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APPEALS CHAMBER

CHAMBRE D'APPEL

The Hague, 18 July 2005

JP/MOW/989e

APPEALS JUDGEMENT IN THE CASE THE PROSECUTOR v. MILAN BABIĆ

- **APPEALS CHAMBER ALLOWS IN PART SIXTH GROUND OF APPEAL**
 - **AFFIRMS SENTENCE OF 13 YEARS' IMPRISONMENT**

Please find below a summary of the Judgement delivered by the Appeals Chamber, composed of Judge Mumba (presiding), Judge Pocar, Judge Shahabuddeen, Judge Güney and Judge Schomburg, as read out by the Presiding Judge.

SUMMARY

In accordance with the Scheduling Order issued on 30 June 2005, today the Appeals Chamber will deliver its Judgement on the Sentencing Appeal in this case.

Milan Babić has appealed against the Sentencing Judgement issued by Trial Chamber I of this Tribunal on 29 June 2004. This case concerns events which took place in Croatia, where the Appellant participated in a joint criminal enterprise whose purpose was the permanent forcible removal of the majority of the Croat and other non-Serb population from approximately one-third of the territory of Croatia, in order to make it part of a new Serb-dominated state through the commission of crimes against humanity and violations of the laws or customs of war. The joint criminal enterprise came into existence from 1 August 1991 and continued until at least June 1992; the Appellant participated in it until 15 February 1992.

On 12 January 2004, the Appellant and the Prosecution filed a plea agreement and a statement of facts in which the Appellant agreed to plead guilty to Count 1 of the Indictment, that is, persecutions on political, racial, and religious grounds as a crime against humanity pursuant to Article 5(h) of the Statute, as an aider and abettor of a joint criminal enterprise.

Having examined the plea agreement and the statement of facts, the Trial Chamber expressed doubts regarding the characterisation of the Appellant's participation in the crimes charged as an aider and abettor. The parties subsequently met and agreed to file a new plea agreement in which the Appellant's participation in the crimes charged in the Indictment was qualified as co-perpetratorship. The Prosecution recommended a sentence of no more than 11 years of imprisonment. On 27 January 2004, the Appellant pled guilty to Count 1 of the Indictment for his participation in the joint criminal enterprise as a co-perpetrator. The following day, the Trial Chamber accepted his plea and found the appellant guilty on Count 1 of the Indictment. On 29 June 2004, the Trial Chamber sentenced the Appellant to 13 years' imprisonment. The Appellant appealed his sentence on 3 September 2004 and the Appeal Hearing took place on 25 April 2005.

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

I will not elaborate on the standard of review on appeal and the relevant provisions on sentencing since I have already addressed that during my opening statement at the Appeal Hearing.

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In his Notice of Appeal the Appellant initially raised twelve grounds of appeal; he subsequently withdrew his twelfth ground of appeal. I will briefly address the remaining eleven grounds in turn, in accordance with the subject-matter and not necessarily in sequence.

Under his first Ground of Appeal, the Appellant argues that he was coerced by the Trial Chamber to enter a plea of guilty as co-perpetrator in the crime charged in the Indictment. He contends that the Trial Chamber erred in law and in fact and abused its discretion: first, in declining to accept the first plea agreement to which he wanted to plead guilty as an aider or abettor; and second, in refusing to allow him, in the alternative, to enter what he calls “an open plea” to the crime of persecution so that the Trial Chamber would reserve its decision as to his state of mind until after receiving the submissions of the parties at the Sentencing Hearing.

Concerning the Appellant’s first claim, it is clear from the record of the proceedings that he was fully aware that he had a choice to submit the original plea agreement for the consideration of the Trial Chamber and that the Trial Chamber did not force the parties to enter a new plea agreement. The parties themselves decided to file a further plea agreement to which the Appellant pled guilty. When expressing doubts as to the legal qualification of the Appellant’s responsibility, the Trial Chamber acted within the confines of Rule 62*bis* of the Rules to assess the factual basis of the guilty plea. It entered its finding of guilt on 28 January 2004 because it was satisfied that the plea was voluntary, informed, unequivocal, and supported by a factual basis. Regarding the Appellant’s second claim, the Appeals Chamber notes that, as correctly pointed out by the Prosecution, there is no precedent for such an “open plea” before this Tribunal, and it is difficult to see how the Trial Chamber could have accepted an “open plea” in light of Rule 62*bis* of the Rules. The Appellant has not shown that, because his request to file an “open plea” was denied, the plea he entered was not voluntary or was invalid. He specifically agreed in the Plea Agreement to plead guilty to Count 1, and the Trial Chamber fulfilled its duty of ensuring that the Plea Agreement was entered into freely and voluntarily. Accordingly, the Appellant’s first ground of appeal is dismissed.

Under the second ground of appeal, the Appellant contends that the Trial Chamber erred in law and in fact by failing to issue a reasoned opinion, and points out two alleged errors.

First, the Appellant argues that, throughout the Sentencing Judgement, reference is made to “claims”, “statements”, “assertions” and “matters” maintained by both the Appellant and the Prosecution and that the Trial Chamber failed to make any finding as to whether it accepted those facts as true. The Appeals Chamber finds that a Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts; the reference to such facts is by itself indicative that it accepts those facts as true. In the present case, these undisputed facts were referred to in the Sentencing Judgement and there is no indication therein that the Trial Chamber disputed their veracity.

Second, the Appellant argues that the Sentencing Judgement contains no reasoned explanation as to why a sentence of thirteen years would do justice, while one consistent with the recommendation of the Prosecution, of less than eleven years, would not. He then compares his case with the case of Biljana Plavšić.

As to whether the Trial Chamber erred by failing to explain why the sentence recommended by the parties was not appropriate, the Appeals Chamber recalls that Trial Chambers shall not be bound by any agreement by the parties but that, nevertheless, in the specific context of a sentencing judgement following a plea agreement, Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure. In the present case, the Trial Chamber found that, I quote, “the recommendation made by the Prosecution of a sentence of imprisonment of no more than 11 years would not do justice in view of the applicable sentencing principles and the gravity of Babić’s crime taking account of the aggravating and mitigating circumstances”. This shows that the Trial Chamber gave due consideration to the recommendation made by the Prosecution and did explain why it could not follow it.

With regard to whether the Trial Chamber erred in not imposing a sentence similar to that of Biljana Plavšić, the Appeals Chamber recalls that the precedential effect of previous sentences rendered before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda is not only very limited but also not necessarily a proper avenue to challenge a Trial Chamber’s finding in exercising its discretion to impose a sentence. Comparisons

with other cases as an attempt to persuade the Appeals Chamber to either increase or reduce the sentence are of limited assistance because the differences are often more significant than the similarities and the mitigating and aggravating factors dictate different results. In this case, even assuming that the two cases were so similar as to be meaningfully comparable, the Appellant's sentence is not so out of reasonable proportion with Plavšić's sentence so as to suggest capriciousness or excessiveness. The Appeals Chamber will therefore not engage in a comparison between these two cases. The Appellant's second ground of appeal is dismissed.

Under the third ground of appeal, the Appellant contends that the Trial Chamber erred in law and in fact and abused its discretion in failing to properly consider and give appropriate weight to the evidence with respect to his alleged limited participation in the crime of persecution to which he pled guilty, and that his sentence should be accordingly reduced. The Appeals Chamber finds that the Trial Chamber was entitled to consider that the Appellant's role in providing support to the joint criminal enterprise was not as limited as the parties suggested and therefore the Appellant's third ground of appeal is dismissed.

The Appeals Chamber now turns to the Appellant's fourth, fifth, sixth, and tenth grounds of appeal, concerned with the Trial Chamber's assessment of the mitigating circumstances.

Under the fourth ground of appeal, the Appellant argues that, while the Trial Chamber acknowledged that by agreeing to substantially cooperate with the Prosecution he incurred substantial security risks for himself and his loved ones, it erred in law and in fact and abused its discretion by considering this only as a "mitigating circumstance" instead of as a "substantial mitigating circumstance". The Appeals Chamber finds that this argument is without merit, as the Trial Chamber in fact expressly stated that it gave "substantial mitigating weight" to this factor. As a result, the Appellant's fourth ground of appeal is dismissed.

Under the fifth ground of appeal, the Appellant contends that the Trial Chamber erred in law and in fact and abused its discretion in finding that, in the absence of exceptional circumstances, the prior good character of a person does not as such count in mitigation. The Appeals Chamber notes that, while it is correct to say that good character has been recognised as a mitigating circumstance in most cases, this is not constant practice but instead varies with the circumstances of each case. Even when personal factors or circumstances - including prior good character - have been considered as mitigating circumstances, they have been given little weight in mitigation. The Appellant in the present case has not demonstrated an abuse of discretion and the Appeals Chamber finds that the Trial Chamber was perfectly entitled not to attach any weight to the Appellant's prior good character as a factor in mitigation. The Appellant's fifth ground of appeal is therefore dismissed.

Under the sixth ground of appeal, the Appellant argues that the Trial Chamber erred in law and fact and abused its discretion when it failed to accept his conduct subsequent to the crime as a mitigating circumstance. He submits that the Sentencing Judgement's discussion of his conduct subsequent to the commission of the crime for which he was convicted fails to mention that he tried to facilitate an attempt to bring an end to hostilities in conjunction with Peter Galbraith, United States Ambassador to Croatia, along the lines of the Z-4 peace plan, and that he tried to alleviate problems in the prisons by employing professional staff.

The Appeals Chamber considers that the Trial Chamber incorrectly interpreted the *Plavšić* Trial Chamber's assessment of Biljana Plavšić's post-conflict conduct, in that it erred in finding that the Appellant's conduct subsequent to the crime of persecution could not be considered in mitigation solely because it did not include the alleviation of the suffering of victims. Further, evidence of the Appellant's conduct subsequent to the commission of the crime, relevant to his contribution to the advancement of peace, was available to the Trial Chamber. The Appeals Chamber is satisfied that the Appellant attempted to further peace after the commission of the crime of persecution and finds that the Trial Chamber erred in law in categorically refusing to take these attempts to further peace into account as a mitigating factor on the basis that they did not directly alleviate the suffering of the victims. Nevertheless, in the opinion of the Appeals Chamber, such an error does not automatically lead to a reduction of sentence and, in light of the gravity of the crime for which the Appellant was convicted and the circumstances of the case, the Appeals Chamber finds, by majority, that significant weight need not be given to the Appellant's attempts to further peace.

With regard to the Appellant's argument that the Trial Chamber should have taken into account that, during the period covered by the Indictment, he attempted to alleviate problems within the prisons by appointing professional prison staff, the Appeals Chamber notes that, as acknowledged by the Appellant at the Appeal Hearing, this argument was raised for the first time on appeal. The Trial Chamber did not therefore commit an error in not considering this factor in its assessment of the mitigating factors. There is no evidence on the basis of which the Appeals Chamber can consider this submission. In addition, the Appeals Chamber recalls that an appellant cannot expect the Appeals Chamber to consider on appeal evidence of mitigating circumstances which was available but not introduced in the first instance.

Under the tenth ground of appeal, the Appellant alleges that the Trial Chamber erred in law and in fact and abused its discretion by failing to afford the appropriate weight to the totality of those mitigating circumstances which it found did exist, namely his admission of guilt, his substantial cooperation, his expression of remorse, his voluntary surrender, and his personal and family circumstances. The Appeals Chamber did not address the issue raised by the Appellant as to whether taken in amalgamation the mitigating factors referred to by the Appellant were properly weighed by the Trial Chamber, as an appellant can only succeed in challenging a Trial Chamber's decision regarding the weight afforded to a mitigating circumstance by demonstrating that the Trial Chamber committed a discernible error concerning a specific factor. Rather, the Appeals Chamber addressed the alleged errors with regard to each of these mitigating circumstances in turn, and found that the Appellant did not show that the Trial Chamber committed a discernible error in the exercise of its discretion in considering the mitigating circumstances in question.

Under the seventh ground of appeal, the Appellant submits that the Trial Chamber erred in law and in fact and abused its discretion in finding that he held a leadership position in the joint criminal enterprise and in considering that as an aggravating factor, thereby imposing a more severe sentence. The Appeals Chamber considers that, contrary to what the Appellant argues, the Trial Chamber did not hold that his position of leadership in the joint criminal enterprise was an aggravating factor as such, but rather found that, I quote, "the fact that Babić held and remained in high political positions counts as an aggravating circumstance". The Trial Chamber thoroughly considered the Appellant's behaviour as a regional political leader and stressed that it considered his leadership position as an aggravating circumstance because he used his authority to enlist resources of the Serbian Autonomous District Krajina to further the joint criminal enterprise, made inflammatory speeches during public events and in the media which prepared the ground for the Serb population to accept that their goals could be achieved through acts of persecution, and amplified the consequences of the campaign of persecutions by allowing it to continue. The Trial Chamber did not consider the Appellant's position of authority alone; it considered that position coupled with the manner in which his authority was exercised. The Appellant's seventh ground of appeal is dismissed.

Under the eighth ground of appeal, the Appellant claimed in his Notice of Appeal that the Trial Chamber erred in law and in fact and abused its discretion in that it grossly misconstrued the scope of his role and participation in the joint criminal enterprise. Nevertheless, in his Appellant's Brief, he merely reiterated the arguments he presented under his third and seventh grounds of appeal. The only distinct argument, which the Appeals Chamber addresses for purposes of clarification, is the existence of a purported "policy" in this International Tribunal which would render plea agreement meaningless in that it would enable Trial Chambers, amongst other things, to disregard the sentencing recommendation made by the Prosecution without giving any reason for a departure from it, and to disregard the facts as presented in a factual statement without providing any reasoning as to why such facts are rejected.

The notion that such an alleged "policy" exists in this International Tribunal is unfounded and the Appellant does not substantiate any of its alleged elements. In cases of guilty pleas, Trial Chambers must, pursuant to Rule 62*bis*(iv), determine whether "there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case". In the case of a plea agreement, a Trial Chamber enters its finding of guilt on the basis of the facts agreed upon by the parties, as set out in the indictment and in the statement of facts. It cannot therefore be said that a Trial Chamber can at the sentencing stage simply disregard those facts, which are the basis of the finding of guilt it enters. Furthermore, although a Trial Chamber does have the discretionary power to impose a sentence higher than the sentence recommended by the parties pursuant to Rule 62*ter*(B) of the Rules, which expressly states that Trial Chambers shall not be bound by any

agreement between the parties, it also has a duty to take into account the “specific context” of a plea agreement - in which the accused admits his guilt - and to give “due consideration” to the recommendation of the parties. A Trial Chamber cannot simply, as alleged by the Appellant, ignore such recommendation and depart from it without providing reasons for such departure.

In the present case, however, due consideration was given to the Appellant’s admission of guilt and, as the Appeals Chamber has already found when assessing the second ground of appeal, the Trial Chamber did not ignore the facts contained in the Factual Statement and did not fail to give a reasoned opinion for its departure from the recommendation of the parties as to sentence. Therefore, the Appellant’s arguments pertaining to this alleged “policy issue” are unfounded, and the Appellant’s eighth ground of appeal is dismissed.

Under the ninth ground of appeal, the Appellant argues that the Trial Chamber erred in law and in fact and abused its discretion by basing its decision upon events and facts which occurred and arose outside of the temporal scope covered by Count 1 of the Indictment. He contends that the Trial Chamber misconstrued his role as being responsible for persecutions on one-third of Croatia’s territory. The Appeals Chamber finds that the temporal scope of the crime and the objective of the joint criminal enterprise were properly referred to by the Trial Chamber and that the Appellant’s arguments are based on a misunderstanding of the Trial Chamber’s findings. The Trial Chamber never implied, as the Appellant submits, that the territory of the Serbian Autonomous District Krajina covered one-third of the Republic of Croatia. The Appeals Chamber therefore finds that the Appellant’s arguments in this respect are without merit and the Appellant’s ninth ground of appeal is dismissed.

Under the eleventh ground of appeal, the Appellant mainly contends that the Trial Chamber improperly based his sentence in part on the conclusion that he did not recognise at all times the significance of his role with respect to the armed conflict in Krajina in 1991-1992. He argues that the Trial Chamber erred in law and in fact and abused its discretion in imposing an impermissible and undefined burden of proof upon him to, I quote, “convince it that he had ‘at all times, recognised the full significance of the role he played in Croatia in that period’”.

The Appeals Chamber does not find that the Trial Chamber imposed an impermissible and undefined burden of proof upon the Appellant, nor that it erred in considering a failure to convince the Trial Chamber as a reason in imposing sentence. Had the Trial Chamber intended to make a finding to the effect that the Appellant did not fully recognise that he was indeed a co-perpetrator in the joint criminal enterprise charged, it would not have been able to accept the guilty plea pursuant to Rule 62*bis* of the Rules. In the Appeals Chamber’s view, the statement in question is related to the parties’ submissions concerning the fact that, due to the secondary nature of the Appellant’s role in the joint criminal enterprise, his participation in the crime was limited. Under the present ground of appeal, the Appellant in fact incorporates “by reference” the arguments he already put forward concerning the proposition that his role was more limited than the Trial Chamber found it to be. As the Appeals Chamber already found that the Appellant did not demonstrate a discernible error by the Trial Chamber in its assessment of his limited participation in the crime to which he pled guilty, there is no need to expound further on this aspect of the present ground of appeal. The Appellant does not put forward any new argument for the consideration of the Appeals Chamber. The Appellant’s eleventh ground of appeal is dismissed.

For the foregoing reasons, the Appeals Chamber, 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 25 April 2005; sitting in open session;

Allows unanimously, in part, the Appellant’s sixth ground of appeal in that it finds that: (1) the Trial Chamber erred in finding that the Appellant’s conduct subsequent to the crime of persecution could not be considered in mitigation solely because it did not include the alleviation of the suffering of victims; and (2) the Trial Chamber committed an error of law in not taking into account the Appellant’s attempts to further peace as a mitigating circumstance. Nevertheless, the Appeals Chamber finds by majority, Judge Mumba dissenting, that, on balance, this error does not have an impact upon the sentence;

Dismisses unanimously, each of the remaining grounds of appeal filed by the Appellant;

Affirms by majority, Judge Mumba dissenting, the sentence of 13 years' imprisonment as imposed by the Trial Chamber;

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 where his sentence will be served.

*The full text of the Judgement will be available in due course upon request at the Media Office and on the Tribunal's Internet site: www.un.org/icty.
Courtroom proceeding can also be followed on the Tribunal's website.*