92)

SCSL-2004-15-PT
(5319-5386)

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before:

Registrar: Mr. Robin Vincent

Date filed: 30 April 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY ALSO KNOWN AS ISSA SESAY

ET AL

CASE NO. SCSL-2004-15-PT

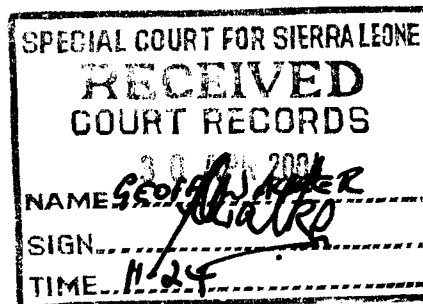
PROSECUTION RESPONSE TO "APPLICATION TO SHOW GOOD CAUSE TO ALLOW AN APPEAL OF THE DECISION ON APPLICATION OF ISSA SESAY FOR PROVISIONAL RELEASE"

Office of the Prosecutor:

Mr. Luc Côté
Mr. Robert Petit
Mr. Abdul Tejan-Cole
Ms. Boi-Tia Stevens

Defence Counsel:

Mr. Timothy Clayson
Mr Wayne Jordash
Mr A.F. Serry-Kamal
Ms Sareta Ashraph



5320

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN-SIERRA LEONE

THE PROSECUTOR

Against

ISSA HASSAN SESAY ALSO KNOWN AS ISSA SESAY ET AL

CASE NO. SCSL-2004-15-PT

PROSECUTION RESPONSE TO "APPLICATION TO SHOW GOOD CAUSE TO ALLOW AN APPEAL OF THE DECISION ON APPLICATION OF ISSA SESAY FOR PROVISIONAL RELEASE"

I. INTRODUCTION

1. The Prosecution files this response to the Defence "Application to show good cause to allow an appeal of the Decision on Application of Issa Sesay for Provisional Release" (the "**Defence Application**"), dated 19 April 2004 and filed on 20 April 2004 on behalf of Issa Hassan Sesay (the "**Accused**").[1] The Defence Application seeks to show good cause for leave to appeal pursuant to Rule 65(E) against the Decision of the Judge Boutet delivered on 31st March 2004 dismissing the Defence motion for provisional release and denying the application for bail. The Prosecution files this Response to the Defence Application.

2. The main reasons advanced by the Defence are as follows:

    a. The Learned Judge failed to provide adequate or cogent reasons for his determination in paragraph 48 of the Decision that he was not satisfied that the Accused was aware of the existence of any indictment against him or that he would have surrendered to the Special Court. They contend that the Learned Judge misapplied

---

[1] Registry Page ("RP") 1573-1577.

himself to the factual issues in arriving at the said determination and submit that the Learned Trial Judge ought properly to have decided the issue in favour of the Accused.

b. The Learned Judge's interpretation of the evidence in paragraph 58 of the Decision that he considers the evidence that indicates that the Accused participated in peace process as a mitigating factor, should he be convicted, rather than as evidence that he will appear for trial is wrong in that the evidence shows that the Accused was instrumental in bringing the RUF to the peace table rather than participating in the peace process at the end of the hostilities.

3. The Prosecution submits that reasons advanced by the Defence do not amount to "good cause" and in consequence the Defence Application ought to be dismissed in its entirety.

II. ARGUMENTS

"Good Cause"

4. Rule 65(E) provides that "(A)ny decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision."

5. In the ultimate paragraph of the Defence Application, the Defence submits that the Learned Judge erred in law and fact in his assessment of certain factual issues and submits that the same amounts to good cause to warrant the granting of leave to appeal against the Decision of the Learned Judge under Rule 65(E).

6. The Prosecution submits that in order to show "good cause" the Defence must show that the Trial Chamber may have erred in making the impugned decision.[2] In

[2] *Prosecutor v Brdanin and Talic*, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9; *Sagahutu v The Prosecutor*, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26 and *Ndayambaje v The Prosecutor*, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29 and *Prosecutor v Simic et al* IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.

Prosecutor v Fatmir Limaj et al,[3] the Appeals Chamber of the ICTY noted that "(A) Trial Chamber 'may have erred' when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case."

7. The Prosecution submits that the Defence has failed to show any error in law or fact in the Decision of the Learned Judge. It submits that the correct principles of law were applied and all the decisive facts of the case correctly taken into account and assessed. The Prosecution submits that the fact that the Defence is disappointed with the conclusion arrived at by the Learned Judge having applied the correct principles of law does not amount to good cause under Rules 65 (E).

8. It is trite law in national as well as international tribunals that a Court of Appeal will not reverse the finding of a trial judge unless the trial judge has applied the wrong principles of law or misinterpreted the facts.[4] The Prosecution respectfully submits that the Defence Application show no error in law or improper application of the facts in the Decision to warrant the reversal of the said Decision. In the absence of the same, the Prosecution submits that the Defence has failed to show "good cause" as required under Rule 65(E).

Paragraph 48

9. In paragraph 3 of the Defence Application, the Defence contends that in paragraph 48 of the Decision, the Learned Judge stated that he is not satisfied that prior to the Accused's arrest "he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Special Court." The Defence submits that the Learned Judge ought properly to have decided the issue in favour of the Accused.

---

[3] IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.

[4] *Prosecutor v Aleksovski* IT-95-14/1 Judgement 24 March 2000 para. 74, the ICTY Appeals Chamber held that "(T)he Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence , it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber." In *Wellesley-Cole v Wellesley-Cole* 1967-68 ALR SL 210, the Court of Appeal of Sierra Leone held that "(A)n appellate Court will be justified that a judge sitting without a jury has come to a wrong conclusion on a question of fact only on the rarest occasions and when it is convinced by the plainest considerations, and before so finding the court, and each of its members, should be clearly satisfied that the judge's conclusion cannot be explained or justified by any advantage enjoyed by him from having seen and heard the witnesses, and that he was plainly wrong; but the court will be free to differ if it is satisfied that the Judge has not taken proper advantage of his having seen and heard the witnesses, either because that unmistakably so spears from the evidence or because the judge's reasons are unsatisfactory. See also *Attorney-General v Shamel and Shamel* 1957-60 ALR SL 154.

10. In paragraph 48, the Learned Judge stated as follows: "Upon my review of the evidence, I am not satisfied that the Accused was aware of the existence of any indictment against him or that he would have then surrendered to the Special Court. In addition, and more importantly, the Accused has not satisfied me that prior to his arrest he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Special Court."

11. The Prosecution respectfully submits that the Defence failed to show good cause as required. It submits that the Learned Judge applied the correct principles, took into account and correctly assessed all the decisive facts of the case and arrived at the correct conclusion. In *Tadic*,[5] the Appeals Chamber held that "64. ... the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence." The Defence do not assert in their Application that the Decision of the Learned of Judge was unreasonable. The Prosecution therefore urges the Court not grant leave to appeal to the Defence.

12. Further, with respect to the Defence, the Prosecution submits that paragraph 48 must not be read in isolation but must be read in the light of the rubric A of the Decision entitled "A. Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail?" The fact that Accused was unaware of the existence of the indictment against him was not the only issue taken into consideration by the Learned Judge in arriving at his conclusion that the Accused had not satisfied the first of the two-pronged test. The Learned Judge also considered the inability of the Special Court to directly perform

---

[5] IT-94-1, Judgement, 15 July 1999 para 64.

any arrest on the territory of Sierra Leone; the current diminished capability of the national authorities to promptly and efficiently provide any police supervision or intervention in the case of flight of the Accused; the fact the report relied on by the Defence mentions that the potential exists for an extremist reaction to the Special Court and the seriousness of the crimes brought against the Accused.

13. In paragraphs 55 and 57 of the Decision, the Learned Judge also noted several other factors taken into consideration. These include the facts granting bail to the Accused entails that he will be released in the country where he is alleged to have committed the crimes for which he has been indicted, the proximity of the trials and the potential threat to stability with the associated risk affecting the public order.

14. The Prosecution submits that Defence application under this rubric deals with only one issue. It submits that even if the Defence is right on this issue, which it does not concede, the other issues which the Defence has not challenged are so overwhelming that considering the totality of the facts in this case the Learned Trial Judge arrived at the correct decision.

15. The Defence also contends in paragraphs 4 and 5 of the Defence Application that the Learned Judge failed to provide adequate or cogent reasons for his determination. The Prosecution disagrees with this contention and submits that the Decision when read in its totality, and not selectively as the Defence does, provides ample and convincing reasons for the Decision of the Learned Judge and that the relevant facts were considered in their entirety and the law properly applied. Further, the Prosecution submits that even if the Defence contention that the Learned Judge did not provide adequate or cogent reason for his determination was true, the same does not amount to "good cause" under Rule 65(E).

Paragraph 51

16. In paragraph 51 of the Decision, the Learned Judge noted that "Although the evidence indicates that the Accused participated in the peace process that followed the end of the hostilities, I do not consider this issue in these circumstances could be rather regarded as a possible mitigating factor, should he be convicted, than as evidence that he will appear for trial."

17. In paragraph 8 of the Defence Application, the Defence submits that the Learned Trial Judge's interpretation of the evidence and his conclusion in paragraph 51 is wrong in two respects. Firstly, the Defence argues that the Accused had not merely participated in the peace process following the end of hostilities but they contend that the evidence adduced shows that the Accused was instrumental in bringing the RUF to the peace table and thereby helping to bring about the end of the hostilities. Secondly, they argue that the fact that the evidence shows that the Accused played a part in the peace process should not be downgraded to mitigation since it relates specifically to the Accused's conduct which ought to weight heavily in his favour on a wide variety of issues including good character, honesty, intent and bail. The Defence also argues that the Learned Judge ought to have given detailed reasons to justify his position rather than deal with the same in a single sentence.

18. The Prosecution disagrees with the Defence on the above-mentioned arguments. It notes that paragraph 51, like paragraph 48 also falls under rubric A, to wit, "A. Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail?" This was one of several issues the Learned Judge properly took into account and assessed in arriving at his decision. The Prosecution reiterates its earlier submission that the Decision must be read as a whole rather than as separate and distinct paragraphs.

19. In paragraph 8 (iii) of the Defence Application, the Defence complains that the Learned Judge ought to give detailed reasons to justify his decision on this issue as the Defence placed a great deal of weight on this evidence. The Defence cites no authority for its argument. The Prosecution submits that the Learned Judge provided comprehensive reasons to support his entire Decision. The Prosecution submits that there is no authority for the submission that the Learned Judge ought to give detailed reason to justify every paragraph of his decision and would further state that the fact that he "downgraded" the Defence's evaluation of the facts does not amount to "good cause".

20. The Learned Judge did not dismiss the issue but simply suggested it is more relevant as a mitigating factor, should the Accused be convicted. This clearly shows that the issue was taken into account and assessed. The Defence has not argued that the

Learned Judge was wrong in making this statement. The Prosecution submits that the said statement is correct in the light of the totality of the evidence before the court.[6]

21. Further, the Prosecution respectfully submits that even the Defence is right on all the issues mentioned in paragraph 16 above, the same does not amount to "good cause". There is no error in law or fact complained of.

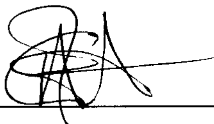
III. CONCLUSION

22. The Prosecution submits that the onus is on the Defence to show good cause. With all due respect to the Defence, the Prosecution submits that they have failed to demonstrate "good cause" as required under Rule 65(E). The Defence showed no error either in law or that the Court failed to take into account and assess all the decisive facts of a case. The Defence gives emphasis to two paragraphs in a Decision containing 57 paragraphs and complains about the conclusions arrived at by the Learned Judge having applied the correct principles of law and taken in account and assessed all the decisive fact. The Prosecution respectfully submits that the same does not amount to "good cause". Taking the totality of the evidence and examining the Decision in its entirety, rather than giving undue emphasis to two paragraphs, the Prosecution respectfully submits that the Learned Judge applied the correct principles and arrived at the correct decision.

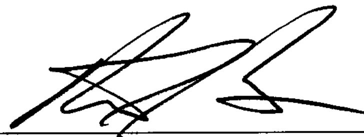
23. Accordingly, the Prosecution submits that the Defence Application be dismissed in its entirety.

Freetown, 30 April 2004.

For the Prosecution,



Luc Côté
Chief of Prosecution



Robert Petit
Senior Trial Attorney

---

[6] Good Character, honesty and the personal circumstances of the Accused are elements which may constitute mitigating circumstances. See *Erdemovic*, IT-96-22, Sentencing Judgement II, 5 March 1998 para 16 (i) and *Blaksic* IT-95-14 Trial Judgement 3 March 2000 para 778.

Prosecution's Index of Authorities

1. *Prosecutor v Brdanin and Talic*, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9;

2. *Sagahutu v The Prosecutor*, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26.

3. *Ndayambaje v The Prosecutor*, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29

4. *Prosecutor v Simic* et al IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.

5. *Prosecutor v Fatmir Limaj et al* IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.

6. Prosecutor v Aleksovski IT-95-14/1 Judgement 24 March 2000 para. 74.

7. *Prosecutor v Tadic*, IT-94-1, Judgement, 15 July 1999 para 64.

8. *Prosecutor v Erdemovic*, IT-96-22, Sentencing Judgement II, 5 March 1998 para 16 (i)

9. *Prosecutor v Blaksic* IT-95-14 Trial Judgement 3 March 2000 para 778.

Annex 1

Prosecutor v Brdanin and Talic, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9;

5329

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Mohamed Shahabuddeen
Judge Rafael Nieto-Navia

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
7 September 2000

PROSECUTOR

v.

RADOSLAV BRDANIN
MOMIR TALIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Ms. Joanna Korner

Counsel for the Defence:

Mr. John Ackerman for Radoslav Brdjanin
Mr. Xavier de Roux, Maître Michel Pitron for Momir Talic

THIS BENCH of 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 ("the International Tribunal"),

BEING SEIZED of the "Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin for Provisional Release", filed by Radoslav Brdjanin ("the Applicant") on 1 August 2000 ("the Application for Leave to Appeal"),

NOTING that the Application for Leave to Appeal is made pursuant to sub-Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"),

NOTING Trial Chamber II's "Decision on Motion by Radoslav Brdjanin for Provisional Release" issued 25 July 2000 denying the motion,

NOTING the "Prosecution's Response to 'Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin (sic) for Provisional Release'", filed on 11 August 2000,

CONSIDERING that sub-Rules 65(A) and (B) provide that once detained, an accused may not be released except upon an order of a Trial Chamber and that such order may only be made after hearing the host country and only if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person,

CONSIDERING that sub-Rule 65(D) provides that decisions on provisional release by Trial Chambers are subject to appeal in cases where leave to appeal is granted upon good cause being shown,

CONSIDERING that the Applicant argues that "good cause" under sub-Rule 65(D) of the Rules exists for granting the Application for Leave to Appeal on the grounds that: i) the Trial Chamber erred by placing the burden at all times on the accused to establish his entitlement to provisional release and that, on the contrary, once a prima facie case is made out by the accused the burden shifts to the Prosecutor; ii) the Trial Chamber erred by interpreting Rule 65 to provide detention as the norm and provisional release as the exception in violation of the International Covenant on Civil and Political Rights of 16 December 1966; and iii) the issue raised is one of general importance to both the International Tribunal and to international law generally,

CONSIDERING that "good cause" within the meaning of sub-Rule 65(D) requires that the party seeking leave to appeal under that provision satisfy the Bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision,

CONSIDERING that under sub-Rule 65(B) of the Rules, the burden of proof is on an applicant to satisfy a Trial Chamber that provisional release should be ordered,

CONSIDERING FURTHER that internationally recognised standards relating to release of persons awaiting trial are applicable to proceedings before the International Tribunal, that in applying them account has to be taken of the different circumstances and situations envisaged by those standards which did not visualise the nature and character of the International Tribunal, and that the International Tribunal does not have the same facilities as are available to national courts to enforce appearance,

FINDING that the Applicant has failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden in this case and, therefore, the Applicant has failed to satisfy the requirement of "good cause" within the meaning of sub-Rule 65(D) of the Rules,

PURSUANT to Rule 65 of the Rules,

HEREBY REJECTS the Application for Leave to Appeal.

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

____

Judge Lal Chand Vohrah
Presiding

Dated this seventh day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Annex 2

Sagahutu v The Prosecutor, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Fausto POCAR, Presiding
Judge David HUNT
Judge Asoka de Z. GUNAWARDANA

Registrar: Mr. Adama DIENG

Decision of: 26 March 2003

Innocent SAGAHUTU
(Applicant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-00-56-I

DECISION ON LEAVE TO APPEAL AGAINST THE REFUSAL TO GRANT PROVISIONAL RELEASE

Counsel for the Appellant
Mr. Fabien Segatwa
Mr. Didier Patry

Counsel for the Prosecution
Ms. Ciré Ali Bâ
Ms. Christine Graham

THIS BENCH OF THE APPEALS CHAMBER of the 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 ("Bench" and "International Tribunal", respectively),

BEING SEISED OF the "*Requête aux fins de demande d'autorisation d'interjeter appel contre la décision rendue le 25 septembre 2002*", filed on 23 December 2002 ("Application") by Innocent Sagahutu ("Applicant");

NOTING the *Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions* ("Impugned Decision"), rendered on 25 September 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête de la défense soulevant des exceptions préjudicielles et demandant la mise en liberté provisoire de l'Accusé et la disjonction d'instance"*, filed by the Applicant on 25 June 2001 ("Motion");

NOTING that the Prosecution filed the "*Prosecutor's Response to the Accused Sagahutu's 'Requête aux fins de demande d'autorisation d'interjeter appel contre la décision rendue le 25 septembre 2002'*" on 6 January 2003 ("Prosecution Response");

NOTING that the Applicant has not filed a Reply to the Prosecution's Response;

NOTING that the Prosecution, in its Response, argues that the Application was untimely because the Defence failed to request an extension of time to the Appeals Chamber, pursuant to Rule 116 of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

NOTING that the Impugned Decision was rendered on 25 September 2002, and that the Defence filed its Application only on 23 December 2002;

NOTING that Rule 65(D) of the Rules, as amended, provides that applications for leave to appeal decisions rendered under the rule "shall be filed within seven days of [the] filing of the impugned decision";

NOTING that the reason given by the Defence for its late filing is that it received the official French translation of the Impugned Decision on 17 December 2002;

CONSIDERING that Rule 116(A) of the Rules provides that "the Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause";

CONSIDERING that, in the view of the Appeals Chamber, a request for an extension of time should be filed prior to the expiration of the relevant time limit;

CONSIDERING that, in the view of the Appeals Chamber, notwithstanding that a decision is delivered in a working language other than that of the Defence, any request for an extension of time should be made in conformity with Rule 65(D), namely within seven days of the filing of the Impugned Decision, in its original language;

CONSIDERING FURTHER that, although the Defence may not have been in a position to understand fully the substance of the Impugned Decision without its translation, as the Defence was served with notice of the filing of the Impugned Decision,

the calculation of the time limit to file its intent to appeal or a request for an extension before the Appeals Chamber commenced as of the date on which the Impugned Decision was filed;

FINDING that the Defence's failure to seek an extension of time to file its Application within seven days of the filing of the Impugned Decision renders the Application untimely;

CONSIDERING, nevertheless, that the Appeals Chamber deems it appropriate to consider the merits of the Application;

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules, with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the International Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), an amendment to the Rules, such as Rule 65, will be incorporated in the Rules of the International Tribunal only if the Judges so decide at a Plenary Meeting, and to the extent they deem it necessary;

3. because the International Tribunal is a distinct body from the ICTY, the Judges of the International Tribunal are bound to apply the Rules of the International Tribunal, and, for these reasons, the Trial Chamber must apply each requirement as specified in Rule 65; and

4. in accordance with the Appeals Chamber's jurisprudence [1], the Trial Chamber found that the "length of the proceedings, the general complexity of the case, and the length of the Applicant's detention remain within acceptable limits and in the interests of justice" and, consequently, no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues, *inter alia*, in his Application, that:

1. the Trial Chamber erred when it determined that, if it is not satisfied of the existence of exceptional circumstances, provisional release shall not be granted, without any need to consider the other criteria pursuant to Rule 65(B);

2. the Trial Chamber erred when it failed to define the concept of exceptional circumstances, thereby prejudicing the rights of the Defence, rendering the burden of proof impossible for the Defence to satisfy, violating international law, and contradicting the texts and jurisprudence of the ICTY; and

3. the Trial Chamber erred when it applied different standards from the ICTY, which has eliminated the "exceptional circumstances" language from its Rules, thereby discriminating against the accused of the International Tribunal;

CONSIDERING that Rule 65(D) of the Rules provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown";

CONSIDERING that "good cause" within the meaning of Rule 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfy the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision; [2]

NOTING that the Prosecution argues in its Response that the Defence failed to demonstrate "good cause" under Rule 65(D) of the Rules;

NOTING that the Prosecution also argues in its Response that the Applicant's claim, that the burden of proving exceptional circumstances is too cumbersome for the accused and violates international law and principles of human rights, is specious because these issues were addressed and rejected during the adoption of the Rules;

CONSIDERING that, in the absence of exceptional circumstances, provisional release may not be granted;

CONSIDERING that, pursuant to Rule 65(B) of the Rules, if the Trial Chamber is not satisfied of the existence of exceptional circumstances, it need not make findings on each of the factors enumerated under the Rule, but that the Trial Chamber may consider evidence adduced in relation to those other factors, where relevant, when the issue of exceptional circumstances is raised;

CONSIDERING that the word "exceptional" provides a sufficiently clear meaning as to have no need of any further definition;

CONSIDERING that the International Tribunal is a distinct and separate jurisdiction from the ICTY, and that the International Tribunal, by applying its Rules equally to all parties, guards against any discrimination *vis-à-vis* the accused;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the requirements of Rule 65(B) and in denying the Applicant's request for provisional release;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

REITERATING that the Application was not timely filed;

HEREBY DISMISSES the Application.

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

Fausto Pocar
Presiding Judge

Done this 26th day of March 2003,

At The Hague,
The Netherlands.

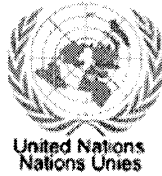
[Seal of the Tribunal]

[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence, 13 June 2001, p. 3 .

[2] *Ndayambaje v. Prosecutor*, Case No. ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, 10 Jan. 2003, p. 5.

Annex 3

Ndayambaje v The Prosecutor, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Fausto POCAR, Presiding
Judge Mohamed SHAHABUDDEEN
Judge Theodor MERON

Registrar: Mr. Adama DIENG

Decision of: 10 January 2003

Elie NDAYAMBAJE
(Applicant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-96-8-A

DECISION ON MOTION TO APPEAL AGAINST THE PROVISIONAL RELEASE DECISION OF TRIAL CHAMBER II OF 21 OCTOBER 2002

Counsel for the Appellant
Mr. Pierre Boule
Mr. Frédérick Palardy

Counsel for the Prosecution
Ms. Silvana Arbia
Mr. Jonathan Moses

THIS BENCH OF THE APPEALS CHAMBER of the 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 ("Tribunal"),

BEING SEISED OF the "*Demande d'autorisation au Collège de la Chambre d'appel, d'interjeter appel de la décision de la Chambre de Première Instance II, ayant rejetée la requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)*", filed on 28 October 2002 ("Application") by Elie Ndayambaje ("Applicant");

NOTING the *Decision on the Defence Motion for the Provisional Release of the Accused* ("Impugned Decision"), rendered on 21 October 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)"*, filed by the Applicant on 21 August 2002 ("Motion");

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia, the Judges of the Tribunal are bound to apply the ICTR Rules;

3. a lengthy detention does not constitute in itself good cause for release, [1] and that, having regard to the general complexity of the proceedings and the gravity of the offences, the Applicant's detention remains within acceptable limits;

4. since the trial of the Applicant, who is jointly tried with five others, began in June 2001, and the testimony of 14 witnesses has already been heard, provisional release would not be justified;

5. the Applicant's detention in Arusha, at a distance from his family, does not constitute exceptional circumstances; and

6. a decision to provisionally release an accused charged with serious violations of international law, including genocide, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner [2] , and, consequently no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues in his Application that:

1. the Trial Chamber erred when it stated in its decision that "a lengthy detention does not constitute in itself good cause for release", and it did not take into account the

exceptional nature of the Applicant's case;

2. the Trial Chamber erred when it failed to take into consideration the period of seven years that he has already spent in detention, and it further failed to take into consideration the fact that unlike the situation in *Nahimana*, his trial has not yet reached a terminal stage;

3. the Trial Chamber erred when it stated that as the trial had begun in June 2001 and fourteen witnesses had been heard since then, the circumstances of the case did not justify the Applicant's release;

4. the Trial Chamber erred by failing to formally take note of the fact that the length of his trial will require an abnormally lengthy preventive detention, and that this should have been considered as an exceptional circumstance;

5. the Trial Chamber erred when it considered, separately, the factors put forward by the Applicant in his Motion; if those grounds had been analysed together rather than separately, their effect would have led the Trial Chamber to quite a different finding with regard to the "exceptional circumstances" test, and this failure amounts to the good cause referred to in Rule 65 of the Rules;

6. the Trial Chamber erred when it failed to take into consideration the factors put forward by the Applicant cumulatively, which may have prevented it from giving these factors all the weight that such an analysis would have allowed; [3] and

7. the Trial Chamber took no account of the Appellant's submission with regard to the inherent problems in the Prosecution case, namely the absence of witnesses who were held back in Rwanda, and as a result, the cumulative effect of the grounds put forward was not fully considered;

NOTING that the Prosecution filed the "*Prosecutor's Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* on 29 November 2002 ("Prosecution Response"), and on 2 December 2002 filed the *Prosecutor's Corrigendum to Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* ("Corrigendum"), twenty-two days and twenty-five days, respectively, after the time limit for the filing of its response had expired; [4]

NOTING that the reason given by the Prosecution for its late filing is that it has yet to receive an official translation of the Application, which was filed in French;

CONSIDERING that the Prosecution did not submit a request for extension of time prior to the expiration of the deadline, and that its request was made not in its Response

but only subsequently in its Corrigendum;

CONSIDERING that Rule 116(B) of the Rules provides that "where the ability of the accused to make full answer and defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause...", yet there is no similar provision in the rule which is applicable to the Prosecution;

CONSIDERING that in the opinion of the Appeals Chamber, the Office of the Prosecutor must be able to work equally in English and in French;

FINDING that the Prosecution's reason for the late filing of its Response cannot be considered to constitute good cause within the meaning of Rule 116 of the Rules;

NOTING that the Applicant has not filed a Reply to the Prosecution's Response and Corrigendum;

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

CONSIDERING that Rule 65(D) of the Rules also provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown," and that "... applications for leave to appeal shall be filed within seven days of filing of the impugned decision";

CONSIDERING that the Application was filed within time;

CONSIDERING that "good cause" within the meaning of Rules 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfies the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision;

CONSIDERING that the Appeals Chamber has affirmed that the length of pre-trial detention does not constitute *per se* exceptional circumstances for the purposes of provisional release [5] ;

CONSIDERING that the Applicant has not shown any reason why the Appeals Chamber should depart from its previous jurisprudence;

CONSIDERING that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in June 2001 and needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified;

CONSIDERING that the Applicant has not shown how the Trial Chamber may have erred in failing to conclude that the anticipated length of the Applicant's ongoing trial is an exceptional circumstance warranting provisional release;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the conditions for ordering provisional release of the Applicant in its conclusions reached in paragraphs 19 to 28 of the Impugned Decision;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

HEREBY REJECTS the Prosecution's request for an extension of time, **DEEMS INADMISSIBLE** the Prosecution Response and Corrigendum, and **DISMISSES** the Application.

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

Fausto Pocar
Presiding Judge

Done this tenth day of January 2003,
The Hague,
The Netherlands.

[Seal of the Tribunal]

[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision (On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence), 13 June 2001, p. 3 ("*Kanyabashi* Decision") (citing *Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74).

[2] *Prosecutor v. Nahimana,* Trial Chamber Decision, 5 Sept. 2002, para. 10.

[3] The Applicant cites the 11 November 1999 decision rendered in *Prosecutor v. Kunarac and Kovac* ("Decision on the Motion for the Provisional Release of Dragoljub Kunarac"), in which, with regard to the aforementioned aspect, the Trial Chamber stated (at para. 10): "In conclusion, the Trial Chamber is of the view that, in the circumstances of the present case, none of the factors put forward by the accused, either alone or in combination, amounts to exceptional circumstances within the ambit of Rule 65 of the rules." (emphasis added)

The Applicant also submits that this principle was further clearly reaffirmed in *Prosecutor v. Kupreskic et al*, Case No. 95-16-T, Decision of 30 July 1999, p. 2: "Considering that each of these grounds, by

themselves, do not amount to the "exceptional circumstances" mentioned in Rule 65(B), and Considering, however, by a majority of the Trial Chamber (Judge Richard May dissenting) that the combination of the aforementioned grounds and their cumulative effect might be regarded as constituting an exceptional circumstance warranting provisional release for at least a limited period of time..." (emphasis added).

[4] This filing was made after the expiration of the ten-day limit prescribed in paragraph 5 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal.

[5] See *Prosecutor v. Kanyabashi*, Decision, 13 June 2001, p. 3.

Annex 4

Prosecutor v Simic et al IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Rafael Nieto-Navia
Judge Fausto Pocar

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
19 April 2000

PROSECUTOR

v.

BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Mr. Grant Niemann

Counsel for the Defence:

Mr. Zarko Nikolic, for Milan Simic
Mr. Igor Pantelic, for Miroslav Tadic
Mr. Deyan Ranko Brashich, for Stevan Todorovic
Mr. Borislav Pisarevic, for Simo Zaric

THIS BENCH of 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 ("the International Tribunal"),

BEING SEIZED of the "Prosecution's Application for Leave to Appeal the Trial Chamber's 'Decision on Miroslav Tadic's Application for Provisional Release', Dated 4 April 2000 and the Trial Chamber's 'Decision on Simo Zaric's Application for Provisional Release', Dated 4 April 2000", filed on 5 April 2000 ("the Application for Leave to Appeal");

NOTING Trial Chamber III's "Decision on Mirosalv Tadic's Application for Provisional Release" and "Decision on Simo Zaric's Application for Provisional Release", both dated 4 April 2000 ("the Decisions"), in which the Trial Chamber granted requests for provisional release by the accused Miroslav Tadic and Simo Zaric and ordered, *inter alia*, their provisional release subject to certain terms and conditions;

NOTING the "Defense Response in Opposition to Prosecution's Application for Leave to Appeal the Trial Chamber's Decision on Miroslav Tadic and Simo Zaric's Applications for Provisional Release, Dated April 4, 2000", filed by Counsel for accused Miroslav Tadic and Simo Zaric on 7 April 2000,

NOTING the "Opposition to Application for Leave to Appeal Against the Trial Chamber's Interlocutory Order of April 4, 2000", filed by Counsel for accused Stevan Todorovic on 7 April 2000,

CONSIDERING that the accused Stevan Todorovic did not make submissions before the Trial Chamber in respect of Miroslav Tadic's and Simo Zaric's requests for provisional release;

CONSIDERING, therefore, that the accused Stevan Todorovic has no *locus standi* to make submissions on the Application for Leave to Appeal;

CONSIDERING that the Prosecutor argues that "good cause" under Sub-rule 65(D) of the Rules of Procedure and Evidence ("the Rules") exists for granting the Application for Leave to Appeal on the ground that i) the present matter "represents one of the first interpretations and applications of amended rule 65(B)"; ii) the Trial Chamber erred in ruling that it was satisfied that, if released, both accused would appear for trial; iii) the Trial Chamber erred by finding that it was satisfied that, if released, both accused would not pose a danger to victims, witnesses or other persons; iv) the Decisions will cause irreparable prejudice to the Prosecutor; and v) the Trial Chamber misapplied the legal principles governing provisional release;

CONSIDERING that Sub-rules 65(A) and (B) provide that once detained, an accused may not be released except upon an order of a Trial Chamber and that a Trial Chamber may make such order only after hearing the host country and only if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person;

CONSIDERING that Sub-rule 65(D) provides that decisions on provisional release are subject to appeal in cases where leave to appeal is granted upon good cause being shown;

CONSIDERING that "good cause" within the meaning of Sub-rule 65(D) requires that the party seeking leave to appeal under that provision satisfy the Bench of the Appeals Chamber that the Trial Chamber may have erred in making the impugned decision;

FINDING that the Prosecutor has failed to demonstrate such an error on the part of the Trial Chamber and that, therefore, the requirement of "good cause" within the meaning of Sub-rule 65(D) has not been met;

PURSUANT TO Rule 65,

HEREBY REJECTS the Application for Leave to Appeal and **ORDERS** the provisional release of Miroslav Tadic and Simo Zaric, subject to the Registry being satisfied that the practical arrangements for their provisional release have been made in accordance with the Decisions.

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

____

Judge Lal Chand Vohrah, Presiding

Dated this nineteenth day of April 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Annex 5

Prosecutor v Fatmir Limaj et al IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.

Cases: IT-03-66-AR65

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Wolfgang Schomburg, Presiding
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar:
Mr. Hans Holthuis

Decision of:
31 October 2003

THE PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

DECISION ON FATMIR LIMAJ'S REQUEST FOR PROVISIONAL RELEASE

Counsel for the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the Defence:

Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Tome Gashi and Mr. Peter Murphy for Haradin Bala
Mr. Steven Powles for Isak Musliu

I. Background

1. This Bench of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian

Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Bench" and "International Tribunal") is seized of the "Application for Leave to Appeal Against the Decision on Provisional Release of Fatmir Limaj, Rendered by Trial Chamber I on 12 September 2003", filed by counsel for Fatmir Limaj (respectively, "Defence" and "Limaj") on 22 September 2003 ("Application for Leave to Appeal"), pursuant to Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Application for Leave to Appeal challenges a decision issued by Trial Chamber I on 12 September 2003, rejecting Limaj's request for provisional release ("Impugned Decision").[1] In the Impugned Decision, the Trial Chamber denied provisional release, *inter alia*, on the following grounds: (i) that "[it] cannot be satisfied that the Accused would have surrendered voluntarily to the Tribunal if he would not have been arrested"; (ii) that "the Accused alleged to have command responsaibility and is charged with participating in serious crimes... [and] that, if convicted, the Accused is charged with participating in serious crimes" and "that therefore if convicted, the Accused is likely to face long prison terms and he therefore has a stong incentive to flee"; (iii) that "according to the letter of Mr. Coffey [Director of the Department of Justice of UNMIK], UNMIK is not able to provide any guarantees that the Accused, if provisionally released would be available for trial"; and (iv) that "the Chamber is not satisfied that if released, the Accused would appear before the Tribunal".

3. With respect to the procedural background, the Bench granted the Office of the Prosecutor ("Prosecution") leave to file a joint response, and an extension of time, on 30 September 2003.[2] The Prosecution filed its response on 26 September 2003 ("Response").[3] Following an oral grant of an extension of time, the Defence replied on 13 October 2003 ("Reply").[4]

4. The question before the Bench is whether "good cause" pursuant to Rule 65(D) Sentence 1 for granting leave to pursue the appeal to the full Appeals Chamber has been shown.

II. Applicable Law

5. Rule 65(B) of the Rules sets out the basis upon which a Trial Chamber may order the provisional release of an accused. It states that provisional release "may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person" (emphasis added).

6. Rule 65(D) of the Rules provides, *inter alia*, that leave to appeal a Trial Chamber's decision on provisional release may be "granted by a bench of three judges of the

Appeals Chamber, upon good cause being shown". According to the settled jurisprudence of the Appeals Chamber, there is "good cause" within the meaning of Rule 65(D) for granting leave to appeal when it appears that the Trial Chamber "may have erred" in rendering the impugned decision.[5]

7. A Trial Chamber "may have erred" when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case.

8. Article 21(3) of the Statute of the Tribunal, adopted by Security Council Resolution 827 of 25 May 1993 ("Statute"), mandates that "the accused shall be presumed innocent until proved guilty". This provision both reflects and refers to international standards as enshrined, *inter alia*, in Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR") of 19 December 1966 and Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

9. Furthermore, Article 9(3) of the ICCPR emphasizes *inter alia* that: "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial". Article 5 (3) of the ECHR provides *inter alia* that: "everyone arrested or detained...shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

10. These human rights instruments form part of public international law.

11. The ICTY is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.

12. Rules 65 (B) and (D) of the Rules must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

13. Moreover, when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure than mandatory detention, it must be applied.[6]

III. Discussion

14. At the outset, the Bench notes that, in breach of Rule 65(D) of the Rules, the Application for Leave to Appeal was filed one day late (Monday 22nd of September instead of Friday 19th September 2003). In fairness to the Accused, who should not be

held responsible for his counsel's negligence, the Bench has nevertheless decided to consider it. In the Application for Leave to Appeal, the Defence relies on five grounds of appeal. They will be dealt with in the following sections, grouped together where appropriate.

(a) The Trial Chamber erred in not granting an oral hearing, in not giving reasons for such a failure, and in failing to inform the parties of its decision (Grounds 1-3)

15. According to the Defence, the Trial Chamber erred in refusing its request for an oral hearing because there are no cases in the practice of the International Tribunal in which an application for provisional release has been refused "on paper " where such a hearing had been requested. This rejection, it is claimed, denied the Defence the opportunity to call important witnesses. The Defence also argues that the Trial Chamber erred in not giving any explanation for its denial, as it is under an obligation to provide reasons for its decisions. Lastly, the Defence contends that the Trial Chamber erred in failing to inform the Defence of its rejection of the request for an oral hearing because it deprived the Defence of the possibility to make detailed submissions in support of its request for an oral hearing, and to make fully informed decisions regarding how best to present certain evidence before the Trial Chamber.

16. The Prosecution submits that the decision whether or not to receive oral submissions in addition to written submissions is one reserved for the discretion of the Trial Chamber and that, when requesting an oral hearing, the Defence did not express its intention to call additional witnesses. The Prosecution contends that the duty to provide a reasoned opinion applies only when the Chamber is dealing with substantive aspects of the Application, and does not limit the Trial Chamber's discretion to decide whether or not to call an oral hearing. The Prosecution argues that the alleged failure by the Trial Chamber to notify the Defence of its decision did not prejudice the preparation of the case as the Defence had ample opportunity to present its case in its written submissions, which indeed amounted to more than 100 pages. Thus, if the Defence did not put before the Trial Chamber all the evidence it could have submitted, this was a miscalculation on the part of the Defence and not an error of the Trial Chamber.

17. The Bench largely concurs with the Prosecution's submissions. Another bench of the Appeals Chamber, rejecting an application for leave to appeal in *Odjanic* , reasoned as follows:

> "CONSIDERING that the right of an accused to be heard is not similar to what the accused regards as his right to be heard personally;
> CONSIDERING that the "right" of an accused, who is represented, to be heard personally is not unfettered and is subject to the discretion of the Chamber before which the accused is appearing;
> CONSIDERING that Ojdanic has not put forth any cogent reason why he should have been heard personally in the present case, nor has he shown that the Trial Chamber abused its discretion when refusing to hear him personally [the Chamber refuses leave to appeal].[7]

It follows that the right to be heard personally is not absolute. The granting of an oral hearing is a matter for the discretion of a Chamber, and it may legitimately be regarded as unnecessary when, as in the present case, the information before the Trial Chamber is sufficient to enable the Chamber to reach an informed decision. The Defence has failed to demonstrate the added value of an oral hearing, namely the reason why if granted, such a hearing could have led the Trial Chamber to another conclusion. Contrary to what was argued by the Defence, the tendering of "detailed submissions" in support of an oral hearing (if available) has to be done when the request for a hearing is made. Finally, the Trial Chamber is not obliged to explain prior to its final decision why a hearing is unnecessary or to notify the parties of this.

18. For the foregoing reasons, the Bench finds that the Defence's arguments under Grounds 1 to 3 do not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, these grounds are dismissed.

(b) The Trial Chamber erred in failing to notify the parties that Mr. Steiner had not responded to the Pre-Trial Judge's letter of 31 July 2003 seeking his appearance (Ground 4)

19. The Defence submits that the Trial Chamber erred in deciding the application for provisional release without informing it that Mr. Steiner, the Director of the United Nations Interim Administration Mission in Kosovo ("UNMIK"), had not responded to a letter of 31 July 2003, in which the Pre-Trial Judge had requested that Mr. Steiner submit his comments on Limaj's provisional release ("Letter"). Had it been informed, the Defence argues, it would at least have sought a subpoena so as to obtain the "very important evidence" that Mr. Steiner could have offered with regard to Limaj's application for provisional release.

20. The Prosecution submits that the Letter only asked Mr. Steiner to respond "if he so wished", and that by no means was the Trial Chamber obliged to notify the Defence of Mr. Steiner's failure to respond. It argues that the Defence was at least on notice that Mr. Steiner had not responded as otherwise the response to the Letter would have been filed, and made available to the Defence. The Trial Chamber waited a full two weeks beyond the deadline of 25 August 2003 set out in the Letter before issuing the Impugned Decision, giving Mr. Steiner extra time to respond, and allowing the Defence ample opportunity to inquire as to whether any response had been received or was forthcoming by, for instance, contacting Chambers or the Registry.

21. First, the Bench wishes to stress that the Trial Chamber was under no obligation to notify the Defence that Mr. Steiner had not responded to the Letter. It was for the Defence, if it so wished, at the expiry of the deadline set out in the Letter, to contact the Registry, which is the channel of communication for the International Tribunal, in order to seek any available information. Secondly, the Bench notes that the Letter requested

Mr. Steiner to respond by the 25th of August 2003; having received no answer from Mr. Steiner before the expiry of the deadline, it would have been evident, in the Bench's view, that Mr. Steiner, who had been appropriately asked by the Trial Chamber to respond only "if he so wished", had chosen not to do so. This is all the more so because Mr. Coffey had already clearly stated UNMIK's position with regard to Limaj's provisional release, and thus it was neither realistic nor warranted to expect an additional response from UNMIK.

22. For the foregoing reasons, the Bench finds that Ground 4 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, it is dismissed .

(c) The Trial Chamber failed to give appropriate consideration to the issue of "guarantees" (Ground 5)[8]

23. According to the Defence, the Trial Chamber placed excessive weight on the absence of guarantees from UNMIK and insufficient weight on the undertakings from the provisional authorities of Kosovo, including the statement by the Prime Minister of Kosovo and by Limaj himself.

24. The Prosecution responds that the Trial Chamber was correct in placing more weight on the representations from UNMIK as UNMIK, not the provisional government, remains responsible for public safety and order in Kosovo and for monitoring the borders of the province. Further, Mr. Coffey, the head of the UNMIK justice system, had stated that given the limited resources available to UNMIK, it would be relatively easy for Limaj to flee and that, the provisional authorities of Kosovo have no means to enforce their own undertakings, as the Prime Minister of Kosovo himself has publicly acknowledged.

25. According to the settled practice of the International Tribunal, it is the State into the territory of which the accused will be released, as the guarantor of public safety and order in that territory, that must provide the International Tribunal with guarantees that the accused will not flee and that if he does so, he will be arrested. As the Trial Chamber correctly noted, in the province of Kosovo, according to Security Council Resolution 1244 of 10 June 1999, UNMIK, and not the provisional institutions of Kosovo, is the authority which, in coordination with KFOR (the NATO Forces in Kosovo), is entrusted with ensuring public safety, and conducting bordering monitoring, and is given the necessary means to enforce such duties. Thus, there is no reason why the Trial Chamber should have taken into account guarantees given by other authorities.

26. For the foregoing reasons, the Bench finds that Ground 5 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

The Trial Chamber failed to give "the most anxious scrutiny" to the Defence's arguments (Ground 6)

27. Pursuant to this ground of appeal, the Defence submits that the Trial Chamber made three different kinds of error. They will be dealt with in turn.

28. First of all, the Defence submits that the Trial Chamber erred in relying on the seriousness of the charges against Limaj when refusing to grant provisional release because, in the ECHR jurisprudence, the severity of the sentence that may be imposed if the accused is convicted is not a ground for refusing an accused provisional release.

29. The Prosecution responds that the jurisprudence of the International Tribunal is fully consistent with international law and hat the Trial Chamber considered the seriousness of the charges and the possibility of a lengthy sentence together with several other factors.

30. The Bench considers that, while under Rule 65(B) of the Rules the seriousness of the charges against an accused cannot be the sole factor that determines the outcome of an application for provisional release, it is certainly one that a Trial Chamber is entitled to take into account when assessing whether an accused, if released, would appear for trial.[9] It is evident that the more severe the sentence which an accused faces, the greater is the incentive to flee. As the Trial Chamber relied on the seriousness of the charges against Limaj in addition to several other factors, it did not err in taking this factor into account. Furthermore, this approach is not inconsistent with the ECHR jurisprudence. Rather, in the Bench's view, such an approach accords with that of the ECourtHR.[10]

31. Next, the Defence claims that Mr. Coffey was not asked for information in a neutral manner but was effectively "primed" by the Prosecution, and that he made his statement without the benefit of any representation from the Defence.

32. The Prosecution rebuts this, arguing that Mr. Coffey's letter was not submitted to the Trial Chamber in response to a Prosecution request but in response to the accused's request, and that it did not "prime" Mr. Coffey; to the contrary, "care was taken not to infringe the neutrality of UNMIK". It rejects as untrue the assertion that Mr. Coffey made his statement "without the benefit of any representation from the Defence" arguing that the Defence in fact met with Mr. Coffey to discuss Limaj's provisional release before Mr. Coffey replied to the letter.

33. The Bench notes that, contrary to what was argued by the Defence, the Defence appears to have met with Mr. Coffey before he sent his letter to the Trial Chamber and thus, Mr. Coffey did in fact have the opportunity to hear both the parties. The Bench does not accept the Defence's implication that the Director of Justice of UNMIK would give a false assessment of the security situation in Kosovo after being "primed" by the Prosecution. There is no basis for asserting that Mr. Coffey's assessment would not be reliable, and thus the Trial Chamber did not err in relying upon it.

5357

34. Finally, the Defence contends that the Trial Chamber failed to explain why it found that Limaj did not voluntary surrender, notwithstanding the declarations to the contrary by individuals involved in Limaj's surrender, such as the Prime Minister of Kosovo, Mr. Steiner, and General Mini, the head of the KFOR, under whose command Limaj was arrested.

35. The Prosecution responds that the Impugned Decision makes explicit reference to the Accused's arrest by the Slovenian authorities, indicating his intention to return to the protection of Kosovo rather than surrender to the International Tribunal.

36. In exercising its discretion under Rule 65(B) of the Rules, the Trial Chamber must take into account all the decisive [material] facts of a case. The Trial Chamber was correct to consider, in addition to the submissions of the Defence in its original motion, Limaj's representations to the press and to the Kranj District Court in Slovenia, the reliability of which is not challenged by the Defence. Weighing all these facts together, it reached the reasonable conclusion that Limaj's surrender was not voluntary.

37. For the foregoing reasons, the Bench finds that Ground 6 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

(d) The Trial Chamber erred in not placing the burden of proof on the Prosecution to demonstrate that the accused is not entitled to provisional release (Ground 7)[11]

38. According to the Defence, international humanitarian law and principles enshrined in the ICCPR and the ECHR impose upon the Prosecution the burden of proof in justifying detention pending trial before this International Tribunal. The Defence adds that the detention should be justified by clear and convincing evidence. In support of its view, the Defence quotes several cases from the Human Rights Committee, the European Court of Human Rights ("ECourtHR"), the United Kingdom. and the United States. It relies as well on Articles 60(2) and 58(1) of the Statute of the International Criminal Court ("ICC").

39. The Prosecution submits that the Defence's interpretation of international law is wrong and that the Impugned Decision is fully consistent with the settled jurisprudence of this International Tribunal, in which it is well established that the burden of proof rests on the accused. It recalls that, unlike national jurisdictions, the International Tribunal lacks a police force and has to rely on States to monitor and enforce conditions of release. It submits that the Trial Chamber's approach is fully consistent with its obligation to conduct a fair evaluation of the circumstances and interests at stake. With respect to the ICC Statute, the Prosecution observes that it is not binding on the International tribunal and it does not support the imposition of a burden of proof on the Prosecution to justify pre-trial detention.

40. It is the Bench's view, contrary to the argument put by the Defence, that the Trial Chamber did not err in not imposing the burden on the Prosecution to demonstrate that provisional release was inappropriate. First, Rule 65(B) does not place the burden of proof on the Prosecution. Pursuant to that Rule, the Trial Chamber was required to determine whether it was "satisfied" that Limaj, if released, would appear for trial. After taking into account the information submitted to it by the parties and weighing all the relevant factors, it held that it was not satisfied. There is thus no basis for holding that, by not placing the burden of proof on the Prosecution, the Trial Chamber erred in its application of Rule 65(B).

41. For the foregoing reasons, the Bench finds that Ground 7 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5 -13 – and, therefore, it is dismissed.

IV. Disposition

42. The Bench finds that the Application for Leave to Appeal does not demonstrate that the Trial Chamber may have erred in the exercise of its powers under Rule 65 (B) and that, therefore, there is no "good cause" within the meaning of Rule 65(D) for granting leave to appeal. Leave to appeal the Impugned Decision is, therefore, denied.

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

Dated this 31st day of October 2003,
At The Hague,
The Netherlands.

____

Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]

---

1 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No.: IT-03-66-PT, "Decision on Provisional Release of Fatmir Limaj", 12 September 2003.
2 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Order on the Prosecution's Request for Leave to Respond Jointly to the Applications for Leave to Appeal", 30 September 2003.
3 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Prosecution's Motion for Leave to Respond Jointly to the Accused's Applications for Leave to Appeal the Trial Chamber's Provisional Release Decisions", 26 September 2003.
4 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Reply of Famir Limaj to Consolidated Response of Prosecution to Applications for Leave to Appeal Against Decisions on Provisional Release", 13 October 2003.
5 - See, *inter alia, Prosecutor v Blagojevic et al,* Case Nos.: IT-02-60-AR65.3 & IT-02-60-AR65.4,

"Decision on Application by Blagojevic and Obrenovic for Leave to Appeal", 16 January 2003, par 8; *Prosecutor v Brdanin and Talic*, IT-99-36-AR65, "Decision on Application for Leave to Appeal", 7 September 2000, p 3; and Prosecutor v Jokic, IT-02-53-AR65, "Decision on Application for Leave to Appeal", 18 April 2002, par 3.
6 - See, among others, *Prosecutor v. Darko Mdjra*, Case No.: IT-02-59-PT, "Decision on Darko Mdra on Request for Provisional Release", 15 April 2002, *Prosecutor v. Enver Hadzihasonivic, Mehmed Alagic and Amir Kubura*, "Decision granting Provisional Release to Enver Hadzihasonivic", 19 December 2001.
7 - *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No. IT-99-37-AR65.2, "Decision Refusing Ojdanic Leave to Appeal", 27 June 2003, p.4.
8 - In the Application for Leave to Appeal, this ground of appeal is (erroneously) referred to as Ground 4. See Application for Leave to Appeal at pp. 7 and 9. The numbers of this and the following grounds of appeal have been accordingly been adjusted in these reasons.
9 - *The Prosecutor v. Nikola Šainovic and Dragoljub Ojdanic*, "Decision on Provisional Release", 30 October 2002, para 6.
10 - See *Letellier v. France*, Judgement of 24 May 1991, ECourtHR, para. 43 and *Mansur v. Turkey*, Judgement of 25 November 1994, ECourtHR, para. 55.
11 - While not discussing this ground of appeal in its brief, the Defence has joined the submissions of the co-accused Bala on this issue. For the sake of clarity, these submissions are summarized again here.

Annex 6

Prosecutor v Aleksovski IT-95-14/1 Judgement 24 March 2000 para. 74.

S361

IN THE APPEALS CHAMBER

Before:
Judge Richard May, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 24 March 2000

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

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" or " Tribunal") is seised of two appeals in relation to the written Judgement rendered by Trial Chamber I *bis* ("Trial Chamber") on 25 June 1999 in the case of *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T ("*Aleksovski* Judgement" or "Judgement").[1]

Having considered the written and oral submissions of both parties, the Appeals Chamber

HEREBY RENDERS ITS WRITTEN JUDGEMENT.

S362

B. Discussion

69. Article 7(3) provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

70. In its Judgement, the Trial Chamber found that "the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police".[167] However, in its view , "anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations".[168] It went on to find that the Appellant had effective authority over the guards, as shown by his issuing orders to them and the availability to him of the means to report to superiors the situation in the prison, including incidents of mistreatment of prisoners.[169] The Trial Chamber found, however, that the Appellant failed to report to the superior authority the offences committed by the guards and HVO soldiers within the prison, and that he even joined in certain incidents of assault.[170]

71. The Appeals Chamber, on the basis of the submissions of the parties and the findings of the Trial Chamber, reaches the following conclusions regarding this ground of appeal.

72. The Appeals Chamber notes that the Appellant has agreed with the Trial Chamber in respect of the constituent elements of liability under Article 7(3).[171] Three elements have been identified by the Trial Chamber: 1) the existence of a superior-subordinate relationship; 2) the fact that the superior "knew or had reason to know that a crime was about to be committed or had been committed"; and 3) his obligation to take all the necessary and reasonable measures to prevent or to punish the perpetrators.[172]

73. The Appellant claims to appeal against the way in which the Trial Chamber applied the law to his case, but this ground of appeal in essence questions the inferences drawn from facts found by the Trial Chamber regarding his authority within the Kaonik prison. The Appeals Chamber therefore considers this ground to be factual in nature .

74. The Appellant disputes two facts found by the Trial Chamber. The first fact is that he had authority over the prison guards who were HVO military police, as demonstrated by his powers to issue orders to them, his generally elevated status within the Kaonik prison, and his right to report to the Military Police command and the Travnik Military Tribunal within whose jurisdiction the prison was placed . The second fact is that he failed to report the offences by his subordinates to either of the superior authorities. Both facts _were found to be proved by the Trial Chamber after examining evidence and arguments specific to them. Like the Trial Chamber, the Appellant also construes the authority of a superior to mean that he has the power to order and to enforce his orders in certain ways.[173] The Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence , it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber.[174] In this appeal , the Appellant has failed to convince this Chamber that unreasonable conclusions were drawn by the Trial Chamber in respect of the two facts.

75. The legal aspect of this ground of appeal consists of a single issue as to whether the Appellant was a commander of the guards, who were military police, for the purposes of Article 7(3) of the Statute.

76. Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision. In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden,[175] whereas the Trial Chamber finds that he was the superior to the guards by reason of his powers over them.[176] The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior,[177] if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus its finding that the Appellant was a superior within the meaning of Article 7(3).[178]

C. Conclusion

77. The Appeals Chamber therefore finds that the fourth ground of appeal of the Appellant must fail for lack of merit, for the following reasons: a) the facts disputed by the Appellant have all been argued and adjudicated at the trial, with no good cause having been shown on appeal to justify a re-examination of the factual findings of the Trial Chamber; and b) the Appellant does not challenge the Trial Chamber's interpretation of the elements of command responsibility, the application of which by the Trial Chamber has not been shown to be unreasonable.

Annex 7

Prosecutor v Tadic, IT-94-1, Judgement, 15 July 1999 para 64.

5365

IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DUSKO TADIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

I. INTRODUCTION

A. Procedural background

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" or "Tribunal") is seised of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II[1] on 7 May 1997 in the case of *The Prosecutor v. Dusko Tadic,* Cass No.: IT-94-1-T ("Judgement")[2] and the subsequent Sentencing

B. Discussion

64. The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")[96] to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferovic cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opacic, who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferovic's association with the Bosnian government does not taint him. The circumstances of Mr. Seferovic and Mr. Opacic are different. Mr. Opacic was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferovic's introduction was made through the Bosnian embassy in Brussels. Mr. Seferovic was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not recall him after learning of the withdrawal of Mr. Opacic as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferovic's testimony be disregarded on the ground that he, like Mr. Opacic, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovic.

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferovic because it was implausible. Here, it is claimed that the Trial Chamber did not act reasonably in concluding from the evidence of Mr. Seferovic that the Appellant was responsible for the killing of the two policemen. The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk. The Trial Chamber, after seeing the witness, hearing his testimony, and observing him under cross-examination, chose to accept his testimony as reliable evidence. There is no basis for the Appeals Chamber to consider that the Trial Chamber acted unreasonably in relying on that evidence for its finding that the Appellant killed the two men.

C. Conclusion

67. The Appellant has failed to show that Nihad Seferovic's reliability as a witness is suspect, or that his testimony was inherently implausible. Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferovic for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.

Annex 8

Prosecutor v Erdemovic, IT-96-22, Sentencing Judgement II, 5 March 1998 para 16 (i)

IN THE TRIAL CHAMBER

Before:
Judge Florence Ndepele Mwachande Mumba (Presiding)
Judge Mohamed Shahabuddeen
Judge Wang Tieya

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 5 March 1998

PROSECUTOR

v.

DRAZEN ERDEMOVIC

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Peter McCloskey

Counsel for the Accused:

Mr. Jovan Babic
Mr. Nikola Kostic

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The accused, Drazen Erdemovic, came into the custody 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, hereinafter referred to as the "International Tribunal", on 30 March 1996, further to an order for his transfer to the custody of the International Tribunal made by Judge Fouad Riad on 28 March 1996.

2. The accused had been detained since 2 March 1996 by the authorities of the Federal Republic of Yugoslavia, hereinafter referred to as the "FRY", in connection with their investigations into serious violations of international humanitarian law committed against the civilian population in and around what was declared a "safe area" of Srebrenica in July 1995. On 29 May 1996, Trial Chamber II requested the FRY to defer to the International Tribunal all investigations and criminal proceedings

S369

V. APPLICATION OF THE LAW TO THE FACTS

15. Aggravating factors

The Trial Chamber accepts that hundreds of Bosnian Muslim civilian men between the ages of 17 and 60 were murdered by the execution squad of which the accused was part. The Prosecution has estimated that the accused alone, who says that he fired individual shots using a Kalashnikov automatic rifle, might have killed up to a hundred (100) people. This approximately matches his own estimate of seventy (70) persons. No matter how reluctant his initial decision to participate was, he continued to kill for most of that day. The Trial Chamber considers that the magnitude of the crime and the scale of the accused's role in it are aggravating circumstances to be taken into account in accordance with Article 24 (2) of the Statute of the International Tribunal.

16. Mitigating factors

i. *Personal circumstances*

Age
At the time of the killings at the Pilica collective farm, the accused was 23 years old. He is now 26 years old and evidence has been provided that he is "not a dangerous person for his environment"[5].

The Trial Chamber believes that his circumstances and character (see below) indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so.

Family and background
The accused has a wife, who is of different ethnic origin, and the couple have a young child who was born on 21 October 1994. Defence Counsel has submitted that the accused's family has fallen on hard times and will suffer hardship due to his serving a prison sentence.

The accused is a locksmith by training and was drawn into the maelstrom of violence that engulfed the former Yugoslavia. He has professed pacifist beliefs and claims to have been against the war and nationalism. He claims that he had to join the BSA in order to feed his family. In July 1995, he was a private in the 10th Sabotage Detachment where he was not in a position of command. He was, apart from a two month period as a sergeant in that unit, a mere footsoldier whose lack of commitment to any ethnic group in the conflict is demonstrated by the fact that he was by turns a reluctant participant in the Army of the Republic of Bosnia-Herzegovina, hereinafter referred to as the "ABH", the Croatian Defence Council, hereinafter referred to as the "HVO", and the BSA. The possibility of his being a soldier of fortune has not been suggested by any of the parties.

The 10th Sabotage Detachment was involved with reconnaissance in enemy territory and placing explosives in the artillery of the areas controlled by the ABH. According to the accused, he chose this unit because "it did not involve the loss of human lives. It involved artillery, old iron."[6] In addition, he chose it as there were other non-Serb soldiers in it and it did not have a reputation for brutality at the material time.

Character
The Prosecution stated that they found no inconsistencies with the information which he gave them; their investigations have confirmed much of what he told them, indicating that the accused is of an honest disposition. This is supported by his confession and consistent admission of guilt, in particular by

the fact that he came forward voluntarily and told of his part in the massacres before his involvement was known to any investigating authorities.

In his submissions, the Defence Counsel portrayed the accused as an easygoing young man showing no signs of bigotry or intolerance, with a desire to help others in difficulty. The accused's upbringing was steeped in values of tolerance for others, and this is reflected in the fact that he chose to marry a woman from another ethnic group. Defence Counsel sees the accused as a victim of the whirlwind of war and a victim of his own deeds[7].

Whilst the Commission of Medical Experts made a finding of emotional immaturity[8], which is noted, there is nothing to substantiate Defence Counsel's submission to Trial Chamber I (which was not raised again before this Trial Chamber) that when the accused committed the killings, he "lacked mental responsibility because he suffered a temporary mental disorder or, at best, his mental responsibility was significantly diminished also."[9]

The Trial Chamber notes that the accused has no criminal record and that he has said that, prior to the mass murder in Srebrenica, he had never killed.

Witness X, who had been in the HVO Military Police with the accused, testified before Trial Chamber I that the accused had saved his life on Mount Majevica[10]. The accused was with some other soldiers of the BSA when they came across Witness X, and he prevented his fellow soldiers from killing his former colleague. It was upon the insistence of the accused that Witness X was finally released unharmed.

Witness Y, who also testified before Trial Chamber I, met the accused in 1993 and they were part of a group of multi-ethnic friends[11]. According to this witness, the accused was not a nationalist. He was a popular, vivacious and outgoing person who was non-confrontational. Witness Y was certain that the accused hated the war and the army but believed that he simply had to do all of it; he was not the sort of person to kill of his own free-will.

According to the evidence of the accused before Trial Chamber I, admitted by this Trial Chamber, he had helped a family of Serb civilians, mainly women and children, to escape from the Tuzla area to Republika Srpska, which led to his being assaulted by soldiers from the HVO. He also appears to have been imprisoned as a result[12]. The accused has told the International Tribunal that during the killings at the Pilica collective farm, he tried to save a man, but was not able to do so because his commander, Brano Gojkovic, said that he did not want to have any witnesses to that crime.

ii. *Admission of guilt*

The Trial Chamber notes the submission of Defence Counsel that the accused's statements as to guilt should "above all, be taken as his moral attitude towards the truth on the one hand and as a plea for understanding of how far the limits of the abuse of man in this region were stretched, not only in his local environment but also in the wider scope."[13] An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.

iii. *Remorse*

The accused told Trial Chamber I that:

> "I only wish to say that I feel sorry for all the victims, not only for the ones who were killed then at that farm. I feel sorry for all the victims in the former [sic] Bosnia and Herzegovina regardless of their nationality."[14]

On 24 June 1996, the Commission of Medical Experts noted that the accused had an ambivalent feeling about his guilt. "He knew he killed innocent civilians, but he had no choice himself. There were other people who ordered him to shoot people. In a legal sense he doesn't feel guilty of the crimes he is accused of."[15] The post-traumatic stress which the accused suffered from in the aftermath of the Srebrenica atrocities demonstrates how he himself has suffered from being forced to commit the killings against his will.

The Trial Chamber also takes note of the testimony of Mr. Jean-René Ruez. Having been able to study the accused closely in the course of the OTP's investigations, Mr. Ruez has told the Trial Chamber that he had no doubt that the accused's feelings of sorrow and remorse were genuine and real, and that he really was going through an emotional process.

This is consistent with his earlier evidence to Trial Chamber I that:

> "One thing is sure, however, and that is in the course of the contacts I have had with him he expressed his sincere regrets to being involved in that situation. He has always had a tough time saying how things happened during those events. Bringing all those memories together was something very difficult for him and always has been. On every occasion whenever he would go into details in the course of hearings, he would say how sorry he was to have participated in those events."[16]

iv. *Cooperation with the OTP*

"The collaboration of Drazen Erdemovic has been absolutely excellent."[17] These are words rarely spoken by the Prosecution of an accused. The Trial Chamber, remembering its obligation to consider such cooperation under Rule 101 of the Rules of Procedure and Evidence of the International Tribunal, takes note accordingly. It also notes the submission of the Prosecution, supported by the testimony of Mr. Ruez, that the accused cooperated without asking for anything in return and that the extent and value of his cooperation has been such as to justify considerable mitigation.

Provision of new information including names and identities of other perpetrators, substantiation and corroboration of existing information
Whilst the OTP knew in general terms of the killings committed in Srebrenica, the testimony of the accused was particularly valuable for providing them with details of four incidents of which they did not previously know: the killings at the Pilica collective farm, those at the Pilica cultural hall, the killing of an unidentified civilian male of military age in Srebrenica as the accused entered the town, and a killing in Vlasenica on 13 July 1996 after he returned to Bijeljina, by soldiers who, under orders, cut the throat of a prisoner. Prior to the testimony of the accused, the OTP had no knowledge of these incidents.

The accused provided substantial details in connection with the aforementioned incidents such as the identification of his commanders and fellow executioners, as well as information on the Drina Corps, the structure of the BSA and the units that were involved in the takeover of Srebrenica such as the 10th Sabotage Detachment and the Bratunac Brigade.

Evidence given in Rule 61 hearing
On 5 July 1996, the accused gave evidence in the Rule 61 hearing of the case brought against Radovan Karadzic and Ratko Mladic[18]. His testimony was significant in two respects: it contributed to the decision of the Rule 61 Chamber to issue international arrest warrants for the two, and secondly, his testimony, that of an insider in the BSA, is evidence of what happened in Srebrenica.

17. Duress

The Trial Chamber has applied the ruling of the Appeals Chamber that "*duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings*"[19]. It may be taken into account only by way of mitigation.

It has been accepted by the parties and the Trial Chamber that there was duress in this case. The earlier testimony of the accused has been cited above. Mr. Ruez has testified of the circumstances of a very vicious and cruelly fought war, the brutal nature of the battle for Srebrenica, the attendant environment of soldiers killing pursuant to superior orders, the accused's vulnerable position as a Bosnian Croat in the BSA and his history of disagreements with his commander, Milorad Pelemis, and subsequent demotion. He feels that had the accused refused to shoot, "most certainly, he would get into very deep trouble. . ."[20]

The accused displays a tendency to feel the helpless victim; there are several references in his testimonies to his having no choice in a variety of situations. He speaks of his having to become a soldier, that he had no choice in leaving the Republic of Croatia for Republika Srpska, that he had to join the BSA "to feed my family", that he "simply had to" go to the military barracks and leave behind his bedridden wife and sick child, that he had no choice in taking part in the Srebrenica operation, and that he "had to shoot those people" murdered in the Pilica collective farm massacre[21]. On the other hand, he has provided testimony of incidents when he broke out of this chain of helplessness and took positive action; such as when he saved some Serbs in Tuzla, when he saved Witness X, when he refused to comply with the orders of Lieutenant Milorad Pelemis, when he tried to refuse to kill at the collective farm and when he refused to kill at the hall in Pilica. Thus, he was capable of taking positive action, once he had weighed up his options. The risks that he took appear to have been calculated and considered.

The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.

Annex 9

9. *Prosecutor v Blaksic* IT-95-14 Trial Judgement 3 March 2000 para 778.

5374

IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLASKIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

ANNEX

Abbreviations

ABiH
Muslim Army of Bosnia-Herzegovina

BH
Republic of Bosnia-Herzegovina

BRITBAT
UNPROFOR British Battalion

ICRC
International Committee of the Red Cross

763. In addition, as observed in the *Erdemovic* case:

> the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity [1671]

764. Finally, the Trial Chamber shares the opinion of the Trial Chamber hearing the *Furundzija* case, that is, such reasoning is not applicable only to crimes against humanity but also to war crimes and other serious violations of international humanitarian law [1672].

B. Sentencing

765. The factors taken into account in the various Judgements of the two International Tribunals to assess the sentence must be interpreted in the light of the type of offence committed and the personal circumstances of the accused. This explains why it is appropriate to identify the specific material circumstances directly related to the offence in order to evaluate the gravity thereof and also the specific personal circumstances in order to adapt the sentence imposed to the accused's character and potential for rehabilitation. Notwithstanding this, in determining the sentence , the weight attributed to each type of circumstance depends on the objective sought by international justice. Keeping in mind the mission of the Tribunal, it is appropriate to attribute a lesser significance to the specific personal circumstances. Although they help to explain why the accused committed the crimes they do not in any event mitigate the seriousness of the offence. Furthermore, these circumstances may aggravate the responsibility of an accused depending on the position he held at the time of the acts and on his authority to prevent the commission of crimes.

1. The accused

766. Tihomir Blaskic was born on 2 November 1960 in the municipality of Kiseljak in Bosnia - Herzegovina. He lived in the town of Bretovsko. His parents were working class and his father died at the front during the conflict. He has a sister and a brother . Tihomir Blaskic has been married since 1987 and is the father of two young boys . His wife looks after their children and Tihomir Blaskic's brother [1673]. Tihomir Blaskic was trained at the Belgrade Military Academy from 1979-1980 and subsequently promoted at regular intervals, first to the rank of Captain First Class within the former JNA, then to the ranks of Colonel and Chief-of-Staff of the HVO Mostar headquarters within the HVO and lastly to the rank of General assigned to the General Inspectorate within the army of the Republic of Croatia. He is a member of the General Inspectorate of this army. Tihomir Blaskic surrendered to the Tribunal on 1 April 1996. He is presently being detained at the United Nations Detention Unit in Scheveningen, The Hague, The Netherlands.

2. Mitigating circumstances

767. Superior orders and co-operation with the Prosecutor are the only two mitigating circumstances explicitly set forth by the Statute and the Rules [1674]. The Tribunal has full discretion in respect of any other relevant mitigating circumstances .

a) The material mitigating circumstances

768. The fact that the accused did not directly participate may be taken as a mitigating circumstance

when the accused holds a junior position within the civilian or military command structure. However, the Trial Chamber considers that the fact that commanders , such as Tihomir Blaskic at the time of the crimes, played no direct part cannot act in mitigation of the sentence when found guilty.

769. Duress, where established, does mitigate the criminal responsibility of the accused when he had no choice or moral freedom in committing the crime. This must consequently entail the passing of a lighter sentence if he cannot be completely exonerated of responsibility. The Trial Chamber points out that over the period covered by the present indictment Tihomir Blaskic did not act under duress whilst in his post. Accordingly, he does not enjoy any mitigating circumstances.

770. It appears that, independently of duress, the context in which the crimes were committed , namely the conflict, is usually taken into consideration in determining the sentence to be imposed. Such was the case in the *Tadic*[1675], *Celebici*[1676] and *Aleksovski*[1677] cases. Though mentioned in these cases, this factor does not seem to have been decisive in fixing the sentence. Nonetheless, the Trial Chamber brings out the explanations given by Tihomir Blaskic whilst testifying to the disorganisation of the armed forces due, essentially, to the lack of experienced troops and the want of proper training and suitable materiel. It also observes the crimes allegedly committed by the other party and the difficulty of controlling the spontaneous reactions of some Croats . Nonetheless, even were they verified, these allegations are still not such as to constitute an excuse for a commander such as Tihomir Blaskic - *a fortiori* once it has been established as in this instance that the accused acted in accordance with a discriminatory policy which he deliberately implemented. The Trial Chamber finds the accused guilty of crimes against humanity and thereby excludes the possibility of disorder ensuing from an armed conflict constituting a mitigating circumstance .

b) Personal mitigating circumstances

771. Article 24(2) of the Statute allows the personal status of the accused to be taken into account in determining the sentence. Thus, where the elements effectively contribute to the determination of the sentence, the sanction must fit the crime's perpetrator and not merely the crime itself[1678] in accordance with the requirement of individualisation. As a human being, the accused has a conscience, a personal history and a character which may explain the process which led to the accused committing the crimes whose seriousness justifies his being tried before the Tribunal.

772. The Trial Chamber notes that the mental state of the accused was not invoked in this case[1679].

773. The accused's conduct after committing the crimes says much about his personality insofar as it reveals both how aware the accused was of having committed crimes and, to some extent, his intention to "make amends" by facilitating the task of the Tribunal[1680]. Such conduct includes co-operation with the Prosecutor, remorse, voluntary surrender and pleading guilty .

774. Co-operation with the Prosecutor is the only circumstance explicitly provided for within the terms of the Rules[1681]. By this simple fact, it takes on a special importance. The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides[1682]. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return[1683]. Providing that the co-operation lent respects the aforesaid requirements[1684], the Trial Chamber classes such co-operation as a "significant mitigating factor"[1685]. The Trial Chambers have, on several occasions, ruled that failure to co-operate constitutes an aggravating circumstance. Here, the Trial

Chamber notes that the accused has not co-operated with the Office of the Prosecutor.

775. Remorse was taken into account as a mitigating circumstance in the *Erdemovic*[1686], *Akayesu*[1687] and *Serushago* cases [1688]. The Trial Chamber hearing the *Kambanda* case noted that the accused did not express any regrets even when the Trial Chamber presented him with the opportunity to do so[1689]. However the remorse expressed by the accused must be established as being real and sincere. Consequently, the Trial Chamber in the *Jelisic* case indicated that it was not satisfied that the remorse expressed by the accused was sincere[1690]. In this instance, the Trial Chamber notes that the feeling of remorse must be analysed in the light of not only the accused's statements but also of his behaviour (voluntary surrender, guilty plea). The Trial Chamber points out that, from the very first day of his testimony, Tihomir Blaskic expressed profound regret and avowed that he had done his best to improve the situation although this proved insufficient[1691]. The Trial Chamber observes that there is a flagrant contradiction between this attitude and the facts it has established - having given orders resulting in the commission of crimes the accused cannot claim that he attempted to limit their consequences . His remorse thus seems dubious.

776. Voluntary surrender is deemed a significant mitigating circumstance in determining the sentence. The factor has been analysed in three cases to date. In the *Erdemovic* case, it was deemed to indicate that the remorse expressed by the accused was sincere and thus a ground for reducing the sentence. However, it was selected as a self-contained mitigating circumstance in the *Serushago* case[1692]. More recently, the Trial Chamber in the *Kupreskic* case indicated that the voluntary surrender of accused constituted a factor operating in mitigation of the sentence[1693]. In the present case , even though his name appeared in an indictment alongside those of five other co -accused, Tihomir Blaskic voluntarily surrendered himself on 1 April 1996, that is approximately a year before the arrest of one of the other co-accused and eighteen months before another of the co-accused was handed over. However, as he himself stated during the hearings, he only surrendered himself once he had very carefully prepared his defence, to the point that he could retrace his movements down to the very minute even at the most critical moments of the conflict. The accused declared that he made preparations using documents which were no longer in his possession and which the Trial Chamber was unable to obtain.

777. A guilty plea, where entered, may in itself constitute a factor substantially mitigating the sentence. In this case, Tihomir Blaskic did not plead guilty. Although the Trial Chamber understands that the accused would contest the ascribability of the crimes , it does not however accept the fact that he took so much time to acknowledge that the crimes did indeed take place, particularly in Ahmici, crimes which the accused himself had ascribed to the Muslims or Serbs[1694], before stating at trial that they had been perpetrated, more specifically, by the Military Police[1695].

778. The case-law of the two *ad hoc* criminal Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance. The assessment of youth varies – whilst the ICTY considers accused aged between 19 and 23 at the time of the facts as being young[1696], the ICTR selects ages from 32 to 37[1697]. In the present case, the Trial Chamber notes that Tihomir Blaskic, now 39 years old, was 32 at the time of the facts. It points out that this is not an unusually young age for a operative zone commander in time of armed conflict. However it must be stated that the accused was given considerable responsibilities, notably in organising the army and the conduct of military operations at a particularly critical period . Although he was a professional officer, the Trial Chamber considers that his age is to some degree a mitigating circumstance.

779. Finally, the Trial Chambers have often found it appropriate to review the accused's personal history

- socially, professionally and within his family. It is essential to review these factors because they may bring to light the reasons for the accused's criminal conduct.

780. The character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused. The Judgement rendered in the *Erdemovic* case states that the accused can be reformed and that he represents no danger[1698]. High moral standards are also indicative of the accused's character[1699]. Thus, the Trial Chamber bears in mind not only the fact that Tihomir Blaskic does not have a criminal record but also his keen sense for the soldiering profession which he considers a duty. In this respect, the Trial Chamber must take note of the exemplary behaviour of the accused throughout the trial, whatever the judgement as to his statements as a witness. The accused also appeared particularly at ease as regards the military aspect. It is appropriate to note that several witnesses attested to the professionalism of the accused and his organisational skills. He is a man of duty. He is also a man of authority who barely tolerated non-compliance with his orders. He is a man of conviction and his commitment to the Croatian cause is undoubted.

781. Another indication that the accused's character is reformable is evident in his lending assistance to some of the victims[1700]. In this regard, the Trial Chamber notes that Tihomir Blaskic allegedly maintained , here and there, good relations with the Muslims throughout the conflict. Accordingly , he supposedly participated in Muslim festivals, stayed in touch with the family of a Muslim friend and protected a Muslim woman whose husband was threatened[1701]. Notwithstanding this, the Trial Chamber observes that these good relations were sporadic and above all on an individual basis. These factors are all the less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes.

782. Nevertheless, in a case as serious as this and also insofar as many accused share these personal factors, the Trial Chamber must find that their weight is limited or even non-existent when determining the sentence[1702].

3. Aggravating circumstances

a) The scope of the crime

i) How the crime was committed

783. The fact that the crime was as egregious as it was is a qualitative criterion which can be gleaned from its particularly cruel or humiliating nature. The Trial Chambers have pointed out, in this regard, the extreme cruelty of the beatings[1703], the sadism with which they were inflicted and the especial humiliation which ensued . The cruelty of the attack is clearly a significant consideration when determining the proper sentence. In this case, the heinousness of the crimes is established by the sheer scale and planning of the crimes committed which resulted in suffering being intentionally inflicted upon the Muslim victims regardless of age, sex or status. In this respect, the Trial Chamber wishes to bring out the particularly heinous nature of the crimes at Ahmici where, during a carefully prepared attack , many Muslim children, women and adults were systematically murdered and sometimes burnt alive in their homes, the houses plundered and set alight and the mosques and religious buildings destroyed. Such facts constitute a decisive aggravating circumstance.

784. The number of victims has been raised on several occasions as an aggravating circumstance and reflects the scale of the crime committed[1704]. By noting that the crimes were committed systematically, the Trial Chambers also took into account as aggravating circumstances the recurrence of the crimes

[1705]. The number of victims must also be considered in relation to the length of time over which the crimes were perpetrated[1706]. In this case, the Trial Chamber not only points to the high number of victims but also the violence of the crimes and the fact that they were repeated, discriminatory and systematic. The Trial Chamber recalls that a very large number of Muslim civilians had their homes forcibly taken away from them. This excludes the very large number of victims who had to take flight. The brutal murder of Muslim civilians in Ahmi ci over a brief time-span is a blatant illustration.

785. The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution[1707], desire for revenge[1708] and sadism[1709]. Resultantly, the Trial Chamber considers that it is essential to review the motives of the crimes violating international humanitarian law imputed to the accused[1710]. Here, the Trial Chamber takes note of the ethnic and religious discrimination which the victims suffered. In consequence, the violations are to be analysed as persecution which, in itself, justifies a more severe penalty.

ii) Effects of the crime upon the victims

786. The status of the victims may be taken into account as an aggravating circumstance . Judgements have indicated that the victims were civilians and/or women[1711]. This Trial Chamber notes that in this case many crimes targeted the general civilian population and within that population the women and children. These acts constitute an aggravating circumstance[1712].

787. The physical and mental effects of the bodily harm meted out to the victims were also seen as aggravating circumstances[1713]. The criterion is thus characterised by its subjectiveness. In the *Tadic, Celebi ci* and *Furundzija* cases, the Trial Chambers observed that the offences had been committed in circumstances which could only aggravate the crimes and the victims' suffering[1714]. Those cases where bodily injury led to death have also been noted[1715]. Consequently, victims' suffering is one factor to be taken into account when determining the sentence. The Trial Chamber here points not only to the suffering inflicted upon the victims while the crimes were being committed through the use of indiscriminate , disproportionate and terrifying combat means and methods, such as "baby bombs", flame-throwers, grenades and a booby-trapped lorry, but also the manifest physical and mental suffering endured by the survivors of these brutal events. Thus, along with the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day must also be mentioned.

b) The degree of the accused's responsibility

i) Command position

788. In the case-law of the two Tribunals, there can be no doubt that command position may justify a harsher sentence, which must be that much harsher because the accused held a high position within the civilian or military command structure[1716]. In this instance, actual authority exercised seems more decisive than command authority alone[1717]. The Judgements of the ICTR on the issue are of particular importance in view of the high level of command authority held by some of the accused[1718]. The Trial Chambers observed that the case-law of the Tribunal classifies command position as an aggravating circumstance[1719]. In the Judgement rendered in the *Celebici* case, the Trial Chamber nevertheless noted that command position does not necessarily entail a harsher sentence and that the accused may

enjoy mitigating circumstances if he had only "constructive knowledge " of the crimes[1720]. However the Trial Chamber stated that:

> it would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in mitigation of criminal responsibility[1721].

789. Therefore, when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander. From this viewpoint, the Trial Chamber recalls that in the *Tadic* case the Appeals Chamber found that a prison sentence above twenty years would be excessive given the relatively low rank of Dusko Tadic within the command structure.[1722] Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime. The Trial Chamber observes that as commander of the Central Bosnia Operative Zone at the time of the facts, Tihomir Blaskic held a senior command position. As indicated above, the Trial Chamber is of the opinion that the accused had more than a constructive knowledge of the crimes. It is satisfied beyond all reasonable doubt that General Blaskic ordered attacks which targeted the Muslim civilian population and thereby incurred responsibility for crimes committed during these attacks or at least made himself an accomplice thereto and, as regards those crimes not ensuing from such orders, he failed in his duty to prevent them and did not take the necessary measures to punish their perpetrators after they had been committed.

ii) Form of participation

790. Active and direct participation in the crime means that the accused committed by his own hand all or some of the crimes with which he is charged. Direct participation in the crime is accordingly an aggravating circumstance which will more often than not be held against the actual perpetrators rather than against the commanders[1723]. The relevant precedents set down by the Judgements delivered in the *Tadic* and *Furundzija*[1724] cases are quite significant. In the case in hand, the Trial Chamber points out that Tihomir Blaskic did not take a direct and active part in the crimes. Nonetheless, at the time of the facts, the accused held a command position which made him responsible for the acts of his subordinates. Accordingly, although the fact that he did not take a direct and active part does not constitute an aggravating circumstance in itself, it can in no way counterbalance the aggravation arising from the accused's command position[1725].

791. Therefore, it can be concluded that command position is more of an aggravating circumstance than direct participation. This holds true insofar as, although direct participation by the commander does constitute an aggravating circumstance, the fact that he does not participate directly may not conversely justify a reduction in the sentence

792. Informed and voluntary participation means that the accused participated in the crimes fully aware of the facts. It was specified as an aggravating circumstance in the *Tadic*[1726] case and in all the Judgements rendered by the ICTR[1727]. The importance of this factor varies in case-law depending on the degree of enthusiasm with which the accused participated. Informed participation is consequently a less aggravating circumstance than willing participation. Not only does the accused's awareness of the

criminality of his acts and their consequences and of the criminal behaviour of his subordinates count but also his willingness and intent to commit them. Once such intent is established, it is likely to justify an additional aggravation of the sentence. In the case in hand, the Trial Chamber brings out the informed and voluntary participation of Tihomir Blaskic in the crimes ascribed to him. As a professional soldier who, as he himself explained, took a course on the law of armed conflicts while in the former JNA, the accused knew perfectly well the range of his obligations. It is inconceivable that Tihomir Blaskic was unable to assess the criminal consequences stemming from the violations of such obligations.

iii) Premeditation

793. The premeditation of an accused in a crime tends to aggravate his degree of responsibility in its perpetration and subsequently increases his sentence. Premeditation is a classic aggravating circumstance in national legal practice. For this reason, it was taken into account by the ICTY and ICTR in the *Tadic, Celebici*, *Kambanda* and *Serushago* cases. The Trial Chamber here holds that, insofar as the accused has been found guilty of crimes against humanity, these circumstances may not be taken into account.

4. Credit for time served

794. Under Sub-rule 101(D) of the Rules, any person found guilty is entitled to "the period which SheC was detained in custody pending surrender to the Tribunal or pending trial or appeal" being deducted from the sentence. Consequently, in calculating the sentence, the fact that the accused has been detained by the Tribunal since 1 April 1996, that is three years, eleven months and two days as of the day of this Judgement, must be considered.

5. The sentence

795. Neither the Statute nor the Rules lays down expressly a scale of sentences applicable to the crimes falling under the jurisdiction of the Tribunal. Article 24(2) of the Statute draws no distinction between crimes when determining the sentence. The Trial Chamber passes only prison sentences, the maximum being life imprisonment pursuant to Sub-rule 101(A) of the Rules.

796. However, the principle of proportionality, a general principle of criminal law, and Article 24(2) of the Statute call on the Trial Chamber to bear in mind the seriousness of the offence and could consequently constitute the legal basis for a scale of sentences. The first question which arises therefrom concerns the existence of a scale of seriousness of the crimes over which the Tribunal has jurisdiction. The question of transposing this scale when determining the sentence only comes up later .

a) Legal bases and consequences of an objective ranking of the crimes

797. To date, the issue of the legal basis for ranking the crimes does not appear to have been the focus of many discussions[1728]. In the *Erdemovic* case, the Appeals Chamber outlined the principle of a scale of seriousness of the crimes although the legal arguments put forward in support of the said principle were not unanimously agreed upon. In their separate opinion , Judges McDonald and Vohrah advanced two arguments for a scale of seriousness of the crimes. First, they indicated a natural distinction between crimes against humanity and war crimes in order to justify the intrinsically more serious nature of the crimes against humanity[1729]. In their respective separate opinions in the *Erdemovic* and *Tadic* cases [1730], Judge Li and Judge Robinson signalled their disagreement on the matter noting that a crime against humanity is not a crime against the whole of mankind but a crime against "humaneness, i.e . a certain quality of behaviour". The Trial Chamber however observes that although the two meanings of

the word "humanity" are allowable, the second in no way acts in mitigation of the seriousness *per se* of a crime against humanity which retains a different nature from a war crime.

798. Secondly, the fact that a crime against humanity is distinguishable from a war crime by its ingredients is raised – crimes against humanity are not isolated acts committed at random but rather acts which, as their perpetrator is aware, have much more serious consequences because of their additional contribution to a widespread pattern of violence[1731]. However, a crime against humanity must not necessarily be considered more serious than a war crime[1732]. The comparison must be made between two similar underlying crimes[1733].

799. Accordingly, an outline of the hierarchy of crimes emerges from the case-law of the two *ad hoc* Tribunals but its legal value does not seem to have been established at the present time[1734].

b) The principles set by the case-law of the two Tribunals

i) The principles

800. A hierarchy of crimes seems to emerge from the case-law of the ICTR. The Trial Chamber seised of the *Kambanda* case[1735] established a complete scale of seriousness of the crimes which was taken up in the subsequent Judgements of the ICTR[1736]. The following hierarchy of crimes falling under the jurisdiction of the Tribunal may therefore be compiled:

1) "The crime of crimes": genocide[1737]

2) Crimes of an extreme seriousness: crimes against humanity

3) Crimes of a lesser seriousness: war crimes[1738]

The ICTR has thus supposedly established a genuine hierarchy of crimes and this has been used in determining sentences as witnessed by the fact that the crime of genocide was punished by life imprisonment[1739].

801. The ICTY has not yet transposed this hierarchy of crimes to the sentencing phase. Until now only the *Tadic* case has the distinctive feature whereby the accused has been found guilty of crimes against humanity and war crimes for the same acts and was sentenced separately for each characterisation specified . In view of this, it should also be noted that the sentences imposed for crimes against humanity were systematically one year longer than those for war crimes. Even in the *Erdemovic* case, the Appeals Chamber did not clearly use the hierarchy of offences, as established in the Judgement, in order to determine the corresponding applicable sentence[1740]. Recently in the *Tadic* case, the Appeals Chamber noted that in determining the sentence there is no distinction in law between the seriousness of a crime against humanity and that of a war crime[1741]. In setting the sentence, the Chamber indicated:

> [t]he authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case[1742].

802. Ultimately, it appears that the case-law of the Tribunal is not fixed. The Trial Chamber will therefore confine itself to assessing seriousness based on the circumstances of the case.

ii) The method for assessing seriousness

803. The objective method for assessing the seriousness of a crime is linked to the intrinsic seriousness of the crime's legal characterisation. It is not the seriousness of the crime committed in the case in point which is borne in mind but the seriousness of the characterisation specified. The subjective method for assessing the seriousness relates to the seriousness *in personam* of the crime[1743].

804. In addition to the seriousness *per* se of the crime, it is also appropriate to take into account its seriousness *in personam*[1744]. Although the subjective seriousness is not taken into account in the scale of seriousness of the crimes, it is a factor in the second phase of determining the sentence and thereby ensures that the circumstances of the case may be duly taken into account in setting the sentence. It is not contrary to the principle of individualisation of the sentence to rely on a scale of seriousness of the crimes. The scale of sentences will follow from the relationship between and the evaluation of the objective seriousness , if relevant, and the subjective seriousness of the crimes. It is understood that the weight of the second factor, that is the subjective seriousness, should not, other than in exceptional circumstances, cancel out the first factor, that is the objective seriousness. Furthermore and where necessary, the imposition of a minimum sentence to be served would give some scope for the sentence to be fine-tuned[1745]. However, the Trial Chamber notes that this notion is not universally accepted in the various legal systems.

c) A single sentence

805. The Trial Chamber is of the view that the provisions of Rule 101 of the Rules do not preclude the passing of a single sentence for several crimes. In this regard , the Trial Chamber takes note that although until now the ICTY Trial Chambers have rendered Judgements imposing multiple sentences, Trial Chamber I of the ICTR imposed single sentences in the *Kambanda*[1746] and *Serushago*[1747] cases.

806. Moreover, the Trial Chamber recalls that in the cases brought before the military Tribunals at Nuremberg and Tokyo, a single sentence was passed even for multiple crimes.

807. Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. The Trial Chamber further observes that crimes other than the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted. In other words, it is impossible to identify which acts would relate to which of the various counts - other than those supporting the prosecution for and conviction of persecution under count 1 which, moreover, covers a longer period of time than any of the other counts. In light of this overall consistency , the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.

6. Conclusion

808. In conclusion, the Trial Chamber holds that in this case, the aggravating circumstances unarguably outweigh the mitigating circumstances and that the sentence pronounced accurately reflects the degree of seriousness of the crimes perpetrated and the faults of the accused given his character, the violence done to the victims, the circumstances at the time and the need to provide a punishment commensurate with the serious violations of international humanitarian law which the Tribunal was set up to punish according to the accused's level of responsibility.

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, in a unanimous ruling of its members,

FINDS Tihomir Blaskic GUILTY:

of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovaca and Kiseljak and, in particular, in the towns and villages of Ahmici, Nadioci, Pirici, Santici, Oc ehnici, Vitez, Stari Vitez, Donja Veceriska, Gacice, Loncari, Grbavica, Behrici, Kazagici, Svinjarevo, Gomionica, Gromiljak, Polje Visnjica, Visnjica, Rotilj, Hercezi , Tulica and Han Ploca/Grahovci between 1 May 1992 and 31 January 1994 (count 1) for the following acts:

- attacks on towns and villages;

- murder and serious bodily injury;

- the destruction and plunder of property and, in particular, of institutions dedicated to religion or education;

- inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields;

- the forcible transfer of civilians;

and by these same acts, in particular, as regards an international armed conflict , General Blaskic committed:

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3);

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects (count 4);

- a grave breach, under Article 2(a) of the Statute: wilful killing (count 5);

- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: murder (count 6);

- a crime against humanity, under Article 5(a) of the Statute: murder (count 7);

- a grave breach under Article 2(c) of the Statute: wilfully causing great suffering or serious injury to body or health (count 8);

- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: violence to life and person (count 9);

- a crime against humanity under Article 5(i) of the Statute: inhumane acts (count 10);

- a grave breach under Article 2(d) of the Statute: extensive destruction of property (count 11);

- a violation of the laws or customs of war under Article 3(b) of the Statute: devastation not justified by military necessity (count 12);

- a violation of the laws or customs of war under Article 3(e) of the Statute: plunder of public or private property (count 13);

- a violation of the laws or customs of war under Article 3(d) of the Statute: destruction or wilful damage done to institutions dedicated to religion or education (count 14);

- a grave breach under Article 2(b) of the Statute: inhuman treatment (count 15);

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 16);

- a grave breach under Article 2(h) of the Statute: taking civilians as hostages (count 17);

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(b) of the Geneva Conventions: taking of hostages (count 18);

- a grave breach, under Article 2(b) of the Statute: inhuman treatment (count 19);

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 20),

In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished, and

NOT GUILTY of counts 3 and 4 in relation to the shelling of the town of Zenica,

and therefore,

SENTENCES Tihomir Blaskic to forty-five years in prison;

STATES that the length of time he has been detained for the Tribunal, that is the period from 1 April 1996 until the date of this Judgement, shall be deducted from the overall length of the sentence.

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

Done this third day of March
At The Hague
The Netherlands.

/signed/
Claude Jorda
President of the Trial Chamber

/signed/
Mohamed Shahabuddeen

/signed/
Almiro Rodrigues

[Seal of the Tribunal]

Judge Shahabuddeen appends a declaration to this Judgement.