

**Declassified to Public
06 September 2012**

ANNEX A

AUTHORITY 28

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
the Former Yugoslavia since 1991

Case No. IT-02-61-A

Date: 20 July 2005

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca**

Registrar:

Mr. Hans Holthuis

Judgement of:

20 July 2005

PROSECUTOR

v.

MIROSLAV DERONJIĆ

JUDGEMENT ON SENTENCING APPEAL

Counsel for the Prosecution:

Mr. Mark J. McKeon
Ms. Barbara Goy

Counsel for the Appellant:

Mr. Slobodan Cvijetić
Mr. Slobodan Zečević

factors considered in aggravation. This is unfortunate, but it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting by taking into account matters relevant to the gravity of the offence as additional aggravating circumstances as well. The Appeals Chamber notes that in section IX. A. of the Sentencing Judgement, the Trial Chamber provides a detailed description of the circumstances surrounding the commission of the crime of persecutions, as well as the Appellant's role before and during the attack on Glogova,²⁴³ and lists all the aggravating factors taken into account.²⁴⁴ The Appeals Chamber considers that those factors not listed in paragraph 222 of the Sentencing Judgement but contained in paragraphs 186-220 were considered by the Trial Chamber within the context of the gravity of the offence, except where otherwise stated by the Trial Chamber.²⁴⁵

107. In the conclusion of section IX. A. of the Sentencing Judgement, the Trial Chamber stated that it had taken into consideration "the gravity of the crime and all the accepted aggravating circumstances".²⁴⁶ This statement refers to prior paragraph 222 which states that "[the Trial Chamber] accepts the following factors as aggravating". In this respect, the Appeals Chamber notes that, for instance, the Trial Chamber did not include its consideration of the long-term effects of the attack on the victims in its list of aggravating circumstances.²⁴⁷ Rather, the Trial Chamber found this element to be "a relevant factor in determining the gravity of the crime."²⁴⁸ Therefore, the Appeals Chamber considers that the Sentencing Judgement clearly shows that the Trial Chamber indeed distinguished between aggravating circumstances on the one hand and the gravity of the offence on the other, albeit considering them under the same heading. The Trial Chamber was cognisant of the fact that double-counting for sentencing purposes is impermissible. With respect to the alleged errors concerning each specific aggravating factor, the Appellant must demonstrate that the Trial Chamber impermissibly double-counted the factor in question and considered it within the context of the gravity of the offence as well.

2. The large number of victims

108. The Appellant alleges under this part of his third ground of appeal that the Trial Chamber's conclusion that "[t]he large number of civilians who were killed, subjected to the risk of being killed, forcibly displaced, and deprived of their property" amounts to an aggravating factor²⁴⁹ is

²⁴³ See Sentencing Judgement, paras 186-220.

²⁴⁴ *Ibid.*, para. 222.

²⁴⁵ See for instance *ibid.*, para. 202.

²⁴⁶ *Ibid.*, para. 223.

²⁴⁷ *Ibid.*, paras 210-218, sub-paragraph (g) in the Trial Chamber's discussion on the gravity of the offence and aggravating circumstances.

²⁴⁸ *Ibid.*, para. 210.

²⁴⁹ Sentencing Judgement, para. 222(i).

erroneous as such circumstance is already “subsumed in the overall gravity of the offence to which [he] pleaded guilty, and [...] incorporated as [a] constitutive element of the crime in the Second Amended Indictment and [in the] Factual Basis.”²⁵⁰ The Prosecution responds that the fact that there was a large number of victims is not an element of the crime of persecution as “a single discriminatory act against an individual could constitute persecution”.²⁵¹ It argues that the fact that crimes against humanity must be related to a widespread or systematic attack “does not signify that a single act by a perpetrator cannot constitute a crime against humanity, if committed within the appropriate context and with the requisite knowledge”.²⁵² The Prosecution acknowledges that the requirement of a widespread and systematic attack refers to the large-scale nature and the number of the targeted persons, but submits that it is not required that the person accused of a crime against humanity be individually responsible for the large number of victims.²⁵³ The Prosecution submits that it is clear from paragraph 222 of the Sentencing Judgement that the Trial Chamber considered the large number of victims as an aggravating circumstance and not when it determined the gravity of the crime.²⁵⁴

109. The Appeals Chamber first recalls that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population;²⁵⁵ however, this requirement only applies to the attack and not to the individual acts of the accused.²⁵⁶ The acts of the accused need only be a part of the attack and, all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.²⁵⁷ With regard to the crime of persecutions, the Appeals Chamber further recalls that this crime is defined as “an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).”²⁵⁸

110. With regard to the allegation that the large number of victims is subsumed in the overall gravity of the offence, the Appellant submits that the Trial Chamber did not address the distinction

²⁵⁰ Appellant's Brief, para. 101.

²⁵¹ Respondent's Brief, para. 4.69 (footnote omitted). *See also* AT. 30.

²⁵² *Ibid.*, para. 4.70. *See also* AT. 30.

²⁵³ AT. 30-31.

²⁵⁴ AT. 31; Respondent's Brief, para. 4.71.

²⁵⁵ *Blaškić* Appeal Judgement, para. 98.

²⁵⁶ *Ibid.*, para. 101 referring to *Kunarac et al.* Appeal Judgement, para. 96.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, para. 131 referring to *Krnjelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.

between the aggravating circumstances and the gravity of the offence.²⁵⁹ However, the Appeals Chamber notes that the Appellant does not point to any specific finding in the Sentencing Judgement that makes it clear that the Trial Chamber additionally took into account the large number of victims as part of the gravity of the crime. The Appeals Chamber therefore finds that the Appellant has failed to demonstrate that the Trial Chamber took this into account twice as part of the gravity of the offence and as an aggravating factor.

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

3. The meticulously planned attack on Glogova

112. The Trial Chamber concluded, at paragraph 222(ii) of the Sentencing Judgement, that the following was an aggravating circumstance:

The Accused launched a meticulously planned attack on Glogova in order to facilitate the scheme of creating Serb-ethnic territories by forcefully displacing Bosnian Muslim population from the entire Municipality of Bratunac that was designed by the Bosnian Serb leadership already in 1991.

The Appellant alleges that paragraph 222(ii) of the Sentencing Judgement contains an error of law as this circumstance cannot be considered as aggravating since it is "in substance [the] context of [the] crime to which [he] pleaded guilty", as expressed at paragraph 14 of the Second Amended Indictment and at paragraphs 7, 8 and 13 of the Factual Basis.²⁶⁰ The Prosecution responds that it is "precisely in 'the context of a crime' where the Trial Chamber should have been looking for aggravating factors"²⁶¹ and that "[o]nly those circumstances directly related to the commission of the offence charged may be seen as aggravating".²⁶² Further, the Prosecution argues that the Appellant provides no authority or reasoning in support of his proposition that the mere fact that the context of planning is mentioned in the Factual Basis prevents the Trial Chamber from taking it into account as an aggravating circumstance.²⁶³

113. The Appellant seems to allege that the Trial Chamber erred in considering as an aggravating factor his very participation in the attack. He argues that the Trial Chamber erred in considering the fact that he "launched a meticulously planned attack on Glogova"²⁶⁴ in aggravation of his sentence

²⁵⁹ Brief in Reply, para. 42.

²⁶⁰ Appellant's Brief, para. 102. The Appeals Chamber notes that the Appellant does not allege in this part of his third ground of appeal that the meticulous planning of the attack on Glogova, considered by the Trial Chamber as an aggravating circumstance, is also a factor subsumed in the overall gravity of the offence or a constitutive element of the crime of persecution. Therefore the Appeals Chamber will not address the arguments put forward by the Prosecution in this regard, *See* Respondent's Brief, para. 4.75; AT. 31-32.

²⁶¹ Respondent's Brief, para. 4.73.

²⁶² *Ibid.* referring to *Kunarac et al.* Trial Judgement, para. 850.

²⁶³ *Ibid.*, para. 4.74.

²⁶⁴ Sentencing Judgement, para. 222(ii).

VII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the oral arguments they presented at the hearing of 17 June 2005;

SITTING in open session;

DISMISSES unanimously all the grounds of appeal filed by the Appellant;

AFFIRMS unanimously the sentence of 10 years' imprisonment as imposed by the Trial Chamber;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

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

Judge Theodor Meron
Presiding

Judge Fausto Pocar

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Inés Mónica Weinberg de
Roca

Dated this twentieth day of July 2005

At The Hague,
The Netherlands.

[Seal of the International Tribunal]