.

3. Finally, the Trial Chamber, though recognizing that the Prosecution had a right to access reports of Rašić's medical condition, authorized their release to the Prosecution only five weeks after the sentencing hearing. This deprived the Prosecution of the opportunity to make submissions regarding material that formed the basis for the sentence.

4. These errors invalidate the Judgement. The Chamber should quash the Trial Chamber's suspension of Rašić's sentence and impose the full custodial term of 12 months' imprisonment.

## II. GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW IN PARTIALLY SUSPENDING EIGHT MONTHS OF RAŠIĆ'S 12-MONTH SENTENCE

### A. Sub-Ground 1: The Trial Chamber erred in imposing a sentence that was partially custodial and partially suspended

5. The Trial Chamber erred in law and usurped the exclusive authority of the President to grant post-conviction release when it effectively determined Jelena Rašić should be released after service of only a third of her 12-month sentence.<sup>1</sup> By suspending all but four months of that term, the Trial Chamber acted *ultra vires* by effectively ordering Rašić's release from imprisonment.

6. Under Article 28 of the Statute and Rule 124 of the Rules, only the President can grant the post-conviction remedies of pardon or commutation of sentence. In *Stakić*,<sup>2</sup> the Appeals Chamber confirmed this exclusive authority when it held that the Trial Chamber acted *ultra vires* by vesting the courts of the Host State with the power to suspend a prison sentence. The Appeals Chamber held that, by "effectively remove[ing] the power from the President of the Tribunal to make the final determination regarding sentence"<sup>3</sup> the Trial Chamber erred.

7. The provisions granting the President the power to release convicted detainees requires him to follow a defined procedure of consultation and deliberation to ensure he is fully informed before any release decision is made. The President must consult "with the judges"<sup>4</sup> and "the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal"<sup>5</sup> before he decides whether to grant a pardon or commutation. Further, the President must consider specific factors, including the gravity of the crime and any demonstration of rehabilitation.<sup>6</sup> Under the Practice Direction<sup>7</sup> and the case-law of the Tribunal, only the President can

<sup>1</sup> Judgement, paras.17, 31, 36.

<sup>2</sup> *Stakić* AJ, paras.392-393.

<sup>3</sup> *Stakić* AJ, para.392.

<sup>4</sup> Art.28. of the Statute.

<sup>5</sup> Rule 124 of the Rules.

<sup>6</sup> Rule 125 of the Rules.

<sup>7</sup> Practice Direction.

determine whether a convicted person may be released early.<sup>8</sup> This decision is informed by the practice of the enforcing State and any reports and observations on the conditions of detention and the psychological condition of the accused.<sup>9</sup>

8. Under the Statute and the Rules, the authority of a sentencing Chamber is limited to imposing a fixed term of imprisonment,<sup>10</sup> restitution<sup>11</sup> and/or, in the case of contempt, a fine of up to 100,000 euros.<sup>12</sup> Though one sentencing Chamber has previously suspended a sentence in its entirety,<sup>13</sup> the rules grant only the President the power to free a detainee once a term of imprisonment is imposed.

**B. Sub-Ground 2: The Trial Chamber erred in suspending Rašić's sentence based on mitigation factors it had rejected**

9. Having rejected Rašić's health as mitigatory, the Trial Chamber erred in relying on it when suspending part of the term of imprisonment it had imposed.<sup>14</sup> Suspension of a prison sentence is a rare and exceptional measure granted only once before at this Tribunal, and only then where the medical condition of the accused was so serious that it prevented the accused from serving *any* custodial term.<sup>15</sup> The Trial Chamber properly rejected the argument that Rašić's case was one of those "exceptional" or "rare" cases in which the health concerns of the accused could mitigate the sentence.<sup>16</sup> By requiring her to serve four months' imprisonment, it effectively found that Rašić was capable of serving a custodial term beyond that which she had already served.<sup>17</sup> Having done so, the Trial Chamber accepted that Rašić's circumstances were not so serious that it would be harmful to continue to detain her, thus wholly undermining the basis for suspension.

<sup>8</sup> *Martinović* Early Release Decision, para.8 ("As a preliminary matter, I note that although Martinović requests the 'commutation' of his sentence, he does not ask for a reduction in his prison term but rather to be released from prison. I will therefore treat Martinović's request as a request for early release.").

<sup>9</sup> See Practice Direction.

<sup>10</sup> Art.24 of the Statute, Rule 101 of the Rules.

<sup>11</sup> Art.25 of the Statute, Rule 105 of the Rules.

<sup>12</sup> Rules 77(E) and 77(G) of the Rules.

<sup>13</sup> See below para.9.

<sup>14</sup> Judgement, paras.30, 31, 36.

<sup>15</sup> *Bulatović* TJ, para.18.

<sup>16</sup> Judgement, para.30.

<sup>17</sup> Judgement, para.31.

10. The Trial Chamber erred when suspending part of the sentence as either the circumstances justify suspension of the whole sentence, or they do not. Once any part of a prison sentence is required to be served immediately, the justification for suspension of any part of it ceases.

11. Further, the Trial Chamber cited “difficult circumstances”<sup>18</sup> as another reason for suspension, yet by imposing a period of immediate imprisonment it must have been satisfied that those conditions were not so difficult as to prevent her continued incarceration. This has the illogical effect of finding that Rašić’s circumstances make imprisonment overly burdensome on her, yet she should be imprisoned anyway.

12. In addition, partial suspension of the sentence was neither argued for nor briefed by the parties.

1. The Trial Chamber properly rejected as mitigation the factors it later relied upon for suspension.

13. The Trial Chamber properly rejected the argument that Rašić’s health condition could be taken into consideration as mitigation.<sup>19</sup>

14. On the basis of the information before it, the Trial Chamber correctly found that Rašić’s health condition could not constitute a mitigating factor. The Trial Chamber was aware of the case-law set out in the *Babić* Appeals Chamber Judgement,<sup>20</sup> and the references therein, yet it misconstrued this jurisprudence and stated that it could take her health into account in the enforcement of the sentence. Thereby it impermissibly mitigated Rašić’s 12-month sentence by two-thirds based on “the accused’s perception of her detention and the practical impact upon her well-being”.<sup>21</sup>

15. By determining that her well-being was being affected by her “quasi-solitary confinement”, the Trial Chamber wrongly mitigated the sentence by crediting a lack of opportunity to associate with other women prisoners. The Trial Chamber’s characterization of the “quasi-solitary confinement” implies a right to associate with same-sex inmates. First, this factor is irrelevant to the suspension of the whole of the

<sup>18</sup> Judgement, para.31.

<sup>19</sup> Judgement, para.30. See Confidential Annex, para.1.

<sup>20</sup> *Babić* SAJ, para.43

remaining term of imprisonment as the lack of opportunity to associate with same-sex inmates is merely temporary. The UNDU is not considered to be permanent. Once a State is identified to take a convicted prisoner, he/she will be transferred.<sup>22</sup> To allow this temporary factor to be considered as mitigating would be to afford to a prisoner a reduction in the severity of a sentence simply because, in the period pending transfer, that prisoner had no opportunity to associate with other prisoners of the same gender.

16. Second, the information on the record does not indicate her conditions of confinement are truly solitary or so “difficult” as to warrant the imposition of a suspended sentence. A discussion of the specific medical conditions and conditions of detention is contained in the Confidential Annex.<sup>23</sup>

17. Rašić’s health condition was wrongly used to significantly mitigate her sentence by causing two thirds of it to be suspended.<sup>24</sup>

18. Further, these alleged health problems are not sufficiently serious as to warrant mitigating the sentence by suspending part of it. In *Prosecutor v. Milan Simić*, for example, the Trial Chamber declined to find that Simić’s health problems, which required “complete nursing care on a daily basis” and meant finding a prison authority to accommodate his use of a wheelchair, justified any reduction in his sentence.<sup>25</sup> Rather, the Trial Chamber held, these were matters to be dealt with by the prison authorities in executing the sentence,<sup>26</sup> and stated “that the prison facility to which Milan Simić will eventually be assigned should, as far as possible, be in a position to accommodate his medical needs”. However, it declined to adjust his sentence because of his health condition,<sup>27</sup> recognizing that matters pertaining to the execution of sentence are to be dealt with by the prison authorities.

19. Unlike the Chamber in *Simić*, the Trial Chamber here concerned itself directly with matters related to the execution of Rašić’s sentence. As *Simić* illustrates, the

---

<sup>21</sup> Judgement, para.31 (emphasis added).

<sup>22</sup> Art.27 of the Statute.

<sup>23</sup> See Confidential Annex, paras.2-4.

<sup>24</sup> See the definition of “mitigating circumstances” Black’s Law Dictionary, Pocket Edition, 1996, p. 98 (“A set of facts that do not justify or excuse an act or offence, but may reduce the degree of moral culpability and thereby reduce the damages in a civil case or the penalty in a criminal case.”).

<sup>25</sup> *M.Simić* SJ, para.100.

<sup>26</sup> *M.Simić* SJ, para.100.

authority of the sentencing Chamber ends when the accused is sentenced. Issues concerning the “execution of the sentence”, such as those pertaining to the conditions of detention, are left to the prison authorities, the Registry and the President<sup>28</sup> as appropriate, and cannot be mitigatory.<sup>29</sup> These issues include what the Trial Chamber called the “difficult circumstances that would be engendered by Jelena Rašić being the only female detainee in the UNDU and the quasi-solitary confinement regime that would follow.”<sup>30</sup> In any event, the Trial Chamber’s characterisation of these issues as “difficult” and “quasi-solitary” is unsupported by the information before it.<sup>31</sup>

2. The Trial Chamber took out of context the Prosecution’s arguments regarding execution of sentence

20. The Trial Chamber appears, wrongly, to have understood the Prosecution submissions on execution of sentence<sup>32</sup> to indicate that factors which cannot be mitigatory can be used *by the Trial Chamber* to alter the length and type sentence. The plain contextual reading of *Simić* and *Babić*,<sup>33</sup> referred to by the Prosecution, shows that these factors are not available to the Trial Chamber to use to reduce or alter the sentence. Unless they are mitigatory, they cannot be used in this way. The Prosecution considers that execution of sentence is a matter for the prison authorities, the Registry and the President, not the sentencing Chamber.

**C. Sub-Ground 3: The Trial Chamber erred in relying on *ex parte* medical reports as a basis for suspending Rašić’s sentence**

21. The Trial Chamber erred in law in relying on *ex parte* reports of Jelena Rašić’s medical condition to “form part of the judicial basis of Jelena Rašić’s sentence.”<sup>34</sup> Though the Trial Chamber noted in its Judgement that “it is in the interests of justice that the medical reports be provided to the Prosecution, which, as a party to this case,

---

<sup>27</sup> *M.Simić* SJ, para.100.

<sup>28</sup> See Art.28 of the Statute; *M.Simić* SJ.

<sup>29</sup> Cf. *Erdemović* 1996 SJ, paras.75, 111, (overturned on other grounds, *Erdemović* AJ).  
<sup>30</sup> Judgement, para.31.

<sup>31</sup> It should be noted that this factor was not argued by the Defence. It only arose in the last moments of the hearing based on a comment from the Chamber. See Plea Hearing and Mitigation Hearing, 31 January 2012, T.64-65.

<sup>32</sup> Judgement, para.29.

<sup>33</sup> See Plea and Mitigation Hearing, 31 January 2012, T.59.

<sup>34</sup> Judgement, para.34.



has a right to access them”,<sup>35</sup> the reports were not available to the Prosecution until 6 March, five weeks after the parties made their sentencing submissions<sup>36</sup> and nearly a month after the delivery of the oral judgement.<sup>37</sup> The Prosecution was thus deprived of the opportunity to examine these reports and to make submissions relating to them before the Trial Chamber had determined the sentence.

22. This error was further exacerbated by the Trial Chamber imposing a partially suspended prison sentence without giving the Prosecution an opportunity to comment on the legality of such a sentence. Had the Prosecution been given the opportunity to make submissions on these reports, it would have pointed out that nothing in the medical reports justifies suspending the sentence in whole or in part.

23. To the extent these reports provide any basis for the Trial Chamber’s finding that Rašić was detained in a regime of “quasi-solitary confinement”, the Prosecution would have argued that these materials were not sufficient to support a finding that she is being detained in “quasi-solitary confinement.”<sup>38</sup>

24. Having denied the Prosecution the opportunity to address these issues, and thus having made an error of law invalidating the decision, the Prosecution invites the Appeals Chamber to re-sentence the Accused.

---

<sup>35</sup> Judgement, para.34.

<sup>36</sup> Registrar’s Submission of Medical Reports (confidential); Judgement, para.34.

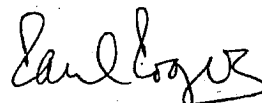
<sup>37</sup> Sentencing Hearing, 7 February 2012.

<sup>38</sup> See Confidential Annex, para.5.

### III. CONCLUSION

25. The Trial Chamber's errors each invalidate its decision to partially suspend Rašić's sentence. The Appeals Chamber should quash the partial suspension of Rašić's sentence and impose an immediate term of 12-months imprisonment.

Word count (including Confidential Annex): 3,002



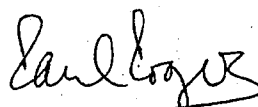
---

Paul Rogers  
Senior Appeals Counsel

Dated this 16<sup>th</sup> day of March 2012  
At The Hague, The Netherlands

## **RULE 111 DECLARATION**

The Prosecutor will exercise due diligence to comply with his continuing Rule 68 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to the Accused all material under Rule 68(i) which has come into his actual knowledge and, in addition, has made available to him collections of relevant material held by the Prosecutor.



~~Paul Rogers~~  
Senior Appeals Counsel

Dated this 16<sup>th</sup> day of March 2012  
At The Hague, The Netherlands

**PROSECUTION'S GLOSSARY**

**Pleadings, Orders, Decisions etc. from Prosecutor v. Jelena Rašić, Case No. IT-98-32/1-R77.2**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
Trial Chamber	Trial Chamber in <i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2
Judgement	<i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2, T.Ch., Written Reasons for Oral Sentencing Judgement, 6 March 2012
Defence Mitigation Submission	<i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2, T.Ch., Defence Mitigation Submission, 27 January 2012 (confidential)
Registrar's Submission of Medical Reports	<i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2, T.Ch., Registrar's Submission of Medical Reports, 6 February 2012 (confidential and <i>ex parte</i> )
Provisional Release Modification Motion	<i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2, T.Ch., Motion for Modification of the Terms of Jelena Rašić's Provisional Release, 2 June 2011
Provisional Release Motion	<i>Prosecutor v. Jelena Rašić</i> , Case No. IT-98-32/1-R77.2, T.Ch., Urgent Motion for Provisional Release, 26 October 2010

**ICTY authority**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
<i>Babić</i> SAJ	<i>Prosecutor v. Milan Babić</i> , Case No. IT-03-72-A, App.Ch., Judgement on Sentencing Appeal, 18 July 2005
<i>Bulatović</i> TJ	<i>Prosecutor v. Slobodan Milošević</i> , Contempt Proceedings Against Kosta Bulatović, Case No. IT-02-54-R77.4, T.Ch., Decision on Contempt of the Tribunal, 13 May 2005
<i>Erdemović</i> 1996 SJ	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-T, T.Ch., Sentencing Judgement, 29 November 1996
<i>Erdemović</i> AJ	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-A, App.Ch., Judgement, 7 October 1997
<i>M.Simić</i> SJ	<i>Prosecutor v. Milan Simić</i> , Case No. IT-95-9/2-S, T.Ch., Sentencing Judgement, 17 October 2002
<i>Martinović</i> Early Release Decision	<i>Prosecutor v. Vinko Martinović</i> , Case No. IT-98-34-ES, President, Decision of the President on Early Release of Vinko Martinović, 16 December 2011
Practice Direction	Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.3, 16 September 2010
<i>Stakić</i> AJ	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-A, App.Ch., Judgement, 22 March 2006

**Documents in the Record**

<b>Abbreviation used in Prosecution Appeal</b>	<b>Full citation</b>
Kennedy Memorandum	Internal Memorandum from Mr. David Kennedy, Commanding Officer, UNDU, to Mr. Ken Roberts, Deputy Registrar, 22 November 2010, attached to Defence Mitigation Submission, 27 January 2012, Exhibit #11 (Registry pages 2430-2428).

Abbreviation used in Prosecution Appeal	Full citation
Falke Memorandum	Memorandum from Dr. Paulus Falke, Medical Officer UNDU-ICTY, to David Kennedy, CO UNDU-ICTY, dated 22 November 2010, attached to Defence Mitigation Submission, 27 January 2012, Exhibit #11 (Registry page 2425).
Judge Robinson letter	Letter from Patrick Robinson, President of the ICTY, to Jelena Rašić, dated 12 January 2011, attached to Defence Mitigation Submission, 27 January 2012, Exhibit #11 (Registry page 2421-2417).
Petrović Report of 18 November 2010	Report of Dr. Vera Petrović, Neuropsychiatrist, forensic psychologist, dated 18 November 2010, attached to Defence Mitigation Submission, 27 January 2012, Exhibit #11 (Registry page 2424)
Petrović Report of 26 January 2012	Report of Dr. Vera Petrović, dated 26 January 2012, Annex II to Registrar's Submission of Medical Reports, (Registry page 2542)
Petrović Report of 1 February 2012	Report of Dr. Vera Petrović, dated 1 February 2012, Annex II to Registrar's Submission of Medical Reports, (Registry page 2540)

**Other Abbreviations**

Abbreviation used in Prosecution Appeal	Definition
Art.	Article
para.	paragraph
paras.	paragraphs
p.	page
Rules	Rules of Procedure and Evidence
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
T.	Transcript