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-03-72-A

Date: 18 July 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **18 July 2005**

PROSECUTOR

v.

MILAN BABIĆ

JUDGEMENT ON SENTENCING APPEAL

Counsel for the Prosecution:

Mr. Mark J. McKeon
Mr. Xavier Tracol
Ms. Kristina Carey

Counsel for the Appellant:

Mr. Peter Michael Müller
Mr. Robert Fogelnest

CONTENTS

I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seised of an appeal from the Sentencing Judgement rendered by Trial Chamber I on 29 June 2004 in the case of *Prosecutor v. Milan Babić,* Case No. IT-03-72-S ("Sentencing Judgement").

2. The events giving rise to this appeal took place in Croatia, where Milan Babić ("Appellant") participated in a joint criminal enterprise that came into existence from 1 August 1991 and continued until at least June 1992. The Appellant was convicted for having participated in the joint criminal enterprise until 15 February 1992.[1] The purpose of this joint criminal enterprise 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 referred to in Articles 3 and 5 of the Statute of the International Tribunal ("Statute"). These areas included those regions that were referred to by Serb authorities as the "Serbian Autonomous District/*Srpska Autonomna Oblast/*("SAO") Krajina", the "SAO Western Slavonia", the "SAO Slavonia, Baranja and Western Srem" (after 19 December 1991, the "SAO Krajina" became known as the Republic of Serbian Krajina/*Republika Srpska* Krajina ("RSK"); on 26 February 1992, the "SAO Western Slavonia" and the "SAO Slavonia, Baranja and Western Srem" joined the RSK), as well as the "Dubrovnik Republic/*Dubrovačka Republika*".[2]

3. 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 (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.[3] Count 1 of the Indictment refers to the campaign of persecutions which included:

> "[t]he extermination or murder of hundreds of Croat and other non-Serb civilians, including women and elderly persons.
>
> […] The prolonged and routine imprisonment and confinement of several hundred of Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA [Yugoslav Peoples' Army] barracks in Knin […].

[1] Sentencing Judgement, paras 14 and 16.
[2] Indictment, para. 5. The Indictment was filed on 6 November 2003 and confirmed on 17 November 2003 (Order for Review of Indictment). *See* also Sentencing Judgement, paras 16-17.
[3] Joint Motion for Consideration of Plea Agreement between Milan Babić and the Office of the Prosecutor Pursuant to Rule 62*ter,* 12 January 2004.

> […] The deportation or forcible transfer of thousands of Croat and other non-Serb civilians from the SAO Krajina/RSK.
>
> […] The deliberate destruction of homes, other public and private property, cultural institutions, historic monuments and sacred sites of the Croat and other non-Serb population."[4]

At the time relevant to the Indictment, the Appellant held the position of President of the Municipal Assembly in Knin. He was President of the Serbian National Council from 31 July 1990 onwards and was elected President of the Executive Council of the so-called "SAO Krajina" on 30 April 1991. Subsequently, on 29 May 1991, he became the Prime Minister/President of the government of the self-declared SAO Krajina. On 19 December 1991, the SAO Krajina proclaimed itself Republic of Serbian Krajina/*Republika Srpska Krajina* ("RSK") with the Appellant as President, a position he held until 15 February 1992.[5] The Trial Chamber examined the plea agreement and the statement of facts and "expressed doubts about the accuracy of the legal characterisation of the Appellant's acts in the plea agreement as an aider and abettor".[6] The parties further met and agreed to file a new plea agreement ("Plea Agreement"), in which the Appellant's participation in the crimes charged in the Indictment was qualified as co-perpetratorship.[7] A statement of facts ("Factual Statement") was filed with the Plea Agreement.[8] The Prosecution recommended a sentence of no more than 11 years of imprisonment.[9] 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.[10] On 28 January 2004, the Trial Chamber accepted his plea and entered its finding of guilt.[11] The Sentencing Hearing took place on 1 and 2 April 2004. On 29 June 2004, the Trial Chamber sentenced the Appellant to 13 years of imprisonment.[12]

4. On 3 September 2004, the Appellant filed his Notice of Appeal, identifying twelve grounds of appeal against the sentence imposed by the Trial Chamber.[13] On 15 November 2004, he filed his

[4] Indictment, para. 15 (emphasis in the original).
[5] *Ibid*., para. 3.
[6] Sentencing Judgement, para. 7.
[7] Amendment to the Joint Motion for Consideration of Plea Agreement between Milan Babić and the Office of the Prosecutor Pursuant to Rule 62*ter,* Annex A, 22 January 2004.
[8] Tab. 1 of the Plea Agreement.
[9] At the Appeal Hearing, the Prosecution suggested that – should the Appeals Chamber determine that the Trial Chamber committed an error of law as submitted by both parties in grounds three, five and six - the Appeals Chamber should impose a sentence of less than 11 years (AT. 37).
[10] Further Initial Appearance, 27 January 2004 ("Further Initial Appearance"), T. 54-55.
[11] Further Appearance, 28 January 2004 ("Further Appearance"), T. 61.
[12] Sentencing Judgement, para. 102.
[13] Notice of Appeal, 3 September 2004 ("Notice of Appeal"). On 16 July 2004, the Defence filed the Motion Pursuant to Rule 127 for Continuance of Time to File Notice of Appeal, seeking an extension of thirty days from the completion of the translation of the Sentencing Judgement into Bosnian/Croatian/Serbian ("BCS"). On 28 July 2004, the Pre-Appeal Judge granted the motion in part in that she ordered the Appellant to file his notice of appeal 17 days after the filing of the BCS translation of the Sentencing Judgement. The BCS translation of the Sentencing Judgement was filed on 18 August 2004.

Appellant's Brief in which he withdrew his twelfth ground of appeal.[14] The Prosecution filed its Respondent's Brief on 20 December 2004.[15] No brief in reply was filed by the Appellant. The Appeal Hearing took place on 25 April 2005.

[14] Appellant's Brief Pursuant to Rule 111, 15 November 2004, Confidential. A public redacted version was filed on 24 March 2005 ("Appellant's Brief").
[15] Prosecution Response to the Appellant's Brief Pursuant to Rule 111, Confidential. A public redacted version was filed on 24 March 2005 ("Respondent's Brief").

II. STANDARD OF REVIEW

5. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules of Procedure and Evidence ("Rules"). Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for sentencing. According to these guidelines, a Trial Chamber must take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct and the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.[16]

6. Appeals against sentence, as appeals from a judgement of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*.[17] This is clear from the terms of Article 25 of the Statute which provides that the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice.[18] These criteria have been frequently referred to and are well established in the jurisprudence of the Appeals Chamber of the International Tribunal[19] and the International Criminal Tribunal for Rwanda ("ICTR").[20]

7. Trial Chambers are vested with broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[21] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[22] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[23]

---

[16] *Čelebići* Appeal Judgement, paras 429 and 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv).
[17] *Kupreškić et al.* Appeal Judgement, para. 408.
[18] *Mucić et al.* Judgement on Sentence Appeal, para. 11. *See* also *Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8.
[19] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, paras 434-435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras 35-48; *Vasiljević* Appeal Judgement, paras 4-12; *Kvočka et al.* Appeal Judgement, para.14.
[20] *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.
[21] *Čelebići* Appeal Judgement, para. 717.
[22] *Krnojelac* Appeal Judgement, para. 11.
[23] *Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Kupreškić et al.* Appeal Judgement, para. 408; *Jelisić* Appeal Judgement, para. 99; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680.

III. FIRST GROUND OF APPEAL: THE VALIDITY OF THE PLEA AGREEMENT

8. The Appellant alleges that he was essentially "coerced" by the Trial Chamber to enter a plea of guilty as co-perpetrator in the crime charged in the Indictment.[24] More specifically, he contends that the Trial Chamber erred in both law and fact and abused its discretion: (1) in declining to accept the first plea agreement, under which he would have pled guilty as an aider or abettor; and (2) in refusing to allow him, in the alternative, to enter 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 and conducting the Sentencing Hearing.[25] The Prosecution disagrees with the Appellant with respect to both propositions.[26] The Appeals Chamber will address these allegations in turn.

9. 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 as an aider and abettor of a joint criminal enterprise. The Trial Chamber examined the plea agreement and the statement of facts and "expressed doubts about the accuracy of the legal characterisation of the Appellant's acts in the plea agreement as an aider and abettor".[27] As a consequence, the parties further met and agreed to file a new plea agreement in which the Appellant's participation in the crime charged in the Indictment was qualified as co-perpetratorship. At the Further Initial Appearance, the Presiding Judge made clear to the Appellant that his plea had to be "voluntary" – such that "no threats were made to [him] to induce [him] to enter this guilty plea"[28] – and informed. In that respect, the Presiding Judge specifically asked the Appellant whether he "fully understood what [his] commitments [were]", to which he replied that he did.[29] The Presiding Judge further asked the Appellant whether he was also aware of what led the parties to enter into the new plea agreement and of the differences between pleading guilty as an aider and abettor and as a co-perpetrator, to which he also replied that he did.[30] On 28 January 2004, satisfied that the plea was,

[24] Appellant's Brief, para. 41.
[25] *Ibid.*
[26] Respondent's Brief, para. 3.2. AT. 41-42.
[27] Sentencing Judgement, para. 7. At the Further Initial Appearance, the Presiding Judge provided an explanation as to why the Trial Chamber had some doubts about the legal qualification of the Appellant's liability with respect to the crime he pled guilty to. He explained that the Trial Chamber was "of a provisional view that this legal qualification might be inconsistent with the facts" (T. 29).
[28] Further Initial Appearance, T. 44.
[29] *Ibid.*, T. 44-45.
[30] *Ibid.*, T. 45.

pursuant to Rule 62*bis* of the Rules, voluntary, informed, unequivocal, and supported by a sufficient factual basis, the Trial Chamber entered a finding of guilt on Count 1 of the Indictment.[31]

10. On the basis of the above, the Appeals Chamber finds that, contrary to what the Appellant argues, the Trial Chamber did not decline to accept the first plea agreement.[32] Rather, the Trial Chamber, relying upon the factual basis provided by the parties, only expressed its "provisional view" that the legal qualification of the Appellant's liability as aiding and abetting "might be inconsistent with the facts".[33] As correctly submitted by the Prosecution, it is "clear from the record of the proceedings that counsel for the Appellant was fully aware that the Appellant had a choice to submit the original plea agreement for the consideration of the Trial Chamber".[34] The Trial Chamber did not force the parties to enter a new plea agreement. The parties themselves decided to file a further plea agreement, pursuant to which the Appellant pled guilty as a co-perpetrator. 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 a guilty plea.[35]

11. With regard to the Appellant's allegation that he was essentially "coerced"[36] by the Trial Chamber to enter a plea of guilty as co-perpetrator to Count 1 of the Indictment, the Appeals Chamber notes that: (1) the Plea Agreement itself states that "Milan Babić acknowledges that he has entered this Plea Agreement freely and voluntarily, [and] that no threats were made to induce him to enter this guilty plea";[37] and (2) the Appellant himself confirmed this during the Further Initial Appearance.[38] The Appeals Chamber finds that the Trial Chamber correctly fulfilled its obligations pursuant to Rule 62*bis* of the Rules and that therefore the plea entered by the Appellant on 28 January 2004 is valid.

12. The Appellant also argues that the Trial Chamber should have allowed him to enter an "open plea" to the crime of persecution (Count 1), which would have permitted the Trial Chamber to reserve its decision as to his degree of culpability until after hearing the parties' submissions and conducting the Sentencing Hearing.[39] The Appeals Chamber does not agree with that contention. As

---

[31] Further Appearance, T. 61.
[32] Appellant's Brief, para. 41.
[33] Further Initial Appearance, T. 29.
[34] Respondent's Brief, para. 3.3.
[35] Rule 62*bis* (Guilty Pleas) reads : "If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (i) the guilty plea has been made voluntarily; (ii) the guilty plea is informed; (iii) the guilty plea is not equivocal; and (iv) 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, the Trial Chamber *may enter* a finding of guilt and instruct the Registrar to set a date for the sentencing hearing." (emphasis added).
[36] Appellant's Brief, para. 41.
[37] Plea Agreement, para. 18.
[38] Further Initial Appearance, T. 44.
[39] Appellant's Brief, para. 41.

the Prosecution observes, "there is no precedent for such an 'open plea' at this Tribunal".[40] Moreover, it is hard to see how the Trial Chamber could have accepted such a plea consistently with Rule 62*bis* of the Rules, which requires as the Prosecution observes, that a plea be unequivocal[41] and made with full knowledge of its "nature and consequences". [42] Finally, the Appellant has not shown that, because his request to file an "open plea" was denied, the plea that he did enter was not voluntary or was otherwise invalid. The Appellant specifically agreed in the Plea Agreement to plead guilty to Count 1 "because he is in fact guilty as a co-perpetrator"[43] and, as noted above, the Trial Chamber satisfied its responsibility to ensure that the Plea Agreement was entered freely and voluntarily.

13. For the foregoing reasons, the Appellant's first ground of appeal is dismissed.

[40] Respondent's Brief, para. 3.9.
[41] *Ibid.*
[42] *Ibid.*, citing *Erdemović* Appeal Judgement, para. 14 of the Joint Separate Opinion of Judge McDonald and Judge Vohrah; *see also* AT. 42.
[43] Plea Agreement, para. 3.

IV. SECOND GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED BY FAILING TO ISSUE A REASONED OPINION

14. The Appellant contends that the Trial Chamber erred both in law and in fact by failing to issue a reasoned opinion pursuant to Article 23 of the Statute.[44] Under this ground of appeal, the Appellant points out two alleged errors: (1) the Trial Chamber failed to make factual findings on agreed facts;[45] and (2) the Trial Chamber failed to provide a reasoned explanation for its departure from the recommendation of the parties as to his sentence.[46] The Prosecution responds that this second ground of appeal should fail mainly because: (1) "the Appellant cites no legal authority for the proposition that the Trial Chamber is required to make findings of fact on matters that are not in dispute";[47] and (2) the Trial Chamber did give a "reasoned explanation" for its departure from the recommendation of the parties as to the Appellant's sentence.[48]

A. Whether the Trial Chamber was required to make factual findings on agreed facts

15. Under this part of his second ground of appeal, the Appellant challenges the fact that the Trial Chamber, throughout the Sentencing Judgement, refers to "claims", "statements", "assertions" and matters "maintained" by both the Appellant and the Prosecution and does not make any finding as to whether or not it accepted those claims, statements and matters maintained as true.[49] He specifically challenges the Trial Chamber's findings with regard to: (1) the "parallel structure" and his degree of responsibility; (2) the influence of the "Serbian propaganda" over his conduct; (3) his awareness of the commission of other crimes charged in the Indictment; and (4) the Appellant's intent with regard to secondary crimes committed by other members of the joint criminal enterprise.

1. The "parallel structure" and the Appellant's degree of responsibility

16. The Appellant challenges the Trial Chamber's finding that he "maintained that his own power was limited and undermined by the creation of the so-called 'parallel structure' in the SAO Krajina, which he said included people who were ultimately controlled by Slobodan Milošević".[50] He mainly contends that the Trial Chamber should have made a finding with respect to this "extremely important matter" as a reasoned opinion "requires that a determination be made as to whether a parallel power structure existed which limited and undermined [his] ability to control

[44] Notice of Appeal, para. 2; Appellant's Brief, para. 70.
[45] Appellant's Brief, paras 71-89.
[46] *Ibid.*, paras 90-100.
[47] Respondent's Brief, para. 3.17.
[48] *Ibid.*, para. 3.32.
[49] Appellant's Brief, para. 71.
[50] *Ibid.*, para. 72, citing para. 24(d) of the Sentencing Judgement (emphasis added by the Appellant).

events".[51] The Prosecution submits in response, *inter alia,* that since the Trial Chamber did not find that the assertions regarding the existence of a parallel structure were false, there was no error.[52]

17. Pursuant to Article 23(2) of the Statute, a judgement of a Trial Chamber "shall be accompanied by a reasoned opinion in writing". As noted in the *Furundžija* Appeal Judgement, the right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[53] It does not oblige a Trial Chamber to make a finding, as suggested by the Appellant, for the "historical record".[54] The requirement of a reasoned opinion in writing "enables a useful exercise of the right of appeal available to the person convicted"[55] and "allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of the evidence".[56]

18. In the specific case of a sentencing judgement following a guilty plea, the Trial Chamber, pursuant to Rule 62*bis*(iv) of the Rules, must be satisfied that "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". A common procedure is that the parties enter negotiations and agree on the facts underlying the charges to which the accused will plead. The parties may also submit, pursuant to Rule 100(A) of the Rules, "any relevant information that may assist the Trial Chamber in determining an appropriate sentence". On the basis of the facts agreed upon by the parties as well as the additional information provided by the parties pursuant to Rule 100(A) (including those facts presented during the sentencing hearing), the Trial Chamber exercises its discretion in determining the sentence. A Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts. The reference by a Trial Chamber to such facts is by itself indicative that it accepts those facts as true.

19. In the present case, the Trial Chamber referred to the Factual Statement filed with the Plea Agreement with respect to the existence of the parallel structure and acknowledged that the Appellant's role was "limited and undermined" by the creation of this parallel structure.[57] Its finding of guilt on Count 1 of the Indictment was based on those documents. There is no indication in the Sentencing Judgement that the Trial Chamber disputed the veracity of the information

[51] *Ibid.*, para. 76.
[52] Respondent's Brief, para. 3.22; AT. 51-52.
[53] *Furundžija* Appeal Judgement, para. 69.
[54] Appellant's Brief, para. 75.
[55] *Kunarac et al.* Appeal Judgement, para. 41 (referring to *Hadjianastassiou v. Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR 12945/87, Judgement of 16 December 1992, para. 33).
[56] *Kunarac et al.* Appeal Judgement, para. 41.
[57] Sentencing Judgement, para. 24(d), referring to paras 33(b) and 14-16 of the Factual Statement.

contained in those documents, and therefore this part of the Appellant's second ground of appeal is dismissed.

2. The influence of the "Serbian propaganda" over the Appellant's conduct

20. The Appellant argues that the Trial Chamber only noted that he "stated that during the events, and in particular at the beginning of his political career, he was strongly influenced and misled by Serbian propaganda"[58] and should have stated whether it accepted this statement as true. He contends that the Trial Chamber neither made any finding nor provided a reasoned opinion as to the impact of this influence on the ethnically motivated speeches he made.[59] The Prosecution submits in response that there was no need for the Trial Chamber to make a finding regarding this issue "unless it disagreed with it".[60]

21. The Appeals Chamber reiterates that a Trial Chamber is not obliged to make specific findings on facts agreed upon by the parties or on undisputed facts. In paragraph 24(g) of the Sentencing Judgement, not only did the Trial Chamber assert that "Babić stated that […] he was strongly influenced and misled by Serbian propaganda", but it also supported that assertion by reference in footnote 38 of the Sentencing Judgement to paragraph 6 of the Factual Statement, which states in relevant part that "there was a media campaign directed by Belgrade that portrayed the Serbs in Croatia as being threatened with genocide by the Croat majority and Milan Babić fell prey to that propaganda."[61]

22. The Trial Chamber's reference to this undisputed fact is, in itself, – absent any indication in the Sentencing Judgement that it believed that fact to be untrue – indicative that it accepted it. The Appellant has not shown that the Trial Chamber found fault with this agreed fact, and therefore this part of the Appellant's second ground of appeal is dismissed.

3. The Appellant's awareness of other crimes committed

23. The Appellant contends that it is unclear whether the Trial Chamber rejected or embraced the information included in the Factual Statement[62] since the Sentencing Judgement states that he "claimed" that although he was aware that other crimes such as imprisonment (paragraph 15(b) of the Indictment), deportation or forcible transfer (paragraph 15(c) of the Indictment), and the destruction of property (paragraph 15(d) of the Indictment) were being committed in the targeted

[58] Appellant's Brief, para. 77, citing para. 24(g) of the Sentencing Judgement.
[59] *Ibid.*, para. 80.
[60] Respondent's Brief, para. 3.24; AT. 51-52.
[61] Factual Statement, para. 6.
[62] Sentencing Judgement, para. 37, referring to para. 34 of the Factual Statement.

territories of the joint criminal enterprise by other persons in furtherance of the campaign of persecutions, he "did not know of the details and the scale of the events that were occurring at the time.[63] He argues that confusion arises as to whether the Trial Chamber rejected the Factual Statement because, while paragraph 37 of the Sentencing Judgement refers to the Factual Statement in a footnote – which in his view indicates that his limited awareness of other crimes charged "was put forth as true" – the Trial Chamber also stated that it did "not accept that [his] role in the [joint criminal enterprise] was as limited as the parties suggest it was".[64] In response, the Prosecution submits that the Sentencing Judgement does not voice any disagreement with the proposition that the Appellant "did not know the details and the scale of the events that were occurring." [65]

24. The Appeals Chamber finds that it is clear in the Sentencing Judgement that the Trial Chamber acknowledged this point, but concluded that there was nevertheless "no doubt" that the Appellant participated as a co-perpetrator in the joint criminal enterprise. The Trial Chamber explained that (1) when he did become aware of the commission of those other crimes, the Appellant continued to participate in the joint criminal enterprise rather than distancing himself from it; and (2) the crimes were in any event foreseeable, as the Appellant had admitted. [66]

25. The Appeals Chamber further finds that the Trial Chamber was correct to conclude that the Appellant's claim as to the limited degree of his awareness of those other crimes did not minimize the degree of his liability for personal participation in the joint criminal enterprise.[67] The Trial Chamber assessed this liability on the basis of the Appellant's acts, including, *inter alia,* providing financial and political support to others as well as making ethnically based inflammatory speeches.[68] On the basis of those acts alone, and not of the degree of the Appellant's awareness of other crimes being committed, the Trial Chamber concluded that it "did not accept that [his] role in the [joint criminal enterprise] was as limited as the parties suggest it was".[69] With regard to the degree of the Appellant's knowledge as to those other crimes being committed, the Trial Chamber correctly indicated that this was a separate issue relevant for his liability for secondary crimes committed as a foreseeable consequence of the joint criminal enterprise.[70] Therefore, this part of the Appellant's second ground of appeal is dismissed.

---

[63] Appellant's Brief, para. 81.
[64] *Ibid.*, referring to para. 79 of the Sentencing Judgement.
[65] Respondent's Brief, para. 3.26.
[66] Sentencing Judgement, para. 40.
[67] *Ibid.*
[68] *Ibid.,* para. 79.
[69] *Ibid.*
[70] *Ibid.,* paras 39-40.

4. The Appellant's intent with regard to other crimes committed

26. The Appellant alleges that the Trial Chamber "erroneously opined that there exists no distinction in degree of guilt between one who intends [that] murder be committed and one who does not have that intention but is merely aware that murders are being committed as part of a Joint Criminal Enterprise".[71] This allegation stems from his understanding of paragraph 38 of the Sentencing Judgement, which reads:

> The parties seem to consider that Babić's guilt is lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the [joint criminal enterprise].

The Prosecution submits in response that: (1) the Trial Chamber did not disagree with the proposition that the Appellant did not intend the commission of murders; (2) paragraph 40 of the Sentencing Judgement recognises the difference between the crimes committed as part of the distinct forms of the joint criminal enterprise; and (3) the Trial Chamber "correctly evaluated" the Appellant's intent.[72]

27. The Appeals Chamber finds no error in the Trial Chamber's statement. Under the third, "extended" prong of the joint criminal enterprise theory recognised by the jurisprudence of the International Tribunal, the critical question with regard to the Appellant's *mens rea* was whether he had the intent to participate in the joint criminal enterprise, and not whether he specifically sought to bring about secondary crimes; so long as the secondary crimes were foreseeable and the Appellant willingly undertook the risk that they would be committed, he had the legally required "intent" with respect to those crimes. Or, to put it in the words of the most recent Appeal Judgement on this issue, the requisite *mens rea* for the extended form is twofold: first, the accused must have the intention to participate in and contribute to the common criminal purpose; second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.[73]

28. Here, the Appellant admitted that he participated in the joint criminal enterprise with the intent to discriminate on political, racial, or religious grounds, and further admitted not only that crimes including murder were a foreseeable result of the joint criminal enterprise but that he was

[71] Appellant's Brief, para. 82. Under this part of his second ground of appeal, the Appellant also raises arguments, pertaining to his alleged limited participation in the crimes charged (Appellant's Brief, paras 86-89). His arguments in that respect will be addressed under the third ground of appeal, which is specifically concerned with the question of his alleged limited participation as a mitigating factor.
[72] Respondent's Brief, paras 3.29-3.30.

aware that murders were in fact being committed. Under these circumstances, the Trial Chamber was right to imply that the Appellant's guilt is not "lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the [joint criminal enterprise]". Therefore, this part of the Appellant's second ground of appeal is dismissed.

B. Whether the Trial Chamber failed to give a reasoned opinion for its departure from the recommendation of the parties as to sentence

29. The Appellant contends that the Sentencing Judgement "contains no reasoned explanation, nor even a discussion, as to why a sentence of thirteen years would do justice, while one consistent with the recommendation of the Prosecutor, of less than eleven years, would not".[74] He then compares his case with the case of Biljana Plavšić[75] and submits that, due to the "striking similarities" between the two cases, and taking into account the "basic concept of fairness", the Trial Chamber should have treated him in a manner similar to its treatment of Biljana Plavšić.[76] The Prosecution responds that the Trial Chamber did provide a reasoned explanation for its departure from the recommended sentence[77] and refers to other facts as ascertained by the Trial Chamber - for instance the Trial Chamber's conclusion that the Appellant played a more significant role than that reflected in the Plea Agreement as well as its decision not to take into account his prior good character - which sufficiently explain the sentence imposed.[78] With respect to the Appellant's argument that the Trial Chamber erred by failing to explain why the sentence imposed upon him is not lower than the one given to Biljana Plavšić, the Prosecution submits that the Appellant "presents no authority for the proposition that a Trial Chamber must compare the sentence it gives in a particular case with other cases an accused believes are similar, and then […] justify the difference".[79] At the Appeal Hearing, the Prosecution submitted that "there hasn't been a substantial deviation from the plea agreement in [this] case. But […] even if there was, […] the reasons given by the Trial Chamber did adequately explain why they rejected the Prosecution's recommendation."[80]

---

[73] *Kvočka et al.* Appeal Judgement, para. 83 (footnotes omitted).
[74] Appellant's Brief, para. 90.
[75] *Ibid.,* paras 92-99.
[76] *Ibid.*, para. 91.
[77] Respondent's Brief, para. 3.32.
[78] *Ibid.,* paras 3.34 and 3.35, referring to paras 79, 90-92 of the Sentencing Judgement.
[79] *Ibid.*, para. 3.36.
[80] AT. 51.

1. Whether the Trial Chamber erred by failing to explain why the sentence recommended by the parties was not appropriate

30. In exercising their discretion to impose a sentence, Trial Chambers must take into account the special context of a plea agreement as an additional factor. A plea agreement is a matter of considerable importance as it involves an admission of guilt by the accused. Furthermore, recommendation of a range of sentences or, as in the present case, a specific maximum sentence, reflects an agreement between the parties as to what in their view would constitute a fair sentence. The Appeals Chamber notes that Rule 62*ter* (B) of the Rules unambiguously states that Trial Chambers shall not be bound by any agreement between the parties. Nevertheless, in the specific context of a sentencing judgement following a plea agreement, the Appeals Chamber emphasises that 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.[81] Those reasons, combined with the Trial Chambers' obligation pursuant to Article 23(2) of the Statute to render a Judgement "accompanied by a reasoned opinion in writing", will facilitate a meaningful exercise of the convicted person's right to appeal and allow the Appeals Chamber "to understand and review the findings of the Trial Chamber".[82]

31. In the present case, the Trial Chamber found that "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".[83] 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. Reference to the Trial Chamber's assessment of the gravity of the crimes and the aggravating and mitigating circumstances is, in the present case, sufficient to allow the Appellant – as he in fact did in his other grounds of appeal – to meaningfully exercise his right to appeal pursuant to Article 23(2). For the foregoing reasons, this part of the Appellant's second ground of appeal is dismissed.

2. Whether the Trial Chamber erred in not imposing a sentence similar to that imposed on Biljana Plavšić

32. As previously noted in the *Dragan Nikolić* case, the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only "very limited"[84] but "also

[81] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 89.
[82] *Ibid.*, citing *Kunarac et al.* Appeal Judgement, para. 41.
[83] Sentencing Judgement, para. 101.
[84] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19 quoting *Čelebići* Appeal Judgement, para. 821.

not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence".[85] The reasons for this are clearly set out in the case law of the International Tribunal: (1) such comparison can only be undertaken where the offences are the same and committed in substantially similar circumstances;[86] and (2) a Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.[87]

33. In the *Jelisić* case, in addressing the appellant's arguments to the effect that he was given a sentence in excess of those rendered in other cases, the Appeals Chamber held the following:

> The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules.[88]

In the present case, the Appellant is not alleging that his case falls within a pattern or a line of sentences passed in similar circumstances for the same offences. He only refers to one case which in his view bears some similarities with his own. The finding of the Appeals Chamber in *Jelisić* was concerned with a comparison with a "line of sentences" and not with a comparison with one single case. Furthermore, the Appeals Chamber emphasises that, as a general principle, comparisons with other cases as an attempt to persuade the Appeals Chamber to either increase or reduce the sentence are of limited assistance: the differences are often more significant than the similarities and the mitigating and aggravating factors dictate different results.[89] 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. In light of the foregoing, this part of the Appellant's second ground of appeal is dismissed.

[85] *Ibid.*
[86] *Čelebići* Appeal Judgement, para. 720.
[87] *Ibid.*, para. 717.
[88] *Jelisić* Appeal Judgement, para. 96.
[89] *Čelebići* Appeal Judgement, para. 719. *Dragan Nikolić* Judgement on Sentencing Appeal, para. 15.

V. THIRD GROUND OF APPEAL: THE ALLEGED LIMITED PARTICIPATION OF THE APPELLANT IN THE CRIME TO WHICH HE PLED GUILTY

34. The Appellant alleges that the Trial Chamber erred in both law and fact and abused its discretion in failing to properly consider and give appropriate weight to the evidence with respect to his limited participation in the crime to which he pled guilty as a mitigating factor.[90] He contends that the Trial Chamber either ignored or failed to ascribe sufficient weight to the facts agreed in the Factual Statement[91] and requests the Appeals Chamber to reduce the sentence.[92] The Appellant submits that since the Factual Statement is the basis of the plea, for the Trial Chamber to reject the Factual Statement and yet accept the plea amounts to an abuse of discretion.[93] The Prosecution agrees that the Trial Chamber "should have considered the limited participation of the Appellant in the crime to which he pled"[94] and that the sentence should accordingly be reduced.[95] The Prosecution further submits that the Trial Chamber erred by failing to consider that the Appellant's limited participation in the joint criminal enterprise had an impact upon the gravity of the offence.[96] The Appeals Chamber will first consider whether the Trial Chamber ignored the facts contained in the Factual Statement, and then determine whether the Trial Chamber erred in its assessment of the facts contained in the Factual Statement when finding that the Appellant's role in the joint criminal enterprise was not sufficiently limited such that it would qualify as a mitigating circumstance.[97] Further, the Appeals Chamber will address the Prosecution's propositions to the effect that: (1) the limited nature and role played by the Appellant "is a factor to consider when determining the appropriate sentence […] as diminishing the gravity of the offence"[98] and; (2) the Trial Chamber

[90] Appellant's Brief, para. 102.
[91] *Ibid.*, para. 108.
[92] *Ibid.*, para. 112.
[93] *Ibid.*, para. 108. *See* also para. 88 of the Appellant's Brief which reads in part: "The Judgement affords no reasoning as to why the Trial Chamber rejected, or disregarded, those portions of the Factual Statement which had previously been accepted, and upon which Appellant's plea of guilty was predicated."
[94] Respondent's Brief, para. 3.39.
[95] *Ibid.*, para. 3.47.
[96] *Ibid.*, para. 3.40.
[97] See Sentencing Judgement, paras 76-80. At para. 111 of the Appellant's Brief, the Appellant further submits that since the mitigating factors must be established on a balance of probabilities, "the Trial Chamber erred in both law and fact and abused its discretion by finding that it was not established as more likely than not that [he] played a limited role in the [joint criminal enterprise]". Mitigating circumstances must indeed be established on the balance of probabilities, as the Trial Chamber acknowledged at para. 48 of the Sentencing Judgement. See *Čelebići* Appeal Judgement, para. 590. However, because the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant's role in the joint criminal enterprise was not as limited as the parties suggested (*see infra* para. 40), and thus, was not a mitigating circumstance, the question of whether the Trial Chamber applied the correct standard of proof with regard to finding his alleged limited role as a mitigating circumstance is moot. Accordingly, the Appeals Chamber dismisses this part of the Appellant's ground of appeal.
[98] Respondent's Brief, para. 3.39 (emphasis added).

should have taken into account the Appellant's participation relative to the other members of the joint criminal enterprise.[99]

A. Whether the Trial Chamber ignored the facts contained in the Factual Statement[100]

35. The Appellant contends that his limited participation in the joint criminal enterprise to perpetrate a campaign of persecutions was agreed upon by the parties and "amply supported in the record".[101] Specifically, he draws the attention of the Appeals Chamber to the following issues:[102] (1) his lack of authority or effective control over the actions of the armed forces of the SAO Krajina;[103] (2) his lack of control over the parallel structure;[104] (3) his lack of effective control over Milan Martić and his police force in Krajina;[105] (4) his lack of control over the Territorial Defence ("TO");[106] (5) his lack of knowledge of the details and the scale of other crimes committed as a result of the joint criminal enterprise and;[107] and (6) the fact that he did not share Martić's state of mind with respect to ethnic cleansing.[108] In his view, his limited role in the joint criminal enterprise was "not a mere suggestion of the parties"[109] but was rather a "major component of the Factual Statement and a component of the Plea Agreement which was reviewed and later accepted by the Trial Chamber".[110]

36. The Appeals Chamber has already found that the Trial Chamber did not dispute the Appellant's lack of knowledge of the details and the scale of other crimes committed as a result of the joint criminal enterprise.[111] Furthermore, there are references in the Sentencing Judgement to

---

[99] *Ibid.*, para. 3.43.
[100] Under this sub-section, the Appeals Chamber also addresses the Appellant's arguments under his second ground of appeal, as developed at paras 86-89 of the Appellant's Brief. *See supra* footnote 71.
[101] Appellant's Brief, para. 102.
[102] *Ibid.*, para. 106.
[103] Factual Statement, para. 5. *See* also para. 87 of the Appellant's Brief, in which the Appellant refers to the fact that the Prosecution reiterated at the Sentencing Hearing that he was not "the architect of the plan and was far from being the most important actor in the joint criminal enterprise" and that he never had "control over the military or Krajina police force that committed the crimes however" (Sentencing Hearing, T. 77, lines 21-22, and T. 78, lines 9-11).
[104] Factual Statement, para. 16. *See* also para. 88 of the Appellant's Brief where the Appellant refers to the fact that "he was not a member of the parallel structure [and] had no ability to control the actions of those in the parallel structure".
[105] Factual Statement, para. 20. *See* also para. 88 of the Appellant's Brief where the Appellant refers to the fact that "the government of the SAO Krajina, of which he was President, never had any effective control over Martić and the police force in Krajina; he tried to remove Martić but was unsuccessful".
[106] Factual Statement, para. 27. *See* also para. 88 of the Appellant's Brief where the Appellant refers to the fact that "he tried to assume command over the TO, who only took orders from the JNA [Yugoslav People's Army] and were committing crimes, but was again unsuccessful".
[107] Factual Statement, para. 34.
[108] *Ibid.*, para. 33(d). *See* also para. 88 of the Appellant's Brief where the Appellant refers to the fact that "he did not share the state of mind, nor approved of the methods, of the leaders of the [joint criminal enterprise] with respect to ethnic cleansing".
[109] Appellant's Brief, para. 109.
[110] *Ibid.*, *See* also para. 86 of the Appellant's Brief: "The limited role of the Appellant was not a mere 'contention' of Prosecution, but rather, was reflected, defined and substantiated in the Factual Statement which was accepted by the Trial Chamber, and upon which the Appellant's plea of guilt was predicated."
[111] *See supra* para. 24.

the Appellant's lack of control over the parallel structure.[112] The fact that the Trial Chamber did not refer in the Sentencing Judgement to the remaining above-mentioned agreed facts does not mean, as alleged by the Appellant, that it ignored them. As previously stated, a Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts.[113]

B. Whether the Trial Chamber erred in its assessment of the facts contained in the Factual Statement

37. Having found that there is no evidence that the Trial Chamber ignored the above-mentioned agreed facts, the Appeals Chamber now turns to determine whether the Trial Chamber erred in finding that the Appellant's role in the joint criminal enterprise was not sufficiently limited so as to qualify as a mitigating circumstance.

38. The Trial Chamber accepted that "Babić was not the prime mover in the campaign of persecutions"[114] but did not accept that his role in the joint criminal enterprise was "as limited as the parties suggest it was"[115] for the following reasons:

> Babić chose to stay in power and provided significant support for the persecutions against non-Serb civilians by among other things participating in the provision of financial, material, logistical, and political support necessary for the military take-over of territories in the SAO Krajina, by making ethnically based inflammatory speeches, by encouraging and assisting in the acquisition of arms and their distribution to Croatian Serbs. The argument that Babić, acting out of conviction to save Serbs in Croatia, was not crucial to the functioning of the [joint criminal enterprise] and had a limited role is unfounded. Babić's role in the [joint criminal enterprise] allowed the [joint criminal enterprise] to function; his participation furthered the objective of the [joint criminal enterprise]. The fact that others could have played the same role and that others eventually did take over is not relevant to the establishing of criminal liability or the mitigation of criminal responsibility.[116]

The Appeals Chamber notes that the reasons given by the Trial Chamber in the above paragraph are fully supported by the Factual Statement.[117] The Appeals Chamber finds that it was within the discretion of the Trial Chamber to choose not to attach greater weight to the fact that, as noted by the Prosecution, he "did not commit the *actus reus* of any of the crimes constituting persecutions".[118] Co-perpetratorship in a joint criminal enterprise, for which the Appellant was found guilty, only requires that the accused shares the *mens* rea or "intent to pursue a common purpose" and performs some acts that "in some way are directed to the furtherance of the common

---

[112] Sentencing Judgement, para. 24(d).
[113] *See supra* para. 18.
[114] Sentencing Judgement, para. 79.
[115] *Ibid.*
[116] *Ibid. See* also paras 40 and 57.
[117] *See* paras 24(e), (g) and (h) of the Sentencing Judgement, referring respectively to paras 33(e), (f) and (h) of the Factual Statement.
[118] Respondent's Brief, para. 3.43.

design."[119] Participation in a joint criminal enterprise does not require that the accused commit the *actus reus* of a specific crime provided for in the Statute.[120] Thus, the Appeals Chamber concludes that the Trial Chamber was entitled to consider as it did that the Appellant's role in providing support to the joint criminal enterprise was not as limited as the parties suggest.

C. Whether the alleged limited role and participation of the Appellant in the joint criminal enterprise has to be taken into account when assessing the gravity of the crime or as a mitigating factor

39. With regard to whether the alleged limited participation of the Appellant must be considered as a mitigating factor or, as the Prosecution argues, as "diminishing the gravity of the offence",[121] the Appeals Chamber recalls its previous finding in the *Aleksovski* Appeals Judgement, in which it endorsed the finding of the Trial Chamber in the *Kupreškić et al.* Trial Judgement that "[t]he determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".[122] The Trial Chamber did so here, stating in the course of its discussion of the gravity of the Appellant's offence that his participation was "significant" and that he had "pleaded guilty as a co-perpetrator."[123] Although these references are fairly brief, they are sufficient to demonstrate that the Trial Chamber duly considered the issue, particularly given that the Trial Chamber's conclusions regarding the significance of the Appellant's participation are further fleshed out in the course of its discussion of mitigating factors. Moreover, even if the Trial Chamber had addressed this factor only in the context of mitigation and not in the context of the gravity of the offence, this erroneous placement would not have been prejudicial; because the Trial Chamber did not commit any error in concluding that the Appellant's participation was in fact significant, a more extensive discussion in the context of the gravity of the offence could not have been of assistance to the Appellant.

D. The relative participation of an accused in a joint criminal enterprise

40. The Appeals Chamber now turns to the Prosecution's argument that the Trial Chamber's reasoning in paragraphs 77 and 78 of the Sentencing Judgement "does not take into account [the

---

[119] *Vasiljević* Appeal Judgement para. 102. *See* also *Tadić* Appeal Judgement, para. 229; *Krnojelac* Appeal Judgement, paras 31-33.
[120] As stated at paragraph 100 of the *Vasiljević* Appeal Judgement, participation in a joint criminal enterprise "need not involve the commission of a specific crime under one of the provisions [of the Statute] (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose."
[121] Respondent's Brief, para. 3.39.
[122] *Kupreškić et al.* Trial Judgement, para. 852, endorsed in *Aleksovski* Appeal Judgement, para. 182. *See* also *Blaskić* Appeal Judgement, para. 683.
[123] Sentencing Judgement para. 50.

Appellant's] participation relative to the other members of the joint criminal enterprise"[124] and that it should have done so. In support of its argument, the Prosecution refers to paragraphs 57 and 58 of the *Tadić* Judgement on Sentencing Appeal, which read:

> Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, *i.e.* commanders, or the very architects of the strategy of ethnic cleansing, was low.
>
> In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.[125]

The Appeals Chamber notes that the above finding of the Appeals Chamber in the *Tadić* case was based on the "circumstances of the case" and was not a legal finding to the effect that the participation of an accused in a joint criminal enterprise *must* always be assessed relative to the participation of other perpetrators in determining the overall level of the accused's participation. Furthermore, contrary to the Prosecution's submission, the Trial Chamber did take into account the Appellant's participation relative to other members of the joint criminal enterprise concluding that "Babić was not the prime mover in the campaign of persecutions."[126] While generally it may be said that a finding of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence,[127] the Appeals Chamber finds that the Trial Chamber's conclusion in this case that, nevertheless, the Appellant's participation in the joint criminal enterprise was not as limited as the parties suggest, was the correct one in light of the totality of his acts demonstrating significant support for the joint criminal enterprise.

41. For the foregoing reasons, the Appellant's third ground of appeal is dismissed.

[124] Respondent's Brief, para. 3.43. AT 40.
[125] *Tadić* Judgement in Sentencing Appeals, paras 56-57.
[126] Sentencing Judgement, para. 79.
[127] *Kajelijeli* Trial Judgement, para. 963, cited in *Krstić* Appeal Judgement, para. 268.

VI. FOURTH, FIFTH, SIXTH, AND TENTH GROUNDS OF APPEAL: MITIGATING CIRCUMSTANCES

42. Under his fourth, fifth, sixth, and tenth grounds of appeal, the Appellant respectively contends that: (1) the Trial Chamber failed to attach appropriate weight as a mitigating circumstance to the fact that he and his family "have lived, and must continue to live, as protected witnesses";[128] (2) the Trial Chamber erred in ruling that, in the absence of exceptional circumstances, the prior character of an accused "does not as such count in mitigation"[129] and in applying that ruling to his detriment;[130] (3) the Trial Chamber erred both in law and in fact in failing to accept his conduct subsequent to the crime as a mitigating circumstance;[131] and (4) the Trial Chamber failed to ascribe sufficient weight to the mitigating circumstances it determined had been established.[132] The Appeals Chamber will address these grounds of appeal in turn.

A. Mitigating circumstances: applicable law

43. Neither the Statute nor the Rules exhaustively define the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of a sentence. Rule 101(B)(ii) of the Rules only states that in determining a sentence, a Trial Chamber shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction".[133] Factors that have previously been taken into account by the International Tribunal as evidence in mitigation include: (1) co-operation with the Prosecution;[134] (2) the admission of guilt or a guilty plea;[135] (3) the expression of remorse;[136] (4) voluntary surrender;[137] (5) good character with no prior criminal convictions;[138] (6) comportment in detention;[139] (7) personal and family circumstances;[140] (8) the character of the accused subsequent to the conflict;[141] (9) duress[142] and indirect participation;[143] (10) diminished mental

[128] Appellant's Brief, para. 113.
[129] Sentencing Judgement, para. 91.
[130] Appellant's Brief, para. 121.
[131] *Ibid.*, para. 131.
[132] *Ibid.*, para. 181.
[133] As stated in the *Serushago* Sentencing Appeal Judgement, Trial Chambers are "required as a matter of law to take account of mitigating circumstances." *See* para. 22; *see* also *Musema* Appeal Judgement, para. 395.
[134] *Jokić* Sentencing Judgement, paras 95-96; *Todorović* Sentencing Judgement, para. 88; Rule 101(B)(ii).
[135] *Jelisić* Appeal Judgement, para. 122; *Jokić* Sentencing Judgement, para. 76.
[136] *Jokić* Sentencing Judgement, para. 89; *Erdemović* 1998 Sentencing Judgement, para. 16(iii).
[137] *Jokić* Sentencing Judgement, para. 73.
[138] *Erdemović* 1998 Sentencing Judgement, para. 16(i); *Kupreškić et al.* Appeal Judgement, para. 459.
[139] *Jokić* Sentencing Judgement, para. 100; *Dragan Nikolić* Sentencing Judgement, para. 268.
[140] *Kunarac et al.* Appeal Judgement, paras 362 and 408.
[141] *Jokić* Sentencing Judgement, paras 90-91 and 103.
[142] *Erdemović* 1998 Sentencing Judgement, para. 17 (stating that duress "may be taken into account only by way of mitigation.").
[143] *Krstić* Appeal Judgement, para. 273.

responsibility;[144] (11) age;[145] and (12) assistance to detainees or victims.[146] Poor health is to be considered only in exceptional or rare cases.[147] This list is not exhaustive and Trial Chambers are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account".[148] They are not required to "articulate every step" of their reasoning in reaching particular findings,[149] and failure to list in a judgement "each and every circumstance" placed before them and considered "does not necessarily mean that [they] either ignored or failed to evaluate the factor in question."[150] For instance, a Trial Chamber's express reference to the parties' written submissions concerning mitigating circumstances is *prima facie* evidence that it was cognisant of these circumstances and took them into account.[151] The standard of proof with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt,[152] but proof on a balance of probabilities: the circumstance in question must have existed or exists "more probably than not".[153]

44. Proof of mitigating circumstances "does not automatically entitle [an] [a]ppellant to a 'credit' in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination".[154] An appellant challenging the weight given by a Trial Chamber to a particular mitigating factor thus bears "the burden of demonstrating that the Trial Chamber abused its discretion".[155] The Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[156]

---

[144] *Čelebići* Appeal Judgement, para. 590.
[145] *Jokić* Sentencing Judgement, para. 100.
[146] *Sikirica et al.* Sentencing Judgement, paras 195 and 229.
[147] *Simić et al.* Trial Judgement, para. 98. All the above mentioned mitigating circumstances have been mentioned at para. 696 of the *Blaskić* Appeal Judgement.
[148] *Čelebići* Appeal Judgement, para. 780.
[149] *Ibid.*, para. 481.
[150] *Kupreškić et al.* Appeal Judgement, para. 458.
[151] *Ibid*., para. 430.
[152] *Čelebići* Appeal Judgement, para. 763.
[153] *Ibid.*, para. 590.
[154] *Niyitegeka* Appeal Judgement, para. 267.
[155] *Kayishema and Ruzindana* Appeal Judgement, para. 366; *Niyitegeka* Appeal Judgement, para. 266. A Trial Chamber's decision may be disturbed on appeal "if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion." *Čelebići* Appeal Judgement, para. 780.
[156] *See Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para. 7. *See* also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9; *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002, paras 5-6.

B. The protected witness status of the Appellant and the impact on his family

45. The Appellant argues under his fourth ground of appeal that while the Trial Chamber acknowledged that "[b]y agreeing to substantially cooperate with the Prosecution [he] incurred substantial security risks for himself and his loved ones",[157] it erred in both law and fact and abused its discretion by considering this only as a "mitigating circumstance"[158] instead of as a "substantial" mitigating circumstance.[159] This argument is without merit, as the Trial Chamber in fact explicitly stated that it gave "substantial mitigating weight" to this factor.[160]

46. For the foregoing reason, the Appellant's fourth ground of appeal is dismissed.

C. The Appellant's conduct prior to the commission of the crime

47. The Appellant contends under his fifth ground of appeal that the Trial Chamber erred both 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".[161] In his view, such an approach is "inconsistent with the jurisprudence of this Tribunal".[162] He submits that "to routinely afford no weight whatsoever to prior good character, as a matter of policy by a particular Trial Chamber, is not in the spirit of individualized sentencing endorsed by this Tribunal".[163] The Prosecution agrees with the Appellant that the Trial Chamber's approach is inconsistent with the jurisprudence of the International Tribunal.[164] It interprets the Trial Chamber's finding as meaning that "prior character is to be given *no* weight absent exceptional circumstances"[165] and submits that this finding would contrast with the views of other Trial Chambers which have found that such factor shall only be given "*minor* weight absent exceptional circumstances".[166]

48. The paragraphs of the Sentencing Judgement at issue under this ground of appeal read as follows:

> The Tribunal has jurisdiction over crimes committed during the armed conflict in the former Yugoslavia, where ordinary citizens were involved in horrendous events. The Trial Chamber is of the view that the prior good character of a convicted person (understood against a common

[157] Sentencing Judgement, para. 88.
[158] *Ibid.*, para. 89.
[159] Appellant's Brief, para. 114.
[160] *See* Sentencing Judgement, para. 75.
[161] Appellant's Brief, para. 121, referring to para. 91 of the Sentencing Judgement.
[162] *Ibid.*, para. 123.
[163] *Ibid.*, para. 127.
[164] Respondent's Brief, para. 3.60.
[165] *Ibid.*
[166] *Ibid.* AT. 46- 47.

> standard of behaviour) does not as such count in mitigation, although in exceptional circumstances, for which there is no evidence in this case, it may.[167]
>
> The Trial Chamber does not accept that this proposed ground of mitigation should be given any effect in this case.[168]

49. 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 a constant practice but instead varies with the circumstances; *e.g.*, in the *Tadić* Sentencing Judgement, the Trial Chamber noted that the Accused was "a law abiding citizen and seemingly enjoyed the respect of his community" and "was an intelligent, responsible and mature adult […] capable of compassion towards and sensitivity for his fellows" but noted that this, "if anything, aggravates more than it mitigates: for such a man to have committed these crimes requires an even greater evil will on his part than for a lesser man."[169]

50. Even when personal factors or circumstances – including prior good character – have been considered as mitigating circumstances, they have been given little weight in mitigation. In the *Furundžija* Trial Judgement, the Trial Chamber acknowledged that the accused had "no previous conviction and [was] the father of a young child" but noted that "this might be said of many accused persons and cannot be given significant weight in a case of this gravity".[170] The same approach was taken in the *Jelisić* Trial Judgement.[171] The statement of the Trial Chamber in the present case to the effect that the International Tribunal "has jurisdiction over crimes committed during the armed conflict in the former Yugoslavia, where ordinary citizens were involved in horrendous events" – read in conjunction with the limitation that the prior good character of a convicted person would in isolation only count in mitigation in exceptional circumstances – follows the same line of reasoning.

51. The Appellant has not demonstrated an abuse of discretion in this case. Contrary to what he submits, the Trial Chamber did not "simply elect […] to treat the undisputed evidence as an irrelevancy".[172] The Trial Chamber did consider the evidence before it but found that there was no

---

[167] Sentencing Judgement, para. 91 (emphasis added, footnote omitted).
[168] *Ibid.*, para. 92 (emphasis added).
[169] *Tadić* Judgement in Sentencing Appeals, para. 59.
[170] *Furundžija* Trial Judgement, para. 284.
[171] *Jelisić* Trial Judgement, para. 124: "Among the mitigating circumstances set out by the Defence, the Trial Chamber will consider the age of the accused. He is now 31 years old and, at the time of the crimes, was 23. The Trial Chamber also takes into account the fact that the accused had never [been] convicted of a violent crime and that he is the father of a young child. Nonetheless, as indicated by the Trial Chamber hearing the *Furundžija* case, many accused are in that same situation and, in so serious a case, the Judges cannot accord too great a weight to considerations of this sort." *See* also *Banović* Sentencing Judgement, para. 75: "[M]any accused share these personal factors and, in the Trial Chamber's view, the weight to be accorded to them is limited".
[172] Appellant's Brief, para. 126.

evidence of "exceptional circumstances"[173] and, as a result, held that it did not accept that "this proposed ground of mitigation should be given any effect in this case".[174] The Appeals Chamber considers that the Trial Chamber was perfectly entitled as it did, in its own words, not to "give any effect" to the Appellant's prior good character as a factor in mitigation. Therefore, the Appellant's fifth ground of appeal is dismissed.

D. The Appellant's conduct subsequent to the commission of the crime

52. The Appellant alleges under his sixth ground of appeal that the Trial Chamber erred in law and in fact and abused its discretion when it failed to accept his conduct subsequent to the crime as a mitigating circumstance,[175] because it was not satisfied that conclusive evidence had been proffered to show that he alleviated the suffering of victims either immediately after the commission of the crime of persecution in SAO Krajina or after the end of the armed conflict in Croatia in 1995.[176] In support of this allegation, he advances the following arguments: (1) attempts to find peace constitute a form of subsequent conduct which should be taken into account as a factor in mitigation;[177] and (2) "the Trial Chamber applied an incorrect standard of proof regarding the burden borne by the Appellant in establishing this mitigating circumstance."[178] The Appeals Chamber will examine these arguments in turn.

1. The Appellant's conduct subsequent to the commission of the crime as a mitigating circumstance

53. In the Appellant's view, "alleviating the suffering of the victims is but one kind of conduct subsequent to the commission of a crime warranting a finding of mitigation. Attempts to find peace […] are another, equally legitimate, form of subsequent conduct that was simply ignored by the Trial Chamber."[179] He submits that he tried "to facilitate [an] attempt to bring an end to hostilities"[180] in conjunction with Ambassador Galbraith and that he tried to alleviate problems in the prisons by employing professional staff.[181] However, he argues that the Sentencing Judgement's discussion of his conduct subsequent to the commission of the crime for which he was convicted

[173] Sentencing Judgement, para. 91.
[174] *Ibid.*, para. 92.
[175] Appellant's Brief, para. 131.
[176] *Ibid.*, para. 138, citing para. 95 of the Sentencing Judgment.
[177] Appellant's Brief, para. 139.
[178] *Ibid.*, para. 140.
[179] *Ibid.*, para. 139. He argues that similar conduct has previously been accepted as a mitigating circumstance in other cases, but only makes reference to the *Plavšić* case (Appellant's Brief, para. 133).
[180] Appellant's Brief, para.132.
[181] *Ibid.*, para. 141. *See* also Factual Statement, para. 34.

fails to mention his role in the 1995 negotiations of the Z-4 peace plan, regarding which Peter Galbraith, United States Ambassador to Croatia, testified.[182]

54. The Prosecution agrees with the Appellant that the Trial Chamber used the "wrong legal standard" in holding that "the *only* relevant subsequent conduct is that which alleviates the suffering of victims".[183] The Prosecution submits that the Trial Chamber erred in its interpretation of the *Plavšić* Sentencing Judgement – which considered reconciliation rather than alleviation of the suffering of victims – when assessing conduct subsequent to the commission of the crime as a mitigating circumstance.[184] The Prosecution also contends that since there was evidence before the Trial Chamber of the Appellant's actions which are parallel to those of Biljana Plavšić and since the Trial Chamber did not even mention such actions, "the only conclusion possible is that the Trial Chamber ignored this evidence."[185]

55. The Appeals Chamber notes that an accused's conduct after committing a crime is relevant in that it reveals how aware he was of the wrongfulness of his actions and his intention to "make amends" by, among other things, facilitating the task of the International Tribunal.[186] In the instant case, the Trial Chamber acknowledged that conduct subsequent to the crime had been accepted in other cases before the International Tribunal, "where the convicted person acted immediately after the commission of the crime to alleviate the suffering of victims."[187] In support of such assertion, the Trial Chamber referred to the *Plavšić* case.[188] Since the Trial Chamber was not satisfied that conclusive evidence had been proffered to show that the Appellant alleviated the suffering of victims after the commission of the crime of persecution or at the end of the armed conflict, it held that his post-conflict conduct did not amount to a mitigating circumstance[189] and found that such conduct concerned matters which had already been considered, such as cooperation and acceptance of responsibility.[190]

56. The Appeals Chamber notes, however, that the Trial Chamber in the *Plavšić* case in fact gave significant weight as a factor in mitigation to Biljana Plavšić's post-conflict conduct, namely

[182] Appellant's Brief, para. 138; AT. 31.
[183] Respondent's Brief, para. 3.63; AT. 47.
[184] Respondent's Brief, para. 3.64.
[185] AT. 48.
[186] *Blaškić* Trial Judgement, para. 773. *See* also *Blaškić* Appeal Judgement, para. 696, where the Appeals Chamber held that the factors taken into account as evidence in mitigation include, *inter alia*, the character of the accused subsequent to the conflict.
[187] Sentencing Judgement, para. 94 (footnote omitted).
[188] Sentencing Judgement, para. 94: "For instance, in the *Plavšić* case, the Trial Chamber accepted Biljana Plavšić's post-conflict conduct as a mitigating factor because after the cessation of hostilities she had demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace."
[189] Sentencing Judgement, paras 95 and 96.
[190] Sentencing Judgement, para. 95.

her contribution to the advancement of the Dayton Agreement and her attempt to remove obstructive officials from office,[191] because "she made a considerable contribution to peace in the region" without reference to the alleviation of the suffering of victims.[192] The Appeals Chamber thus considers that the Sentencing Judgement incorrectly interpreted the *Plavšić* Trial Chamber's assessment of Biljana Plavšić's "post-conflict conduct."

57. Furthermore, the Appeals Chamber notes that evidence of the Appellant's conduct subsequent to the commission of the crime of persecution proffered by the parties, relevant to his contribution to the advancement of peace, was available to the Trial Chamber.[193] During the Appeal Hearing, the Defence confirmed that it did not refer to the Appellant's involvement in peace negotiations and to Ambassador Galbraith's testimony in its Sentencing Brief, and admitted omitting to do so out of negligence.[194] The Appellant correctly states, however, that this evidence was presented to the Trial Chamber,[195] since it had been referred to by the Prosecution in its Sentencing Brief and at the Sentencing Hearing.[196] The Appeals Chamber considers that even though the Trial Chamber was acquainted with this evidence and referred to it in the Sentencing Judgement,[197] it appears that the Trial Chamber decided not to consider this evidence in mitigation.

58. A review of the evidence before the Trial Chamber reveals that the Appellant made efforts towards peaceful cohabitation between Croats and Serbs.[198] In his position as Minister of Foreign Affairs of the RSK in 1994 and 1995, he participated in negotiations between the Croatian and RSK authorities, encouraged and facilitated by the international community.[199] According to Ambassador Galbraith's testimony, given in another case and in another context, the Appellant had the interests of the Serb population of the Krajina more at heart than any of the other politicians; he was "the only one actually who had any concerns for the local population" and was more open to the idea of Serbs and Croats living together than others.[200] The Appeals Chamber notes that in this context, reference was made explicitly only in relation to Croats and Serbs living together, however not to

---

[191] *Plavšić* Sentencing Judgement, paras 85-93.
[192] *Ibid*., para. 94.
[193] A review of the Appellant's Sentencing Brief reveals that subsequent conduct as a mitigating circumstance was addressed as a separate heading but the arguments contained therein are those relevant to his co-operation with the Prosecution and his voluntary surrender. *See* Milan Babić Sentencing Brief, para. 65. However, the Prosecution's submissions during the Sentencing Hearing specifically addressed his attempts to facilitate peace. *See* Sentencing Hearing, T. 205 and 206.
[194] AT. 30 and 31.
[195] Appellant's Brief, para. 132; AT 31.
[196] Prosecution's Sentencing Brief, paras 27-28; Sentencing Hearing, T. 205 and 206.
[197] Sentencing Judgement, footnotes 38 and 41.
[198] Sentencing Hearing, T. 205.
[199] *Ibid*., referring to Ambassador Galbraith's testimony in the *Milošević* case marked as Ex. PS5. At the Appeal Hearing, the Prosecution also referred to the Appellant's testimony in the *Milošević* case, marked as Ex. PS7 (AT. 48). Although the Prosecution referred to it as Ex. PS6 at the Appeal Hearing, the Appellant's testimony in the *Milošević* case was marked as PS7 when the Prosecution tendered it into evidence. *See* Sentencing Hearing, T. 81.
[200] Sentencing Hearing, T. 205.

"other non-Serb civilians/populations."[201] Drago Kovaćević, who was in the Krajina region as a social worker, gave evidence about his and the Appellant's attempts to negotiate with the Croatian authority to try to achieve the peaceful reintegration of the Krajina into the Republic of Croatia along the lines of the Z-4 peace plan.[202] He also gave evidence that he was present when the Z-4 peace plan was discussed between the Appellant and Ambassador Galbraith, and agreed that the Appellant was in favour of the agreement.[203]

59. The Appeals Chamber is satisfied that the Appellant attempted to further peace after the commission of the crime of persecution. The Appeals Chamber 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.

60. In the opinion of the Appeals Chamber, such an error does not automatically lead to a reduction of sentence. In light of the gravity of the crime for which the Appellant was convicted and the circumstances of the case, the Appeals Chamber finds that significant weight need not be given to the Appellant's attempts to further peace. The Appellant's attempt to protect the Krajina Serbs from attack by agreeing to the Z-4 plan described above, however commendable in its own right, does not minimise the serious criminal conduct for which the Appellant was convicted. The Trial Chamber found that the Appellant's participation in the joint criminal enterprise to perpetrate persecution was motivated by the blind pursuit of the interests of Serbs at the expense of non-Serb peoples, a "lack of moral strength" that "prevented him from standing against injustice committed against non-Serb civilians and led him to become involved".[204] The fact that the Appellant agreed to the Z-4 peace plan suggests continued solicitude for Serbs vis-à-vis Croats, rather than contrition, given that the Appellant was specifically observed to have had the interests of the Krajina Serbs more at heart than any of the others and thus sought to protect them from attack by agreeing to Serb and Croat co-habitation. In short, his efforts with regard to the Z-4 plan do not show that the Appellant was aware of the wrongfulness of his prior actions and willing to make amends for them.

61. The Appeals Chamber notes that in light of the mandate of the International Tribunal under Chapter VII of the UN Charter, an attempt to further peace in the former Yugoslavia is in general relevant as a mitigating circumstance. In the concrete case before us, however, the Appeals Chamber recalls, *inter alia*, paragraph 53 of the Sentencing Judgement, where the Trial Chamber correctly held that it was "persuaded of the extreme gravity of the crime to which Babić pleaded guilty". A sentence must always be proportionate to the gravity of the crime, balancing this gravity

[201] Sentencing Judgement, paras 15, 16, 24, 34.
[202] *Ibid.*, T. 206, referring to Drago Kovaćević's testimony.
[203] *Ibid.*, T. 153.

and any aggravating factors against mitigating factors. Taken in the context of the complete picture of the Appellant's conduct that was before the Trial Chamber, the Appeals Chamber is not persuaded that the Trial Chamber would have, or that it should have, issued a different sentence had it not excluded consideration of the Z-4 peace negotiations on the basis of the error of law identified above. This is particularly so in light of the gravity and aggravating circumstances of a very serious crime committed over a long period of time in the context of a long armed conflict, which at that time was in its initial phase. For these reasons, the Appeals Chamber concludes that the Appellant's engagement in the Z-4 peace negotiations subsequent to his involvement in the crime of persecution of non-Serbs does not require mitigation of his sentence.

62. Additionally, the Appellant submits that, during the period covered by the Indictment, he attempted to alleviate problems within the prisons by appointing professional prison staff and that this was also ignored by the Trial Chamber.[205] The Appeals Chamber notes that this argument was not included in the Appellant's Sentencing Brief, nor was it raised by the Defence in its oral submissions before the Trial Chamber. In fact, during the Appeal Hearing, the Defence did not deny that this argument was raised for the first time on appeal.[206] There is no evidence on the basis of which the Appeals Chamber can consider this submission. The Trial Chamber therefore committed no error by not considering this factor in its assessment of the mitigating factors. In addition, the Appeals Chamber emphasises 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.[207]

63. For the foregoing reasons, this part of the Appellant's sixth ground of appeal is dismissed.

2. Whether the Trial Chamber applied the correct standard of proof required for the establishment of the Appellant's conduct subsequent to the commission of the crime as a mitigating circumstance

64. The Appellant alleges, under this part of his sixth ground of appeal, that "the Trial Chamber applied an incorrect standard of proof regarding the burden borne by the Appellant in establishing

[204] Sentencing Judgement, para. 98.
[205] Appellant's Brief, para. 141, referring to paragraph 34 of the Factual Statement, which reads in its relevant part: "[…] At the end of 1991 or beginning of 1992, in relation to imprisonments he took steps to alleviate the problems by appointing professional prison staff." The Defence further submitted that by bringing in new guards in the prisons, he "was able to get rid of the brutality that was in there."
[206] At the Appeal Hearing, Judge Güney asked the following: "In the appeals brief, you mentioned for the first time that Mr. Babić attempted to alleviate […] the problems prevailing in detention centres by using professional prison personnel, but you do not explain to what extent this contributed to improving detention conditions. Could you expand on this? […]". In response, the Defence did not deny that this was mentioned for the first time in the Appellant's Brief and said that the Appellant would be better placed to answer this question. The Appellant did not provide any further explanation. AT. 53 and 54.

this mitigating circumstance."[208] He contends that since mitigating circumstances need only be established on a balance of probabilities, the testimony of Ambassador Galbraith concerning his peace efforts should have been considered as a mitigating circumstance and afforded some weight, as such testimony shows that it is more likely than not that his efforts in connection with the peace plan took place.[209] The Prosecution, however, disagrees that the Trial Chamber employed the wrong standard of proof and submits that the Trial Chamber did assess the evidence on a balance of probabilities as it should have done.[210]

65. The Appeals Chamber recalls that the Trial Chamber correctly noted that "[m]itigating factors […] are to be determined on a balance of probabilities."[211] The Appeals Chamber finds that the Appellant has failed to show the application of an incorrect legal standard by the Trial Chamber and, in any event, concludes that this purported error would not necessitate a change in the Appellant's sentence for the reasons articulated in the preceding sub-section. Accordingly, this part of the Appellant's sixth ground of appeal is dismissed.

E. The Trial Chamber's overall assessment of the mitigating circumstances

66. The Appellant alleges under his tenth ground of appeal that the Trial Chamber erred both 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, to wit: (1) admission of guilt, (2) substantial co-operation, (3) expression of remorse, (4) voluntary surrender, (5) personal and family circumstances".[212] He contends that, "taken either separately or in amalgamation […] the harshness of the sentence imposed does not adequately consider the appropriate weight to those mitigating circumstances".[213] The Prosecution responds that the Appellant failed "to prove that the Trial Chamber made a discernible error in the weight given to these mitigating circumstances".[214] The Appeals Chamber will address the alleged errors with regard to each of these mitigating circumstances in turn.[215]

---

[207] "As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised." *Kvočka et al.* Appeal Judgement, para. 674; *see* also *Kupreškić* Appeal Judgement, para. 414.
[208] Appellant's Brief, para. 140.
[209] *Ibid*.
[210] Respondent's Brief, para. 3.65.
[211] Sentencing Judgement, para. 48.
[212] Appellant's Brief, para. 181.
[213] *Ibid.*, para. 188.
[214] Respondent's Brief, para. 3.97; AT. 48 - 49.
[215] The Appeals Chamber will not address the issue of whether, taken "in amalgamation", the mitigating factors referred to by the Appellant were properly weighed by the Trial Chamber. 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

1. The Appellant's admission of guilt

67. The Appellant alleges that the Trial Chamber erred in "not affording the appropriate weight" to his admission of guilt as a mitigating circumstance.[216] He contends that even though the Trial Chamber noted that his acceptance of guilt was "exceptional because his admission of facts and of guilt made it likely that an indictment would be issued against him",[217] it did not consider this circumstance as "exceptional" when attaching weight to it.[218] The Prosecution responds that the Appellant's assertion is "unsubstantiated and unsupported" and that he did not establish that the Trial Chamber abused its discretion.[219]

68. The Appeals Chamber finds that the Trial Chamber did take this mitigating circumstance into account. It found it to be "exceptional"[220] and did consider it in its final determination.[221] The Appellant has not shown that the Trial Chamber committed a discernible error in the exercise of its discretion in weighing the mitigating circumstance in question. As a result, this part of the Appellant's tenth ground of appeal is dismissed.

2. The Appellant's substantial cooperation

69. The Appellant alleges that while the Trial Chamber "did, in fact, attach substantial mitigating weight to his cooperation with the Tribunal", it is however "apparent that the appropriate weight is not reflected in the [s]entence imposed".[222] His argument is based on a comparison with the sentence imposed on Biljana Plavšić, who received a lesser sentence despite the fact that she "tendered no cooperation".[223] In his view, the "disparity cannot be reconciled on the mere basis of her age and the erroneous conclusion by the Trial Chamber that [his] post-conflict behaviour was not tantamount to that of Biljana Plavšić".[224] The Prosecution responds that, as noted by the Appellant, the Trial Chamber did attach "substantial mitigating weight" to his cooperation and that his argument is therefore wrong.[225] It further argues that the Appellant's comparison with the

Chamber committed a discernible error concerning a specific factor. As correctly stated at para. 675 of the *Kvočka* Appeal Judgement, "[m]ere recital of mitigating factors without more does not suffice to discharge this burden".
[216] Appellant's Brief, para. 182.
[217] Sentencing Judgement, para. 70.
[218] Appellant's Brief, para. 182.
[219] Respondent's Brief, paras 3.89 and 3.90.
[220] Sentencing Judgement, para. 70.
[221] Sentencing Judgement, para. 71: "The Trial Chamber is satisfied that Babić's admission of guilt in the circumstances described above is a mitigating factor." *See* also Sentencing Judgement, para. 97: "In conclusion, the Trial Chamber accepts that the following factors establish that a reduced sentence is appropriate: Babić's admission of guilt and the promptness thereof …."
[222] Appellant's Brief, para. 183.
[223] *Ibid.*
[224] *Ibid.*, para. 184.
[225] Respondent's Brief, para. 3.91; AT. 49.

Plavšić's case is "not proper" as "sentences cannot be compared on the basis of cooperation and age."[226]

70. As acknowledged by the Appellant and noted by the Prosecution, the Trial Chamber did attach substantial weight to the Appellant's cooperation.[227] The Appellant has not shown that the Trial Chamber failed to give sufficient weight to relevant considerations but is again challenging his sentence on the basis of a comparison with the *Plavšić* case. The Appeals Chamber has already dismissed the Appellant's argument that the Trial Chamber erred in not imposing a sentence similar to that imposed on Biljana Plavšić as such comparison is of limited use in the present case.[228] This part of the Appellant's tenth ground of appeal is therefore dismissed.

3. The Appellant's expression of remorse

71. The Appellant submits that the Trial Chamber failed to ascribe sufficient weight to his expression of remorse.[229] He draws the attention of the Appeals Chamber to the fact that "[u]nlike any other person convicted before the Tribunal, [he] did not wait until he was about to be sentenced to publicly express his remorse, but did so more promptly, at the time he entered his plea of guilty", and to the fact that he had "privately expressed his remorse much earlier, when he first began to cooperate with the Tribunal".[230] The Prosecution agrees with the Appellant that he promptly expressed remorse and notes that his case is "unique since he came forward at a time when the Prosecution was still in the investigating phase".[231] Nevertheless, the Prosecution maintains that the Appellant fails to demonstrate that the Trial Chamber failed to give appropriate weight to his expression of remorse.[232]

72. The Appeals Chamber notes that the Trial Chamber considered the Appellant's expression of remorse both before[233] and after[234] he entered his plea of guilt, and did take this circumstance into account in mitigation.[235] The Appellant has not shown that the Trial Chamber committed a discernible error in the exercise of its discretion. As a result, this part of the Appellant's tenth ground of appeal is dismissed.

---

[226] *Ibid.*, para. 3.92.
[227] Sentencing Judgement, para. 75.
[228] *See* Section IV(B)(2).
[229] Appellant's Brief, para. 185.
[230] *Ibid.*
[231] Respondent's Brief, para. 3.93; AT. 49.
[232] *Ibid.*, para. 3.93.
[233] Sentencing Judgement, para. 82.
[234] *Ibid.*, para. 83.
[235] *Ibid.*, para. 84: "The Trial Chamber is satisfied that the remorse expressed by Babić is sincere and consequently constitutes a mitigating factor."

4. The Appellant's voluntary surrender

73. The Appellant notes that he had not only voluntarily surrendered, but did so "knowing that he would be facing a prison sentence".[236] He also draws the attention of the Appeals Chamber to the fact that he began to cooperate and live with his family under the protection of the International Tribunal before he was indicted.[237] Further, he argues that his situation is "distinct from that of any other [a]ccused" because he surrendered without any arrest warrant.[238] The Prosecution agrees with the Appellant that he confessed his involvement before being indicted and further states that he knew that "he would be sentenced to a term of imprisonment when he agreed to testify".[239] Although noting that this makes the Appellant's case different from that of other accused, the Prosecution states that the Trial Chamber did consider this factor in mitigation and that "none of this shows that the Trial Chamber failed to give the factor appropriate weight".[240]

74. The Appeals Chamber finds that the Appellant's argument that he surrendered knowing that he "would be facing a prison sentence" has no merit as this might equally be said of every accused having surrendered and pled guilty before the International Tribunal for the serious crimes referred to in the Statute. With regard to his arguments pertaining to his cooperation, the Appeals Chamber has already found that the Trial Chamber properly took into account his status as a protected witness and the impact that his cooperation had on his family and accordingly gave "substantial weight" to his cooperation.[241] With regard to the fact that he surrendered without any arrest warrant, the Appeals Chamber notes that the Trial Chamber accepted both parties' submissions in this respect, as it clearly stated in the Sentencing Judgement.[242] Further, as correctly noted by the Prosecution, the Trial Chamber did take into account, when considering the Appellant's cooperation, the fact that he "provided self-incriminatory statements and documentation to assist in bringing himself and others to justice".[243]

75. The Appeals Chamber finds that the Trial Chamber correctly took into account his voluntary surrender as a mitigating circumstance[244] and did consider it in its final determination.[245] As a result, this part of the Appellant's tenth ground of appeal is dismissed.

---

[236] Appellant's Brief, para. 186.
[237] *Ibid.*
[238] *Ibid.*
[239] Respondent's Brief, para. 3.94.
[240] *Ibid.*
[241] Sentencing Judgement, para. 74. *See* Section VI(B).
[242] Sentencing Judgement, para. 86.
[243] *Ibid.*, para. 74.
[244] *Ibid.*, para. 86.
[245] *Ibid.*, para. 97.

5. The Appellant's personal and family circumstances

76. The Appellant reiterates that, as discussed under his fourth ground of appeal, "the circumstances surrounding this case, and the effect of [his] cooperation on his family, are unlike any others that have been considered by the Tribunal".[246] He then turns to compare his case with the the case of Biljana Plavšić, who received a lesser sentence despite the fact that she "did not put herself and her family in danger by assisting the Tribunal in bringing others to justice".[247] The Prosecution responds that the Trial Chamber did consider this factor in mitigation and that "the fact that the Appellant received a greater sentence than Biljana Plavšić does not demonstrate that the Trial Chamber gave this factor an inappropriate weight, however."[248]

77. As the Appeals Chamber has already noted, the Trial Chamber properly took into account both the Appellant's status as a protected witness and the impact of his cooperation on his family when according "substantial weight" to that cooperation as a mitigating factor and concluded that the Trial Chamber correctly assessed these circumstances.[249] The Appellant does not present further arguments, under the present part of his tenth ground of appeal, to show that the Trial Chamber committed a discernible error in the exercise of its discretion. As a result, this part of the Appellant's tenth ground of appeal is dismissed.

[246] Appellant's Brief, para. 187.
[247] *Ibid.*
[248] Respondent's Brief, para. 3.95.
[249] *See* Section VI(B).

VII. SEVENTH GROUND OF APPEAL: THE APPELLANT'S LEADERSHIP POSITION AS AN AGGRAVATING CIRCUMSTANCE

78. The Appellant submits under the present ground of appeal that the Trial Chamber erred both 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 position as an aggravating factor, thereby imposing a more severe sentence.[250] He argues that the Trial Chamber based its conclusion on two arguments: (1) "as a regional political leader he enlisted the resources of the SAO Krajina to further the joint criminal enterprise"; and (2) "by his speeches and media exposure [he] prepared the ground for the Serb population to accept that their goals could be achieved through acts of persecution".[251] The Prosecution agrees with the Appellant that "his position as a regional political leader was not equivalent to a leadership position in the joint criminal enterprise"[252] but submits that the Appellant "mischaracterised"[253] the Trial Chamber's finding with regard to his role. In its view, the Trial Chamber properly considered the Appellant's role "as a high political leader" as an aggravating circumstance, and therefore did not abuse its discretion.[254]

79. 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 as such was an aggravating factor, but rather found that "the fact that Babić held and remained in high political positions counts as an aggravating circumstance".[255] The Appeals Chamber has already noted that the Trial Chamber accepted that the Appellant "was not the prime mover in the campaign of persecution".[256] It does not follow from the Trial Chamber's analysis of the Appellant's role that the former considered that the Appellant held a leadership position in the joint criminal enterprise. Rather, the Trial Chamber focused on the fact that the Appellant was "a high-ranking regional political leader" who had prominent functions during the time covered in the Indictment.[257] This was clearly stated in the Indictment,[258] in the Factual Statement,[259] and is not in any case disputed by the Appellant. The Appellant's argument in that respect is therefore unfounded.

---

[250] Appellant's Brief, para. 143.
[251] *Ibid.*, para. 145, quoting para. 61 of the Sentencing Judgement.
[252] Respondent's Brief, para. 3.67, quoting para. 148 of the Appellant's Brief.
[253] *Ibid.*, para. 3.68.
[254] *Ibid*., para. 3.68; AT. 43.
[255] Sentencing Judgement, para. 62.
[256] *Ibid*., para. 79. *See supra* para. 38.
[257] Sentencing Judgement, para. 56.
[258] Indictment, para. 3.
[259] Factual Statement, paras 4 and 5.

80. The Appeals Chamber now turns to the arguments raised at the Appeal Hearing with regard to this ground of appeal.[260] The Prosecution reiterated its position that the Trial Chamber did not consider the Appellant's position as a political leader as being equivalent to a leadership position in the joint criminal enterprise.[261] In reply, the Defence stated the following:

> If that reasoning holds, then anyone who is indicted, who is in a high political office no matter what their role in the joint criminal enterprise [is] must be given an aggravating circumstance. Is that what the law intends? Or does the law intend that a person be given an aggravating circumstance for a leadership role if they in fact [held] a leadership role in the joint criminal enterprise?[262]

Counsel for the Defence concluded that "[i]ndeed there have been cases where people in high political offices have been found to warrant the aggravating circumstance, but they were also leaders of the joint criminal enterprise."[263] The Appeals Chamber notes that, contrary to the Defence's assertion, the position of an accused in "high political offices" has been considered as an aggravating factor for the purposes of sentencing even where an accused's leadership of a joint criminal enterprise is not at issue.[264] Several cases before the International Tribunal in which the mode of liability of joint criminal enterprise was not at issue illustrate that a Trial Chamber has the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute.[265] A high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence.[266] Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised.[267] For instance, in the *Aleksovski* case, the Appeals Chamber considered that the superior responsibility of the appellant, who was a prison warden, "seriously aggravated [his] offences, [as] [i]nstead of preventing it, he involved himself in violence against those whom he should have been protecting".[268] In *Ntakirutimana*, the ICTR Appeals Chamber

---

[260] AT. 52-53.
[261] AT. 43, lines 2-6: "[…] in this particular ground, the [A]ppellant has misconstrued what the Trial Chamber did. It did not base this particular aggravating circumstance on [the Appellant's] leadership role in the joint criminal enterprise. In fact, it based the aggravating circumstance on his role as a regional political leader."
[262] AT. 52, line 23 to AT. 53 line 4.
[263] AT. 53, lines 6-9.
[264] *Brdanin* Trial Judgement, para. 1099. Having found that a joint criminal enterprise was not an appropriate mode of liability to describe the individual criminal responsibility of Brđanin, the Trial Chamber found that his position of authority at the highest level of the political hierarchy and the abuse of such authority constituted an aggravating factor of considerable weight.
[265] *See Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745; *Kupreškić* Appeal Judgement, para. 451.
[266] *Krstić* Trial Judgement, para. 709.
[267] *Kayishema and Ruzindana* Appeal Judgement, paras 358 - 359.
[268] *Aleksovski* Appeal Judgement, para. 183.

concurred with the Trial Chamber that the abuse of the appellant's personal position in the community was an aggravating circumstance.[269]

81. In the present case, the Trial Chamber did not hold that the Appellant's position as a regional political leader in itself constituted 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 SAO 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.[270] Therefore, the Appeals Chamber considers that the Trial Chamber correctly found that the Appellant's leadership position was an aggravating circumstance.

82. For the foregoing reasons, the Appellant's seventh ground of appeal is dismissed.

[269] *Ntakirutimana* Appeal Judgement, para. 563.
[270] Sentencing Judgement, para. 61.

VIII. EIGHTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER GROSSLY MISCONSTRUED THE SCOPE OF THE APPELLANT'S ROLE AND PARTICIPATION IN THE JOINT CRIMINAL ENTERPRISE

83. The Appellant claims, in his Notice of Appeal, that the Trial Chamber erred both 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]".[271] The Appellant's Brief, however, does not put forward any new argument to support his assertion but only refers to the arguments he presented in support of his third and seventh ground of appeal. He expressly acknowledges this.[272] As those arguments have already been addressed by the Appeals Chamber,[273] there is no need to expand on them further. The only distinct argument advanced under his eighth ground of appeal is that the Trial Chamber disregarded the "representations and recommendations made by the Prosecution", a circumstance which in his view gives rise to "important policy considerations not previously addressed by the Tribunal".[274] Even though this argument goes beyond the scope of the Appellant's eighth ground of appeal in that it does not support his allegation that the Trial Chamber "grossly misconstrued" his role and participation in the joint criminal enterprise, the Appeals Chamber will nevertheless address the argument for purposes of clarification.

84. The Appellant contends that, in light of his claim that the weight to be accorded by a Trial Chamber to the sentencing recommendations made by the Prosecution is an unresolved issue, plea agreements are rendered "without value or meaning"[275] by a purported "policy" which he describes as follows:

> a) a Trial Chamber is under no obligation to afford any consideration, whatsoever, to a sentencing recommendation made by the Prosecution;
>
> b) a Trial Chamber is permitted to, and may well, impose a sentence higher than [the one] recommended by [the] Prosecution;
>
> c) a Trial Chamber needs not to articulate any reasons for exceeding the sentencing recommendation made by the Prosecution;
>
> d) a Trial Chamber needs not to accept the facts as they are presented in a factual statement and by [the] Prosecution; and

[271] Notice of Appeal, para. 8.
[272] Appellant's Brief, para. 162. *See* also Respondent's Brief, para. 3.72.
[273] *See* Sections V and VII.
[274] Appellant's Brief, para. 165.
[275] *Ibid.,* paras 166 and 168.

e) a Trial Chamber does not have any obligation to provide clear reasoning [as to] why such facts were rejected.[276]

85. When assessing the Appellant's second ground of appeal, the Appeals Chamber found that the Trial Chamber did not ignore the facts contained in the Factual Statement[277] and did not fail to give a reasoned opinion for its departure from the recommendation of the parties as to sentence.[278] With these previous findings in mind, the Appeals Chamber turns to consider the Appellant's proposition that plea agreements are rendered meaningless due to the "policy" described above.

86. The above-described "policy" could indeed, as suggested by the Appellant and noted by the Prosecution, have a "chilling effect"[279] on plea agreements before the International Tribunal.[280] Nevertheless, 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 they enter. 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 unambiguously 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.[281] A Trial Chamber cannot simply, as alleged by the Appellant, ignore such recommendation and depart from it without providing reasons for such departure.[282]

87. 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, due consideration was given to the recommendation of the parties. Additionally, the Trial Chamber explained the reason for its departure: it disagreed with the parties as to the scope of the Appellant's

[276] *Ibid.*, para. 167.
[277] *See* Section V(A).
[278] *See* Section IV(B)(1). The Prosecution, for this reason, did not wish to present any argument in respect of this argument of the Appellant: "This argument has also been addressed previously in the Prosecution's answer to the second ground of appeal and will, therefore, not be reiterated in this section." (Respondent's Brief, para. 3.76).
[279] Respondent's Brief, paras 3.72 and 3.77.
[280] Appellant's Brief, para. 168.
[281] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 89.

role in the joint criminal enterprise. Therefore, the Appellant's arguments pertaining to this alleged "policy issue" are unfounded, and the Appellant's eighth ground of appeal is dismissed.

[282] *Ibid*.

IX. NINTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER CONSIDERED FACTS OUTSIDE THE SCOPE OF THE INDICTMENT

88. The Appellant alleges that the Trial Chamber erred both in law and in fact and abused its discretion by "basing its decision upon events and facts which occurred and arose outside of the time period covered by Count 1 of the [I]ndictment".[283] He argues that the Trial Chamber misconstrued his role as "being responsible for persecutions on one-third of Croatia's territory" and contends that references to such responsibility can *inter alia* be found under the Trial Chamber's discussion of the "extreme gravity"[284] and the "large geographical area"[285] in which the crimes occurred.[286] The Prosecution responds that the Appellant's argument is "unfounded".[287] It argues that the Indictment "clearly differentiates between the temporal and geographical goal of the joint criminal enterprise in which the Appellant was co-perpetrator and the degree of participation of the Appellant in that joint criminal enterprise" and concludes that the Appellant has failed to demonstrate that the Trial Chamber erred in its "acceptance of the language of the Indictment and the factual summary".[288]

89. According to the Indictment, the Appellant was charged for his participation in a joint criminal enterprise that "came into existence no later than 1 August 1991 and continued until at least June 1992", which purpose was "the permanent removal of the majority of the Croat and other non-Serb population from approximately one-third of the Republic of Croatia".[289] The crime of persecution he was charged with was "within the objective of the joint criminal enterprise"[290] but only covered the period "[f]rom on or about 1 August 1991 until at least 15 February 1992".[291] Contrary to what the Appellant submits,[292] a distinction was clearly drawn by the Trial Chamber in the Sentencing Judgement between the temporal scope and geographical objective of the joint criminal enterprise. The Appeals Chamber finds that the temporal scope of the crime, as the Appellant himself acknowledges, was properly referred to by the Trial Chamber: "[a]s noted in the Sentencing Judgement, [the] Appellant acknowledged that from about 1 August 1991 to 15 February 1992, he contributed to a campaign of persecution in various ways".[293] The same is true,

[283] Appellant's Brief, para. 171.
[284] Sentencing Judgement, para. 53.
[285] *Ibid*.
[286] Appellant's Brief, para. 172.
[287] Respondent's Brief, para. 3.82.
[288] *Ibid. See* also AT. 38.
[289] Indictment, para. 5.
[290] *Ibid.*, para. 6.
[291] *Ibid.*, para. 13.
[292] Appellant's Brief, para. 174 : "The Trial Chamber, failed to draw the necessary distinction between the geographical scope existing in the period of time covered by Appellant's plea and afterwards."
[293] Appellant's Brief, para. 175; referring to para. 24 of the Sentencing Judgement.

as the Appellant also acknowledges, with respect to the objective of the joint criminal enterprise, referred to by the Trial Chamber as "the permanent and forcible removal of the majority of Croat and non-Serb populations from approximately one third of Croatia through a campaign of persecutions".[294] The Appeals Chamber finds 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 SAO Krajina […] covered one-third of the Republic of Croatia".[295] The Appellant refers for example to paragraph 24(b) of the Sentencing Judgement as an "incorrect and misleading" quotation of paragraph 33(b) of the Factual Statement.[296] These paragraphs respectively read:

> Babić was instrumental in the establishment, support, and maintenance of the government bodies that ruled the SAO Krajina, which, in cooperation with the JNA and a parallel power structure, implemented the objective of **the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia,** and he participated in the commission of crimes listed in the indictment.[297]
>
> He was instrumental in the establishment, support and maintenance of the government bodies ruling the SAO Krajina/RSK, which in cooperation with the JNA and the parallel power structure implemented the objective of **the joint criminal enterprise**.[298]

90. These paragraphs are very similar: the "objective of the joint criminal enterprise" referred to in the Factual Statement was incontestably, as shown above and correctly referred to by the Trial Chamber at paragraph 24(b) of the Sentencing Judgement, "the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia".[299] The same misunderstanding on the part of the Appellant applies to the alleged "incorrect and misleading" quotation by the Trial Chamber of paragraph 33(g) of the Factual Statement at paragraph 24(f) of the Sentencing Judgement. [300] The said paragraphs read as follows:

> He requested the assistance of or facilitated the participation of JNA forces to establish and maintain the SAO Krajina, furthering the objective of **the joint criminal enterprise.**[301]
>
> Babić requested the assistance or facilitated the participation of JNA forces in establishing and maintaining the SAO Krajina, thereby furthering the objective of **permanently and forcibly removing the majority of Croat and other non-Serb populations from approximately one-third of Croatia**.[302]

The Appeals Chamber finds that the Appellant's arguments in that respect are without merit.

---

[294] *Ibid.*, para. 174; referring to para. 34 of the Sentencing Judgement.
[295] *Ibid.*, para. 175; AT. 25.
[296] *Ibid.*, para. 173.
[297] Sentencing Judgement, para. 24(b), emphasis added.
[298] Factual Statement, para. 33(b), emphasis added.
[299] Indictment, para. 5.
[300] Appellant's Brief, para. 178.

91. The Appeals Chamber now turns to the Appellant's further argument that the references at paragraph 53 of the Sentencing Judgement to the "extreme gravity of the crime to which [he] pleaded guilty" and the fact that the crime of persecution "extended over […] a large geographical area" indicate that the Trial Chamber considered that he was responsible for persecutions on one-third of Croatia's territory.[303] The Appeals Chamber notes that the Appellant only suggests that the Trial Chamber based its conclusion on a wrong assessment of the temporal and geographical scope of the Indictment, but does not set forth any reasoning in support of this suggestion. Therefore, it finds that this argument is also without merit.

92. For the foregoing reasons, the Appellant's ninth ground of appeal is dismissed.

[301] Factual Statement, para. 33(g), emphasis added.
[302] Sentencing Judgement, para. 24(f), emphasis added.
[303] Appellant's Brief, para. 172.

X. ELEVENTH GROUND OF APPEAL: THE RECOGNITION BY THE APPELLANT OF THE FULL SIGNIFICANCE OF HIS ROLE

93. The Appellant submits 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.[304] The Appellant alleges that the Trial Chamber erred both in law and in fact and abused its discretion in imposing an impermissible and undefined burden of proof upon him "to convince [it] that he had 'at all times, recognised the full significance of the role he played in Croatia in that period'".[305] He submits further that the Trial Chamber erred in determining that he failed to meet such burden and in considering this "failure" as one of the reasons for the sentence imposed.[306] In his view, he did not bear any burden to convince the Trial Chamber that he "accurately recognised the full significance of the role he played in the events to which he pled guilty".[307] He further argues that, in any event, the Trial Chamber's conclusion is "in direct conflict with the incontrovertible facts that [he] pled guilty; expressed sincere remorse for his actions and omissions; substantially cooperated with the Tribunal by providing information, documentation, and testimony about both himself and others; and in doing so placed both himself and his family in danger".[308]

94. The Prosecution responds that the Trial Chamber properly placed upon the Appellant the burden to "demonstrate as a mitigating factor that he recognised the full significance of the role he played in Croatia",[309] that the Trial Chamber applied the correct legal standard – that is, "the balance of probabilities"[310] – and that the Appellant failed to demonstrate that the Trial Chamber concluded that he "did not tell the truth".[311] The Appeals Chamber will address these alleged errors in turn.

95. In its conclusion pertaining to the determination of the sentence, the Trial Chamber noted that, by admitting his guilt, the Appellant "demonstrated some courage", but concluded that it was "not convinced that he ha[d], at all times, recognised the full significance of the role he played in Croatia" in the period covered by the Indictment.[312] The Trial Chamber reached this conclusion after its assessment of the mitigating and aggravating circumstances, and it would indeed appear, as

[304] Appellant's Brief, para. 191, referring to para. 98 of the Sentencing Judgement. *See* also Appellant's Brief, para. 192.
[305] Appellant's Brief, para. 190.
[306] *Ibid.*, paras 190 and 192.
[307] *Ibid.*, para. 192.
[308] *Ibid.*, para. 193. *See* also para. 198.
[309] Respondent's Brief, para. 3.99.
[310] *Ibid.*, para. 3.100, referring to para. 48 of the Sentencing Judgement.
[311] *Ibid.*, para. 3.102, citing para. 198 of the Appellant's Brief.

the parties assert, that the "Appellant's failure to convince the Trial Chamber was among the reasons given for the sentence imposed."[313] The Appeals Chamber nonetheless notes that, apart from the gravity of the crime, the only other "individual circumstance" considered in aggravation by the Trial Chamber, as expressly stated in the Sentencing Judgement, is the fact that the Appellant held and remained in high political positions.[314]

96. The Appeals Chamber does not find that the Trial Chamber imposed an impermissible and undefined burden of proof upon the Appellant to demonstrate that he had at all times recognised the full significance of the role he played in Croatia, nor that it "erred in considering a failure to convince [the Trial Chamber] as a reason in imposing sentence."[315] In support of his argument, the Appellant refers to paragraph 102 of the Sentencing Judgement which forms part of the Disposition. The said paragraph reads as follows:

> For the foregoing reasons, having considered the arguments and the evidence presented by the parties, the Trial Chamber hereby sentences Milan Babić to 13 (thirteen) years of imprisonment.[316]

97. The above paragraph should be read as making reference to the legal findings made within the Sentencing Judgement. The statement in question was made in a paragraph contained in the section of the Sentencing Judgement titled "Conclusion":

> Babić was a regional political leader who sought to promote what he considered the interests of his people to the detriment of Croats and other non-Serbs by serious violations of international humanitarian law. His lack of moral strength prevented him from standing against injustice committed against non-Serb civilians and led him to become involved in a joint criminal enterprise. By admitting his guilt in relation to the armed conflict in Krajina in 1991-1992, Babić demonstrated some courage. *Yet the Trial Chamber is not convinced that he has, at all times, recognised the full significance of the role he played in Croatia in that period.*[317]

98. The Appeals Chamber cannot interpret this statement as implying that the Trial Chamber found that the Appellant did not tell the truth as he claims.[318] The Appellant suggests that the Trial Chamber's conclusion implied that he was a "liar" or a "self deluded fool",[319] but the Appeals Chamber does not find that such inference can be drawn from the statement in question. The Appellant does not provide any reference to any part of the Sentencing Judgement where the Trial Chamber concluded or suggested that he lied and, as the Prosecution notes, "there is nothing in the [Sentencing Judgement] to suggest that the Trial Chamber improperly held the Appellant's initial

[312] Sentencing Judgement, para. 98.
[313] Appellant's Brief, para. 192; Respondent's Brief, para. 3.101.
[314] Sentencing Judgement, paras 54- 62.
[315] Appellant's Brief, para. 192.
[316] Sentencing Judgement, para. 102.
[317] *Ibid.*, para. 98 (emphasis added).
[318] Appellant's Brief, para. 198.
[319] *Ibid.*, para. 199.

guilty plea as an aider and abettor against him".[320] 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.

99. 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.[321] As the Appeals Chamber has already found that the Appellant has not demonstrated 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 expand 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.

100. For the foregoing reasons, the Appellant's eleventh ground of appeal is dismissed.

[320] Respondent's Brief, para. 3.101; footnote 185.
[321] Appellant's Brief, paras 194, 195 and 196.

XI. DISPOSITION

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.

Done in English and French, the English text being authoritative.

_____	_____	_____
Judge Florence Ndepele Mwachande Mumba Presiding	Judge Fausto Pocar	Judge Mohamed Shahabuddeen

_____	_____
Judge Mehmet Güney	Judge Wolfgang Schomburg

Judge Florence Ndepele Mwachande Mumba appends a partial dissenting opinion limited to the sentence.

Dated this eighteenth day of July 2005,

At The Hague,
The Netherlands.

[Seal of the Tribunal]

XII. PARTIALLY DISSENTING OPINION OF JUDGE MUMBA

1. I write separately to say that considering that the Appeals Chamber has found that the Trial Chamber erred in failing to take into account the Appellant's post conflict conduct as a mitigating circumstance, his sentence should be accordingly reduced. My reasons are set out in brief below.

2. In this case, the Appeals Chamber found that the Trial Chamber erred in law in not taking into account the Appellant's attempts to further peace subsequent to the commission of crime for which he was convicted as a mitigating factor. Bearing in mind the circumstances of this case and those prevailing at the time in 1995 when the Appellant made these efforts, I am of the considered opinion that he should be given actual credit for this in the determination of his sentence. Evidence was admitted that in his position as Minister of Foreign Affairs and as Prime Minister, he not only participated in negotiations between the Croatian and RSK authorities, but also tried to achieve the peaceful reintegration of the Krajina into the Republic of Croatia along the lines of the Z-4 peace plan.[1] According to Ambassador Galbraith, the Appellant's efforts included attempts to convince Serbian President Slobodan Milošević to support the peace deals;[2] meetings with Ambassador Galbraith during 1995, which included the conclusion of an agreement in order to avoid war;[3] subsequently making a public statement of support for this agreement intended to attract significant support;[4] and appeared to be prepared to make the kind of concessions that could have possibly averted a war.[5] As a result of these efforts, Ambassador Galbraith further testified that the Appellant risked being dismissed by his RSK colleagues in Knin, and by the RSK Assembly, but that it was a last chance for peace.[6] In addition to all this, evidence was presented to the Trial Chamber to the effect that the Appellant had the interests of the Serb population of the Krajina at heart, had concerns for the local population, considered as a possibility the idea of the cohabitation of Serbs and Croats and was more open to this idea than others.[7]

3. The Security Council Resolution creating the International Tribunal lays down its aims as, *inter alia,* including the contribution to the restoration and maintenance of peace.[8] It is my

[1] Sentencing Hearing, T. 206, *See* also the Testimony of Drago Kovaćević, Sentencing Hearing , T. 153.
[2] *Prosecutor v. Milan Babić,* Case No. IT-03-72-T ("*Babić* Case"), Ex. PS5, Witness Galbraith, T. 23087, 23105 and 23158.
[3] *Babić* Case, Ex. PS5, Witness Galbraith, T. 23104, 23105 and 23157.
[4] *Ibid.*, Ex. PS5, Witness Galbraith, T. 23105.
[5] *Ibid.* , Ex. PS5, Witness Galbraith, T. 23203.
[6] *Ibid.*, Ex. PS5, Witness Galbraith, T. 23108. The majority Judges in the Appeals Chamber in fact acknowledged at para. 57 that this evidence was available before the Trial Chamber.
[7] Sentencing Hearing, T. 205; *Milošević Trial*, Witness Galbraith, T. 23110.
[8] Security Council Resolution 827 (1993), S/3217, 25 May 1993, which states that one of the aims of this International Tribunal is to contribute to the restoration and maintenance of peace. *See* also Report of the Security-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993, (S/25704), Art. 10.

considered view that, where individuals who have committed grave crimes, subsequently choose to take steps to lessen the effects of their crimes on the local population and seek to restore a situation of peaceful co-existence, this is taken into account and accorded significant weight. Furthermore, since in this case the Appellant's subsequent conduct has direct impact on the crimes for which he was convicted, it lends support to his argument and should be taken into account and given the appropriate weight. Failure to recognise this, and failure to reduce his sentence as a result, implies that his actions in this regard were of negligible value. Giving the Appellant credit for his actions would not, in my view, in any way minimise the gravity of the crimes for which he was convicted.

4. It is settled law that in an appeal against sentence the Appeals Chamber should not substitute its own sentence for that of a Trial Chamber unless it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.[9] In the instant case, the Appeals Chamber has found that the Trial Chamber erred in failing to take into account the Appellant's efforts to achieve peace, subsequent to the commission of the crimes for which he was convicted, as a mitigating factor. Considering that when the Appeals Chamber finds that the Trial Chamber erred in law in not taking into account a particular factor in mitigation, it has the power to revise the sentence imposed by the Trial Chamber, I am of the view that in light of the particular error committed by the Trial Chamber, this is one such case which warrants the Appeals Chamber's intervention by reducing the sentence passed by the Trial Chamber. To argue therefore that in light of the particular gravity of the offences in this case, a material mitigating factor such as the one in question should not have any impact whatsoever on the sentence, is in my opinion, contradictory with the finding of the Appeals Chamber that the Trial Chamber committed an error by not considering the said mitigating factor.

5. A mitigating factor need not minimise the serious criminal conduct for which a person is convicted, no such standard exists in law. A mitigating factor affects penalty, not liability. The realisation of wrongful conduct, coupled with acts which halt or reverse the continuation of crimes should be sufficient to mitigate penalty. In this case, even if it were accepted that the Appellant's peace efforts were driven more for the comfort of Serbs rather than contrition, there is no evidence that the Serbs were going to benefit more than the non-Serbs from the said peace efforts. Thus, the negative inference against the Appellant has no basis.

6. In my view, therefore, failure to accord weight to the Appellant's attempts to further peace after the commission of the crime of persecution, to the extent that it results in a reduced sentence

after finding that the Trial Chamber erred in law by disregarding such conduct, which the Appeals Chamber has found amounts to a mitigating circumstance, is not acceptable. It is for this sole reason that I dissent from the sentencing aspect of the judgement.

Done in English and French, the English version being authoritative.

_____
Judge Florence Ndepele Mwachande Mumba

Dated this eighteenth day of July 2005,
At the Hague
The Netherlands

[Seal of the Tribunal]

[9] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, 29 November 2002, para. 9; *Alfred Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 395.

XIII. GLOSSARY OF TERMS

A. List of Abbreviations, Acronyms and Shorts References

Appellant	Milan Babić
Appellant's Brief	*Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Public redacted version of "Appellant's brief pursuant to Rule 111 filed on 15 November 2004", 25 March 2005
AT.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
BCS	Bosnian/Croatian/Serbian
Defence Sentencing Brief	*Prosecutor v. Milan Babić,* Case No. IT-03-72-S, Milan Babić's Sentencing Brief, 22 March 2004
Factual Statement	*Prosecutor v. Milan Babić*, Case No. IT-03-72-PT, Amendment to the Joint Motion for Reconsideration of Plea Agreement between Milan Babić and the Office of the Prosecutor pursuant to Rule 62*ter*, Tab 1, 22 January 2004
Further Appearance	*Prosecutor v. Milan Babić,* Case No. IT-03-72-PT, Further Appearance, 28 January 2004
Further Initial Appearance	*Prosecutor v. Milan Babić,* Case No. IT-03-72-PT, Further Initial Appearance, 27 January 2004
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
International Tribunal	See: ICTY
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Milan Babić Sentencing Brief	*The Prosecutor v. Milan Babić,* Case No. IT-03-72-S, Milan Babić Sentencing Brief, 22 March 2004

Notice of Appeal	*Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Milan Babić's Notice of Appeal, 3 September 2004
Plea Agreement	*Prosecutor v. Milan Babić,* Case No. IT-03-72-PT, Amendment to the Joint Motion for Reconsideration of Plea Agreement between Milan Babić and the Office of the Prosecutor pursuant to Rule 62*ter*, Annex A, 22 January 2004
Prosecution Sentencing Brief	*The Prosecutor v. Milan Babić,* Case No. IT-03-72-S, Prosecution's Sentencing Brief, 22 March 2004
Respondent's Brief	*Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Public redacted version of "Prosecution Response to the Appellant's Brief Pursuant to Rule 111 filed 20 December 2004", 25 March 2005
RSK	Republic of Serbian Krajina/*Republika Srpska* Krajina
Rules	Rules of Procedure and Evidence of the International Tribunal
SAO	Serbian Autonomous District/*Srpska Autonomna Oblast*
Sentencing Judgement	*Prosecutor v. Milan Babić,* Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings before the Trial Chamber in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
TO	Territorial Defence

B. List of Cited Court Decisions

1. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement")

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

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

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

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement)

"ČELEBIĆI" (A)
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

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

ERDEMOVIĆ
Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement")

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

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement")

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

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement")

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

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

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement")

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

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

SIKIRICA, DOŠEN AND KOLUNDŽIJA
Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 ("*Sikirica et al.* Sentencing Judgement")

B. SIMIĆ, M. TADIĆ, ZARIĆ
Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgement")

D. TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997 ("*Tadić* 1997 Sentencing Judgement")

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

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

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

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

2. ICTR

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

BAGILISHEMA
Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement")

KAJELIJELI
Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement")

KAMBANDA
Jean Kambanda v. Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

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

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

NIYITEGEKA
Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgement and Sentence")

Eliézer Niyitegeka v. Prosecutor, Case No. IT-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

NTAKIRUTIMANA
Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement and Sentence")

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-A, Appeal Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

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