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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-94-2-S

Date: 18 December 2003

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IN TRIAL CHAMBER II

Before:	**Judge Wolfgang Schomburg, Presiding** **Judge Carmel A. Agius** **Judge Florence Ndepele Mwachande Mumba**
Registrar:	**Mr. Hans Holthuis**
Judgement of:	**18 December 2003**

PROSECUTOR

v.

DRAGAN NIKOLIĆ

SENTENCING JUDGEMENT

The Office of the Prosecutor:

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Ms. Patricia Sellers-Viseur
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EASTERN BOSNIA
(CROATIA)
(SERBIA)
Vlasenica
(MONTENEGRO)
Eastern Bosnia map.jpg | Team 5 Nikolic | 15-12-2003 M&P

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I. INTRODUCTION

1. 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 ("Tribunal") was created by United Nations Security Council Resolution 827 (1993) under Chapter VII of the Charter of the United Nations. Article 39 of Chapter VII reads as follows:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, <u>to maintain or restore international peace and security</u>". [1]

2. Dragan Nikoli} was the first person indicted by this Tribunal on 4 November 1994. This case deals with his individual responsibility for particularly brutal crimes committed in the Sušica detention camp near the town of Vlasenica in the Municipality of the same name. Dragan Nikoli} was a commander in this camp established by Serb forces in June 1992.

3. In confessing his guilt and admitting all factual details contained in the Third Amended Indictment in open court on 4 September 2003 Dragan Nikoli} has helped further a process of reconciliation. He has guided the international community closer to the truth in an area not yet subject of any judgement rendered by this Tribunal, truth being one prerequisite for peace.

4. It is now for this Trial Chamber to balance the extreme gravity of the crimes for which the Accused accepted full responsibility against this contribution to peace and security. In doing so, it is for this Trial Chamber to come as close as possible to justice for both victims and their relatives and the Accused, justice being of paramount importance for the restoration and maintenance of peace.

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[1] Emphasis added. Chapter VII is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".

II. THE ACCUSED

5. The Accused, Dragan Nikoli}, also known as "Jenki", was born on 26 April 1957 in the municipality of Vlasenica, today part of the "Republika Srpska" entity of Bosnia and Herzegovina. He is the eldest son of Spasoje and Milica Nikoli}[2] and comes from a modest rural background.[3] A brother, Milan, was born in 1959 and a sister, Milojka, in 1961. Growing up, Dragan Nikoli} had a very close relationship with his brother. The strong bond forged between the brothers carried through into their adulthood.[4]

6. Raised in the town of Vlasenica in Bosnia and Herzegovina (hereinafter "BiH"), the Accused finished secondary school in 1978 when he was 21 years old. His mandatory military service ended early due to the sudden death of his father in 1981. Dragan Nikoli} was then 23 and as such had become the head of the family. He was, for a period, gainfully employed in a furniture store until it went out of business. In 1986, the Accused was able to secure employment in the Alpro aluminium factory in Vlasenica, where he worked from 16 June 1986 until 20 April 1992.[5] The Accused served in the military from 1992-1995 and has been unemployed since 1995.[6]

7. Dragan Nikoli} has never been married and he has no children. He is of Serbian ethnicity and belongs to the Orthodox faith, although by his own assessment, religion as such has played little role in his life. It appears that, prior to the events of 1992, he was well liked by his friends and work colleagues in Vlasenica, irrespective of their ethnicity. He still enjoys the strong support of his family. Living later in Serbia, the Accused was financially supported by his brother Milan until the latter is reported to have committed suicide in February of 1997 or 1998.[7] Dragan Nikoli} appears to have led an unremarkable life before the events occurred with which this Sentencing Judgement is concerned. Prior to 1992 the Accused had no criminal record.[8]

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[2] Expert Report of Dr. Nancy Grosselfinger, p. 11.
[3] *Ibid.*, p. A.
[4] *Ibid.,* pp. 17-19.
[5] *Ibid.*, pp. 11-12, *Prosecutor v. Nikoli},* Case No. IT-94-2-S, Third Amended Indictment, 31 October 2003, paras 1, 37.
[6] Expert Report of Dr. Nancy Grosselfinger, p. 12.
[7] *Ibid.*, pp. 11, 14, 15, 18; Witness Jovo Deli}, T. 307.
[8] Sentencing Hearing, T. 335.

III. PROCEDURAL HISTORY

A. Overview of the Proceedings

8. The initial indictment against Dragan Nikoli}, confirmed on 4 November 1994, contained counts of Grave Breaches of the Geneva Conventions, Crimes Against Humanity and Violations of the Laws or Customs of War.[9] That same day, two arrest warrants were issued, one addressed to the then Bosnian Serb administration in Pale,[10] and the other addressed to the Republic of Bosnia and Herzegovina,[11] in accordance with Rules 2(A) and 55 of the Rules of Procedure and Evidence (hereinafter "Rules").[12]

9. Following the failure to effect service of the indictment and execute the subsequent arrest warrants,[13] proceedings pursuant to Rule 61 of the Rules were initiated on 16 May 1995.[14] The Trial Chamber heard 15 *viva voce* witnesses in public hearings from 9 to 13 October 1995, which testimonies, however, do not form the part of the evidence used for the purposes of this Judgement.[15]

10. Consequently, on 20 October 1995, the Trial Chamber issued its decision on the Rule 61 proceedings, determining that there were reasonable grounds for believing that Dragan Nikoli} had committed all the crimes in the then indictment.[16] In addition, the Trial Chamber stated that the failure to effect service of the indictment and to execute the arrest warrant was due to the failure or refusal of the then Bosnian Serb administration in Pale to co-operate.[17] Therefore, the Trial Chamber asked the President of the Tribunal to notify the Security Council of the United Nations

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[9] The initial Indictment listed counts against the Accused in paras. 1.1 – 24.1 without specifying the number of counts. *The Prosecutor of the Tribunal against Dragan Nikoli}, a.k.a. "Jenki" Nikoli}*, Case No IT-94-2-I, Review of Indictment, 4 November 1994.

[10] *The Prosecutor of the Tribunal against Dragan Nikoli}, a.k.a. "Jenki" Nikoli}*, Case No IT-94-2-I, Warrant of Arrest to the Bosnian Serb Administration in Pale, 4 November 1994.

[11] *The Prosecutor of the Tribunal against Dragan Nikoli}, a.k.a. "Jenki" Nikoli}*, Case No IT-94-2-I, Warrant of Arrest to the Republic of Bosnia and Herzegovina – Sarajevo, 4 November 1994.

[12] The Accused was believed to be residing on the territory either of the then Republic of BiH or of the then Bosnian Serb administration in Pale, which had not been recognized as a State by the international community. *Ibid.* and *supra* footnote 10.

[13] "On 15 November 1994, the Registrar received official notification that the Republic of Bosnia and Herzegovina was unable to execute the arrest warrant due to the fact that Dragan Nikoli} resides in the town of Vlasenica, which was stated to be "temporary occupied territory controlled by aggressors". […] There has been no response from the Bosnian Serb administration concerning its willingness or ability to execute the warrant of arrest issued against Dragan Nikolić." *The Prosecutor v. Dragan Nikoli}, a.k.a. "Jenki"*, Case No IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, pp. 21-22.

[14] *The Prosecutor v. Dragan Nikoli}, a.k.a. "Jenki" Nikoli}*, Case No IT-94-2-R61, Order Submitting Indictment to Trial Chamber for Hearing, 16 May 1995. This was the first hearing in ICTY initiated pursuant to Rule 61 of the Rules.

[15] *The Prosecutor v. Dragan Nikoli}, a.k.a. "Jenki"*, Case No IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, p. 1.

[16] *Ibid.*, p. 23.

[17] *Ibid*.

accordingly.[18] In a letter dated 31 October 1995, the President of the Tribunal brought the matter to the attention of the Security Council.[19] Pursuant to Rule 61 (D) of the Rules, the Trial Chamber issued an international arrest warrant for Dragan Nikoli} to be transmitted to all States.[20] The Accused was finally apprehended by the Multinational Stabilisation Force (hereinafter "SFOR") on or about 20 April 2000 in BiH.[21]

11. Immediately after his arrest Dragan Nikoli} was transferred to the Tribunal on 21 April 2000. On 26 April 2000 by the order of the President of the Tribunal, the case was assigned to Trial Chamber II.[22] The Accused's initial appearance was held on 28 April 2000, when he entered a plea of not guilty to all 80 counts of the First Amended Indictment of 12 February 1999.[23] Following the elections of new Judges in 2001, the composition of Trial Chamber II was changed and the case was assigned to this bench on 23 November 2001.[24]

12. Two issues, which in the Trial Chamber's view are of particular importance in the pre-trial proceedings of this case, are addressed in more detail below. The first is the development of the indictment against the Accused, and the second is the question of the Tribunal's jurisdiction based on the alleged illegality of the arrest of the Accused.

1. Indictment Related Issues

13. The original indictment of 4 November 1994 has been amended three times, the latest version being the Third Amended Indictment of 31 October 2003 (hereinafter "Indictment").[25]

14. The first amendment to the indictment of 4 November 1994 was sought by the Office of the Prosecutor (hereinafter "Prosecution") following an invitation from the Trial Chamber to amend in light of the evidence presented at proceedings held under Rule 61 of the Rules.[26] On 12 February

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[18] *Ibid*., p. 24.

[19] Letter dated 31 October 1995 from the President 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 Addressed to the President of the Security Council, S/1995/910, 31 October 1995.

[20] *The Prosecutor v. Dragan Nikoli}, a.k.a. "Jenki" Nikoli}*, Case No IT-94-2-R61, International Warrant of Arrest and Order for Surrender, 20 October 1995.

[21] See *infra* subsection III. A. 2.

[22] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-I, Ordonnance du Président relative à l'attribution d'une affaire à une Chambre de Première Instance, 26 April 2000. At that time, Trial Chamber II was comprised of Judge Hunt (Presiding), Judge Mumba and Judge Liu.

[23] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-I, Initial Appearance, T. 4-5. See *infra* para. 14 for specific details as to the amendments to the original indictment of 4 November 1994.

[24] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Ordonnance du Président relative à la composition d'une Chambre de Première Instance pour une affaire, 23 November 2001.

[25] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-S, Third Amended Indictment, 31 October 2003.

[26] "Based on this review of the indictment and in light of all the material submitted by the Prosecutor, the Chamber would like to draw the Prosecutor's special attention to two points which it deems to be particularly important". In light

1999, the Trial Chamber confirmed the First Amended Indictment which contained 29 counts of Crimes Against Humanity, 29 counts of Grave Breaches of the Geneva Conventions and 22 counts of Violations of the Laws or Customs of War.[27]

15. As a result of the suggestions made by the pre-trial Judge in 2001, the Prosecution filed a Motion for leave to amend the First Amended Indictment on 7 January 2002, in order to:

> remove charges based on Article 2 and 3 of the Statute on the basis of judicial economy;
>
> remove charges solely based upon Article 7 (3) of the Statute;
>
> reduce the number of counts from eighty to eight, by regrouping the charges of persecution and inhumane conditions;
>
> confine the alleged scope of the Accused's individual criminal responsibility to Article 7 (1) of the Statute;
>
> add three new charges, arising out of conduct previously alleged.

16. On 15 February 2002, the Trial Chamber granted leave to file the Second Amended Indictment, to which the Accused entered a plea of not guilty on 18 March 2002.[28]

17. On 15 May 2003, the Prosecution pursuant to Rule 65 *ter* (E) (i) of the Rules filed Annex B "Admitted, Undisputed and Contested Facts" to its Pre-Trial Brief, which it had filed previously, on 20 January 2003.[29]

18. On 25 June 2003, the Third Amended Indictment, which arose out of the first discussion between the Parties of a possible plea agreement, was submitted by the Prosecution. The amendments only rearranged the legal assessment, thus without any changes to the factual basis.[30]

19. The Third Amended Indictment was accepted by the Trial Chamber at the status conference held on 27 June 2003.[31] The Accused again pleaded not guilty to all counts[32] and the Parties agreed

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of Rule 50, "it is the prerogative of the Prosecutor, not the Chamber, to amend the indictment", therefore "the Chamber can only express its belief and invite the Prosecutor to amend the indictment accordingly, should he share such belief." *The Prosecutor v. Dragan Nikoli}, a.k.a. "Jenki"*, Case No IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 32.

[27] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-I, Order Confirming the Amended Indictment, 12 February 1999.

[28] Further Initial Appearance, T. 79.

[29] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Annex B Admitted, Undisputed and Contested Facts, 15 May 2003. In para. 145 of this document, the Parties agreed that "from at least early June 1992 until about 30 September 1992 an armed conflict existed in Bosnia Herzegovina". During the Sentencing Hearing it was admitted that there was a widespread and systematic attack, which was still contested in para. 146 of this document, and that the wording of para. 36 of the Indictment is correct, T. 200-201.

[30] The amendments included, *inter alia*, reference to the Accused as "a" commander of the camp, instead of "the"; expansion of the factual allegations in Count 1 with the Accused's aiding and abetting rape and his other participation in sexual violence against Muslim female detainees and with the facts relating to the Accused's participation in the creation and maintenance of an atmosphere of terror and inhumane living conditions which were charged previously in

that trial hearings would commence in September 2003. It was expected that the trial would last for about eight or nine weeks only.[33]

20. During the hearing of 4 September 2003 (hereinafter "Plea Hearing") the Third Amended Indictment underwent some formal clarifications,[34] which were accepted by the Trial Chamber.[35]

2. The Arrest / Jurisdiction of the Tribunal

21. For a considerable period of time during the pre-trial proceedings, the Trial Chamber had to deal with jurisdictional matters.

22. On 17 May 2001, the defence for Dragan Nikoli} (hereinafter "Defence") filed a motion challenging the jurisdiction of the Tribunal pursuant to Rule 72 (A) (i) of the Rules mainly based upon the allegedly illegal arrest of the Accused. The Defence submitted that the allegedly illegal arrest of the Accused by unknown individuals on the territory of what was at that time the Federal Republic of Yugoslavia (hereinafter "FRY") should be attributable to SFOR and the Prosecution, thereby, according to the Defence, barring the Tribunal from exercising its jurisdiction over the Accused.[36] SFOR had arrested him on the territory of BiH after he had been handed over by these unknown individuals. The Defence further submitted that, irrespective of whether or not this was attributable to the Prosecution, the illegal character of the arrest should in and of itself bar the Tribunal from exercising jurisdiction, by not applying the disputed maxim *"male captus, bene detentus"*.[37]

Counts 2, 7 and 8 as inhumane acts under Article 5(i) of the Statute, *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Second Motion for Leave to Amend the Second Amended Indictment, 25 June 2003.

[31] Status Conference, T. 159. It was later confirmed by the Trial Chamber in a written decision of 30 June 2003. *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Decision on Prosecution's Motion for Leave to Amend the Second Amended Indictment, 30 June 2003.

[32] Status Conference, T. 153-154.

[33] Status Conference, T. 162-163.

[34] See *infra* para. 35.

[35] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Plea Hearing, T. 184.

[36] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber as Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention, 29 October 2001, para. 20.

[37] The maxim *male captus, bene detentus* (in the meaning of "illegally captured, legally detained") expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court, *The Prosecutor v. Dragan Nikolić*, Case No IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 70.

(a) Trial Chamber Decision

23. On 9 October 2002, the Trial Chamber dismissed this Defence motion. The Trial Chamber considered two main issues. First, the Trial Chamber decided on whether the conduct of the unknown individuals was attributable to SFOR. Second, the Trial Chamber decided on whether the rendition of the Accused to the Tribunal violated the principle of State sovereignty and/or international human rights and/or the rule of law.[38]

(i) Attribution to SFOR

24. The Trial Chamber stated that it had not been suggested that SFOR had "instructed, directed or controlled" the conduct of the unknown individuals, and concluded "that there was no collusion or official involvement by SFOR in the alleged illegal acts".[39] With regard to the question whether SFOR "'acknowledged and adopted' the conduct of the unknown individuals 'as its own'", the Trial Chamber held that SFOR had the authority to detain the Accused once he had "'come into contact with' SFOR". The Trial Chamber also held that SFOR was, "in accordance with their mandate and in light of Article 29 of the Statute and Rule 59 *bis* of the Rules, obliged to inform the Prosecution and to hand [the Accused] over to its representatives".[40]

(ii) Violation of State sovereignty

25. After having conducted a survey of the application of the maxim *male captus, bene detentus* in various national legal jurisdictions, the Trial Chamber stressed that the "core elements of this maxim were developed in the context of horizontal relationships between sovereign and equal states", and not "in the […] vertical […] context in which the Tribunal operates in relation to States".[41] The Trial Chamber stated that the following factors must be taken into account when considering whether there had been a violation of State sovereignty:

> "the role the executive authorities of the forum State played in the transfer of the accused, the nationality of the accused, the role of the injured State itself and any treaty obligations that may exist between the injured State and the forum State, especially as to extradition."[42]

26. The Trial Chamber decided that there was no violation of State sovereignty in the current case and based its decision on three grounds: First, the Trial Chamber held that in the vertical relationship between the Tribunal and States, "sovereignty by definition cannot play the same role"

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[38] *Ibid.*, paras 56 and 71.
[39] *Ibid.*, para. 64.
[40] *Ibid.*
[41] *Ibid.*, paras 76, 95, 100.
[42] *Ibid.*, para. 97.

as in the horizontal relationship between States.[43] Second, the Trial Chamber recalled that neither SFOR nor the Prosecution were at any time prior to Dragan Nikolić's crossing the border between the FRY and BiH involved in this transfer.[44] Third, the Trial Chamber found that, in contrast to various cases involving horizontal relationships between States, "in the present case, no issue arises as to possible circumvention of other available means for bringing the Accused into the jurisdiction of the Tribunal", as "States are obliged to surrender indicted persons in compliance with any arrest warrant".[45] The Trial Chamber held that even if a violation of State sovereignty had occurred, the FRY would have been obliged, under Article 29 of the Statute, to immediately re-surrender the Accused after his return to the FRY. The Trial Chamber recalled the maxim "*dolo facit qui petit quod [statim] redditurus est*"[46].

(iii) Violation of human rights and due process of law

27. The Trial Chamber re-emphasised that "there exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law."[47] It ruled that the issue of respect for due process encompasses more than the Trial Chamber's duty to ensure that the Accused receives a fair trial.[48] The Trial Chamber added that:

> the abuse of process doctrine may be relied upon if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated.[49] [I]n a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused."[50]

28. The Trial Chamber held that in the case before it, the facts assumed by the Parties "do not at all show that the treatment of the Accused by the unknown individuals […] was of such an egregious nature".[51] The Trial Chamber therefore held that none of the human rights of the

[43] *Ibid.*, para. 100.
[44] *Ibid.*, para. 101.
[45] *Ibid.*, para. 103.
[46] According to Black's Law Dictionary, 7th ed. Appendix A, page 1631, Legal Maxims, this maxim is translated as "a person acts with deceit who seeks what he will have to return [immediately]." *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 104.
[47] *Ibid*., para. 111.
[48] *Ibid*.
[49] *Ibid*., footnotes omitted (emphasis added).
[50] *Ibid*., para. 114.
[51] *Ibid*.

Accused were violated and that proceeding with the case would not violate the fundamental principle of due process of the law.[52]

29. The Defence filed an interlocutory appeal against this decision on 24 January 2003, following certification of the appeal by the Trial Chamber on 17 January 2003 pursuant to Rule 73 (C) of the Rules.[53]

(b) Appeals Chamber Decision

30. The Appeals Chamber dismissed the interlocutory appeal in its decision of 5 June 2003. First, the Appeals Chamber held that, even if the conduct of the unknown individuals could be attributed to SFOR, thus making SFOR responsible for a violation of State sovereignty, there was no basis upon which the Tribunal should not exercise its jurisdiction in the present case.[54] The Appeals Chamber weighed the "legitimate expectation that those accused of [universally condemned offences] will be brought to justice […] against the principle of State sovereignty and the fundamental human rights of the accused"[55] and stated that

> the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. [In this case] the State whose sovereignty has allegedly been breached [Serbia and Montenegro] has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction. *A fortiori*, […] the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions […] do not necessarily in themselves violate State sovereignty.[56]

31. Second, the Appeals Chamber defined the circumstances in which a human rights violation could vitiate the exercise of jurisdiction:

> [C]ertain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. […] Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the Accused and the

[52] *Ibid*., para. 115.
[53] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Decision to Grant Certification to Appeal the Trial Chamber's "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 17 January 2003 and *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Appellant's Brief on Appeal against a Decision of the Trial Chamber dated 9th October 2002, 24 January 2003.
[54] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 27.
[55] *Ibid.*, para. 26.
[56] *Ibid.*, paras 26-27.

> essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[57]

32. The Appeals Chamber concurred with the Trial Chamber's evaluation on the gravity of the alleged violation of the Accused's human rights:

> [T]he evidence [presented] does not satisfy the Appeals Chamber that the rights of the Accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction.[58]

B. Plea Agreement

33. On 28 August 2003 the Trial Chamber ordered that depositions, pursuant to Rule 71 of the Rules, should be taken during the week of 1-5 September 2003 and that a pre-trial conference should be held on 16 September 2003,[59] to be immediately followed by the commencement of the trial hearings.

34. On 1 September 2003, the first date scheduled for depositions in this case, in preparation for which witnesses had already arrived in The Hague, the Prosecution and Defence filed a joint motion requesting the Trial Chamber to postpone the deposition hearing "due to developments in the case" and "in the interest of all parties".[60] Subsequently, on 2 September 2003, the Trial Chamber scheduled a status conference to be held on 4 September 2003.[61]

35. On 2 September 2003 the Prosecution and Defence filed a Confidential Joint Plea Agreement Submission (hereinafter "Plea Agreement"), which was accepted by the Trial Chamber at the Plea Hearing of 4 September 2003.[62] The factual basis of the Plea Agreement was the one contained in the Indictment. However, following the suggestion of the Presiding Judge, the Prosecution sought during the hearing to introduce the following clarifications to the Indictment:

> In paragraph 2 "planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of all crimes charged in this indictment" was re-worded as "committing the crimes charged in counts 1, 2 and 4, and for aiding and abetting the execution of crimes charged in count 3";
>
> Paragraphs 7, 19, 22, 35 added reference to Article 7(1) of the Statute of the Tribunal.[63]

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[57] *Ibid*., para. 30.
[58] *Ibid*., para. 32 (emphasis added).
[59] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Scheduling Order, 28 August 2003.
[60] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Joint Motion to Postpone the Deposition Hearing Scheduled for 1 September 2003, 1 September 2003, para 1.
[61] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Scheduling Order, 2 September 2003.
[62] Plea Hearing, T. 176.
[63] Plea Hearing, T. 182-183.

36. The Trial Chamber orally accepted and confirmed the Indictment and stressed that "it is not intended to change any factual or legal basis" and that the changes are made merely "for purposes of clarification".[64] Dragan Nikoli} pleaded guilty to Count 1 through 4 of the Indictment and the Trial Chamber entered a finding of his guilt.[65]

37. On 11 September 2003 the Trial Chamber issued an order for sentencing briefs to be filed by 20 October 2003 and sentencing hearings to be held from 3 to 7 November 2003.[66]

C. Expert Reports

38. On 25 September 2003 the Trial Chamber *proprio motu* issued an order pursuant to Rules 54, 90 (C), 94 *bis*, 98, second sentence, and 100 of the Rules requesting Prof. Dr. Ulrich Sieber, Director of the "Max-Planck-Institut für ausländisches und internationales Strafrecht" in Freiburg, Germany (hereinafter "Max Planck Institute") to submit an expert report (hereinafter "Sentencing Report") providing information on "the range of sentences for the crimes, as laid down in the Indictment to which the Accused has pleaded guilty, applicable in (i) States on the territory of the former Yugoslavia, (ii) member States of the Council of Europe and (iii) other major legal systems; and the sentencing practice in relation to these crimes developed by (i) State courts in States on the territory of the former Yugoslavia, (ii) International or mixed courts and (iii) if available, the sentencing practice developed by other States mentioned above."[67]

39. On 2 October 2003 the Trial Chamber *proprio motu* issued an order pursuant to Rules 54, 90 (C), 94 *bis*, 98, second sentence, and 100 of the Rules, requesting the Registrar to appoint an expert to submit a report on the Accused's socialisation providing details on, *inter alia*, the Accused's childhood, the conditions under which he grew up, his school and work career and relations with friends and family. The Registrar appointed Dr. Nancy Grosselfinger who submitted her report on 20 October 2003 (hereinafter "Grosselfinger Report").

D. Sentencing Hearing

40. The Sentencing Hearing designed to provide the Trial Chamber with "any relevant information that may assist in determining an appropriate sentence" pursuant to Rule 100 (A) of the Rules commenced on 3 November 2003 and concluded on 6 November 2003.

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[64] Plea Hearing, T. 184.
[65] Plea Hearing, T. 186, 191, 192, 195-196.
[66] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Scheduling Order, 11 September 2003.
[67] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-PT, Scheduling Order, 25 September 2003, p. 2.

41. The Prosecution called three witnesses to testify, all of whom had been detained in Su{ica camp during the time of the Accused's criminal conduct. Written statements of two other victims were admitted into evidence as Prosecution exhibits.[68] In addition, the report of the Prosecution's expert psychologist, Dr. Maria Zepter, was admitted into evidence under Rule 94 *bis* of the Rules.[69] The common goal of this evidence was to describe the closer circumstances and the environment in which the crimes were committed and the impact these crimes had on surviving victims and their relatives.

42. The Defence called two witnesses; Jovo Deli}, a brother-in-law of the Accused (also working as a Defence investigator), who testified on the character of the Accused prior to his criminal conduct in Su{ica camp and his emotional state of mind in the United Nations Detention Unit (hereinafter "UNDU") before and after his guilty plea.[70] Ljiljana Rikanovi}, a cousin of the Accused and his present day confidant, testified as to the Accused's attitude and demeanour in the light of his post-crime conduct and his conduct after having pleaded guilty.[71] Additionally, the Trial Chamber admitted into evidence written statements of three Defence witnesses, the Accused's mother Milica Nikoli}, Fikret Zuki}, and Milenko Majstorovi}.[72] All three addressed the pre and post war character and behaviour of the Accused.

43. Prof. Sieber testified as an expert witness on the basis of his Sentencing Report on 5 November.[73] During his testimony, it was agreed that a new consolidated version of the Sentencing Report would be submitted.[74] This final version of the Sentencing Report, incorporating details from the oral presentation, was filed on 12 November 2003.[75] Based on the comprehensive nature of the Sentencing Report and the recent updates thereto, the Trial Chamber granted the Parties an extension of time, until 24 November 2003, in which to file written submissions on the Report.[76] Only the Defence filed a supplementary submission on the Report on 19 November 2003.[77] Dr.

[68] Admitted into evidence as Exh. P1 (statement of Witness SU-115) and Exh. P2 (statement of Witness SU-230).
[69] Admitted into evidence as Exh. P6.
[70] Jovo Deli}, T. 308-309.
[71] Ljiljana Rikanovi}, T. 325.
[72] Admitted into evidence as Exhs D1, D2 and D3, respectively.
[73] The Sentencing Report was admitted into evidence as Exh. J1 and the power point presentation that formed the basis of his testimony in court was admitted as Exh. J2.
[74] Sentencing Hearing, T. 428 – 429.
[75] This new revised and consolidated version of the Sentencing Report, including the annexes on Country Reports, was admitted into evidence as Exh. J1/1 and the German translation of the Country Reports were admitted as Exh. J1/2.
[76] Sentencing Hearing, T. 355.
[77] *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-S, Confidential Addendum to Defence Sentencing Brief, 19 November 2003. On 1 December 2003, the Trial Chamber issued a decision lifting the confidentiality of Defence Confidential Sentencing Brief of 23 October 2003 and Confidential Addendum to Defence Sentencing Brief of 19 November 2003. *The Prosecutor v. Dragan Nikoli}*, Case No IT-94-2-S, Decision on Lifting Confidentiality of the Defence Sentencing Brief, 1 December 2003.

Nancy Grosselfinger gave her oral testimony on 4 and 6 November 2003, primarily based on her written expert report of 20 October 2003.[78]

44. During the hearing, confidential Annex C to the Prosecution Sentencing Brief, which dealt with the question of the Accused's substantial co-operation with the Prosecution, was addressed in private session.[79] Upon the agreement of the Parties, the confidentiality of Annex C paragraph 5 was lifted and admitted into evidence.[80]

45. The Accused was given the final word.[81] He made a statement expressing remorse and he accepted responsibility for his crimes.[82]

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[78] The Grosselfinger Report was admitted into evidence as Exh. J3.
[79] Sentencing Hearing, T. 444 – 455.
[80] Exh. P7.
[81] Compare, inter alia, *Krnojelac* Appeal proceedings, T. 327, line 9: "The Chamber, according to the principles and standards of international law […] must listen to what Mr. Milorad Krnojelac would like to say to us […]"; *Kunarac* Appeal proceedings, T. 343-344; *Krstić* Appeal proceedings, T. 447; *Vasiljević* Appeal proceedings, T. 164-165; *Simić et al.*, Trial proceedings, T. 20721; *Stakić* Trial proceedings, T. 15331-32, *Mrđa* Sentencing Proceedings, T. 194.
[82] Statement by the Accused, T. 500-503.

IV. GUILTY PLEA AND PLEA AGREEMENT

46. Article 20, paragraph 3 of the Statute states:

> The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

47. If the Tribunal accepts a guilty plea, the Rules provide guidelines to ensure that this guilty plea is a voluntary and informed one. The Rules provide as follows:

> **Rule 62 *bis***
>
> Guilty Pleas
>
> If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:
>
> (i) the guilty plea has been made voluntarily;
>
> (ii) the guilty plea is informed;
>
> (iii) the guilty plea is not equivocal; and
>
> (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,
>
> the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

48. Having accepted a guilty plea on the basis of a plea agreement, a Trial Chamber operating in a party-driven system such as the ICTY is thereafter limited to what is specifically contained in, or annexed to, the plea agreement. Simply put, the Trial Chamber cannot go beyond what is contained in a plea agreement with regard to the facts of the case and the legal assessment of these facts. However, the Trial Chamber is not bound by a sentence recommendation contained in a plea agreement. The Rule governing the plea agreement procedure states:

> **Rule 62 *ter***
>
> Plea Agreement Procedure
>
> (A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
>
> (i) apply to amend the indictment accordingly;
>
> (ii) submit that a specific sentence or sentencing range is appropriate;
>
> (iii) not oppose a request by the accused for a particular sentence or sentencing range.
>
> (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A)[83].
>
> (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.

[83] Emphasis added.

49. The Indictment was read out in its entirety, paragraph by paragraph. The Accused pleaded guilty to all charges and admitted that the entire factual basis was correctly reflected in the Indictment, including his statements quoted therein.[84] Having satisfied itself as to the matters set out in Rule 62 *bis* of the Rules, namely that the guilty plea was voluntary, informed and unequivocal, and that there was a sufficient factual basis for the crimes and for the Accused's participation in them,[85] the Trial Chamber entered a finding of guilt on Counts 1 through 4 of the Indictment against the Accused.[86]

[84] Plea Hearing, T. 186, 191, 192, 195-196.
[85] Plea Hearing, T. 174-176.
[86] Plea Hearing, T. 196.

V. THE FACTS

A. Facts Emanating From the Plea Agreement

1. General Factual Background

50. In January 1992, the "Birač Autonomous Region", an area consisting of Vlasenica and eight neighbouring municipalities, was created by a joint declaration of the Serbs of those municipalities. The Spring of 1992 saw tensions in the area increase due to a referendum on the proposed independence of BiH.[87]

51. The town of Vlasenica is located within the municipality of the same name (see the map on the inside of the front cover of this Judgement). The 1991 census recorded that 55% of the 33,817 citizens in the municipality were Muslim, 43% were Serb, and 2% were listed as "other". Of the approximately 7,500 citizens in the town of Vlasenica, 65% were Muslim and 35% were Serb.[88]

52. On about 21 April 1992 the town of Vlasenica was taken over by Serb forces consisting of the Yugoslav People's Army (hereinafter "JNA"), paramilitary forces and armed locals.

53. As soon as Serb control of the municipality of Vlasenica had been established, the Crisis Staff took over the administration of the town and all official positions were occupied by Serbs appointed by the Crisis Staff. Military responsibilities formerly carried out by the JNA were assigned to local Serb men who had been mobilised. Their duties included guarding important facilities and searching the surrounding woods for armed Muslims.[89]

54. Many Muslims and other non-Serbs fled from the Vlasenica area, and beginning in May 1992 and continuing until September 1992, those who had remained were either deported or arrested.[90]

55. In late May or early June 1992, Serb forces established a detention camp run by the military and the local police militia in Sušica. It was the main detention facility in the Vlasenica area and was located approximately one kilometre from the town[91].

56. From early June 1992 until about 30 September 1992, Dragan Nikoli} was a commander in Su{ica camp.[92]

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[87] Indictment, para. 38.
[88] *Ibid.,* para. 37.
[89] *Ibid.,* para. 40.

57. The detention camp comprised two main buildings and a small house (see the inside of the back cover of this Judgement). The detainees were housed in a warehouse or hangar (hereinafter "the hangar") which measured approximately 50 by 30 meters. Between late May and October 1992, as many as 8,000 Muslim civilians and other non-Serbs from Vlasenica and the surrounding villages were successively detained in the hangar in Su{ica camp.[93] The number of detainees in the hangar at any one time was usually between 300 and 500. The building was severely overcrowded and living conditions were deplorable. The food provided for the detainees was sparse and often spoiled.[94]

58. The second main building was a smaller building used to store uniforms and equipment. In addition, a small house was used by the commander of the camp and the camp guards to, *inter alia,* interrogate Muslim and other non-Serb detainees.[95]

59. Men, women and children were detained in Su{ica camp, some being detained as entire families. Women and children were usually only detained for short periods of time and then forcibly transferred to nearby Muslim areas. Before being forcibly transferred, non-Serbs usually had to sign a document stating that they were leaving the area voluntarily and giving up their property.[96]

60. The guards brutally beat the detainees on a daily basis. Many of them died from the beatings.[97]

61. Many of the detained women were subjected to sexual assaults, including rape. Camp guards or other men who were allowed to enter the camp frequently took women out of the hangar at night. When the women returned, they were often in a traumatised state and distraught.[98]

62. By September 1992, virtually no Muslims or other non-Serbs remained in Vlasenica.[99]

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[90] *Ibid*., para. 42.
[91] *Ibid*., paras 43-44.
[92] *Ibid*., para. 1.
[93] *Ibid*., para. 45.
[94] *Ibid*., para. 46.
[95] *Ibid*., para. 45.
[96] *Ibid*., para. 44.
[97] *Ibid*., para. 46.
[98] *Ibid*., para. 47.
[99] *Ibid*., para. 42.

2. Facts Related to the Individual Criminal Conduct of the Accused

63. The Trial Chamber will now review the facts specific to each of the counts in the Indictment.

64. The Accused admitted the veracity of each of the now following facts The Trial Chamber recalls that it is bound by the assessment contained in the Plea Agreement and the factual basis underlying that agreement, in this instance the hereto attached Indictment.[100]

65. The Trial Chamber recognises that the Accused spontaneously admitted his guilt by stating: "*I plead guilty, Your Honour*" to Count 3 and: "*Guilty, Your Honour*" to Count 4 even before the Trial Chamber asked for his plea.[101]

(a) Count 1 - Persecutions

66. From early June until about 30 September 1992, Dragan Nikoli} was a commander in Su{ica detention camp. During his tenure as a camp commander, the Accused persecuted detainees on political, racial and religious grounds.[102]

67. The Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment.[103] In addition, Dragan Nikoli} participated in creating and maintaining an atmosphere of terror in the camp through murders, beatings, sexual violence and other physical and mental abuse.[104]

68. The Accused persecuted Muslim and other non-Serb detainees by participating in sexual violence directed at the female detainees in Su{ica camp.[105]

69. As part of the persecutions, Dragan Nikoli} subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities.[106]

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[100] See *supra* para. 48.
[101] Plea Hearing, T. 192 and 196.
[102] Indictment, paras 1 and 3.
[103] *Ibid*., para. 4.
[104] *Ibid*., para. 6.
[105] *Ibid*., para. 4 (as described in paras 20 and 21 of the Indictment). Certain allegations in paragraphs 20 and 21 of the Indictment underlying the charge of aiding and abetting rape in Count 3 do not appear to fall within the definition of this crime. In the Chamber's view, these acts, which are described in the Indictment as forms of sexual violence, are more appropriately subsumed within the charge of persecutions in Count 1. The term "sexual violence" has not previously been defined before this Tribunal, but the Trial Chamber considers that the criminal behavior outlined in this Judgement should be considered as "sexual violence" in the common usage sense of the term. Therefore, the Trial Chamber adopts for this Judgement only, the term "sexual violence" as used by the Prosecution, but subsumes this conduct under the charge of Persecutions.
[106] Indictment, para. 6.

As a result of the atmosphere of terror and the conditions in the camp, detainees suffered psychological and physical trauma.[107]

70. The Accused persecuted detained Muslims and other non-Serbs by assisting in their forcible transfer from the Vlasenica municipality. At the end of June 1992, large numbers of the male detainees were transferred from Su{ica camp to the larger Batkovi} detention camp located near Bijeljina in north-eastern Bosnia and Herzegovina. "Most of the women and children detainees were transferred either to Kladanj or Cerska in Bosnian Muslim controlled territory."[108]

(b) Count 2 – Murder

71. In the following paragraphs the Trial Chamber will outline the criminal conduct of the Accused that lead to the deaths of nine non-Serb detainees, which underlies the count of murder.

(i) The murder of Durmo Hand`i} and Asim Zild`i}

72. One evening sometime between 13 – 24 June 1992, the Accused and other camp guards entered the hangar and called out Durmo Hand`i} and Asim Zild`i}. Once outside, the Accused and the guards subjected these two detainees to severe physical abuse, including punching, kicking and beatings with weapons such as lengths of wood. This lasted for at least 45 minutes, during which time the two men repeatedly begged for the beating to stop.[109]

73. After the beating, Durmo Hand`i} and Asim Zild`i} were brought back to the hangar. A short time after returning Asim Zild`i} died. The next morning the Accused ordered two detainees to bury the body of Asim Zild`i}.[110]

74. Later that morning, the Accused entered the hangar and approached Durmo Hand`i}. He demanded information regarding Durmo Hand`i}'s son notwithstanding the fact that Durmo Hand`i} was in severe agony from being beaten the night before. Durmo Hand`i} died shortly thereafter and was buried that day by other detainees.[111]

(ii) The murder of Ra{id Ferhatbegovi}, Muharem Kolarevi}, D`evad Sari} and Ismet Zeki}

[107] *Ibid*., para. 6.
[108] *Ibid*., para. 5.
[109] *Ibid*., para. 8.
[110] *Ibid*., para. 9.
[111] *Ibid*., para. 10.

75. During the night of 23 and 24 June 1992, the Accused ordered Muharem Kolarevi} and D`evad Sari} to be taken out of the hangar. A little while later, other camp guards took out Ismet Zeki} as well. For approximately 30 minutes after the men had been taken out of the hangar, detainees inside heard cries of pain and then gunshots that came from a location close to the hangar.[112]

76. Afterwards, a guard called two detainees from the hangar and ordered them to dispose of the bodies of Muharem Kolarevi} and D`evad Sari} behind the hangar. The Accused ordered the two detainees to wash away the blood from the area where Muharem Kolarevi} and D`evad Sari} had been beaten.[113]

77. After attempting to wash away the blood, the two detainees waited outside of the hangar. They watched the guard who had called them out of the hangar shoot and kill Ismet Zeki}, while the Accused was sitting inside the nearby guard house.[114]

78. Shortly after Ismet Zeki} was killed, the Accused and the guard who had shot Zeki} entered the hangar with some local policemen. The policemen pointed at Ra{id Ferhatbegovi} and asked if he was the one who was running away. The guard who had killed Ismet Zeki} said "yes". Ra{id Ferhatbegovi} was then removed from the hangar and shortly thereafter the other prisoners heard one shot, killing also Rašid Ferhatbegović.[115]

79. Early the next morning, the Accused entered the hangar and again called out the two prisoners who had disposed of the bodies the day before. They went to the area of the camp that was used as a toilet and saw the body of Muharem Kolarevi} slumped over a fence and caught in wire. The guard who had killed Ismet Zeki} the day before then shot Muharem Kolarevi} again.[116]

80. The two detainees took the body of Muharem Kolarevi} to the area where they had left the bodies the previous evening. There they saw the body of Ra{id Ferhatbegovi} with a bullet hole in the centre of his forehead.[117]

(iii) <u>The murder of Ismet Dedi}</u>

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[112] *Ibid*., para. 11.
[113] *Ibid*., para. 12.
[114] *Ibid*., para. 13.
[115] *Ibid*., para. 14.
[116] *Ibid*. para. 15.
[117] *Ibid*.

81. Around 6 July 1992, the Accused took Ismet Dedi} out of the hangar and closed the door behind them. The detainees inside the hall then heard Ismet Dedi} scream.[118]

82. A few minutes later, Dragan Nikoli} directed two detainees to drag Ismet Dedi} back inside the hangar. The other detainees observed that Ismet Dedi}'s body was covered in blood and was barely recognisable. Ismet Dedi} died shortly thereafter. The other detainees placed his body in a plastic bag and removed it.[119]

(iv) The murder of Mevludin Hatuni}

83. In early July 1992 Mevludin Hatuni}, his wife and his daughter were detained in Su{ica detention camp. Between about 3 and 7 July 1992, while in detention, Mevludin Hatuni} offered his house to a Serb in exchange for moving Mevludin Hatuni}'s family out of the area. Mevludin Hatuni} was permitted to leave the camp to arrange the transfer of the house.[120]

84. When Mevludin Hatuni} returned to the camp, Dragan Nikoli} accused him of having told the Serb to whom he had given his house that he would "wait for his opportunity to get even." Later that evening the Accused beat Mevludin Hatuni} because of the alleged statement.[121]

85. The next morning the Accused entered the hangar and beat Mevludin Hatuni} again until Mevludin Hatuni} lost consciousness. That evening, when the Accused entered the hangar and saw that Mevludin Hatuni} had regained consciousness, he proceeded to beat him for the third time and, shortly thereafter, Mevludin Hatuni} succumbed to his injuries and died. Other detainees wrapped the body and removed it from the hangar.[122]

(v) The murder of Galib Musi}

86. From about the second week of July 1992, over a seven-day period, the Accused beat detainee Galib Musi}, who was 60 years old. Among other acts, the Accused kicked Galib Musi} and beat him with a metal pipe. Each time Dragan Nikoli} beat Galib Musi}, Musi} lost consciousness. During the beatings, Dragan Nikoli} accused Galib Musi} of having requested a

[118] *Ibid*., para. 16.
[119] *Ibid*.
[120] *Ibid*., para. 17.
[121] *Ibid*.
[122] *Ibid*.

Muslim organization to come to expel the Serbs from Vlasenica. After about seven days of beatings, Galib Musi} died.[123]

(c) Count 3 – Aiding and Abetting Rape

87. Paragraph 20 of the Indictment states:

> From early June until about 15 September 1992 many female detainees in Su{ica camp were subjected to sexual assaults, including rapes and degrading physical and verbal abuse. Dragan Nikoli} personally removed and otherwise facilitated the removal of female detainees from the hangar, which he knew was for purposes of rapes, and other sexually abusive conduct. The sexual assaults were committed by camp guards, special forces, local soldiers and other men.

88. Paragraph 21 of the Indictment continues by stating:

> Female detainees were sexually assaulted at various locations, such at the guardhouse, the houses surrounding the camp, at the Panorama Hotel, a military headquarters, and at locations where such women were taken to perform forced labour. Dragan Nikoli} allowed female detainees, including girls and elderly women, to be verbally subjected to humiliating sexual threats in the presence of other detainees in the hangar. Dragan Nikoli} facilitated the removal of female detainees by allowing guards, soldiers and other males to have access to these women on a repetitive basis and by otherwise encouraging the sexually abusive conduct.

89. The Trial Chamber observes that the Prosecution has used the broad term of "Sexual Violence" to describe the acts alleged in paragraphs 20 and 21 of the Indictment,[124] the basis for Count 3. Apparently based on a mutual agreement between the Parties, this criminal conduct is defined in the Indictment as aiding and abetting rape. The charge states:

> By his aiding and abetting in the conduct described in paragraph 20 and 21,[125] in relation to female detainees in the Su{ica camp, **DRAGAN NIKOLI]** is individually criminally responsible for:
>
> > **Count 3:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5(g) and Article 7(1) of the Statute of the Tribunal.

90. As discussed, the Trial Chamber considers that only that part of the Accused's criminal conduct set out in paragraphs 20 and 21 of the Indictment which amounts to the crime of aiding and abetting rape should be considered under Count 3. The remaining criminal conduct alleged in these paragraphs of the Indictment should be subsumed under Count 1, Persecutions.

(d) Count 4 - Torture

(i) The torture of Fikret Arnaut

[123] *Ibid*., para. 18.
[124] See footnote 105.
[125] Here paras 87-88 (footnote added); highlighting part of this text in bold reflects the text as printed in the Indictment.

91. The Accused beat Fikret Arnaut while he was detained in Su{ica camp during the period from 1 June to 18 July 1992. Fikret Arnaut was beaten both inside and outside the hangar and several times in a corner of the hangar known as the "punishment" corner. The Accused kicked, stomped on and punched Fikret Arnaut with metal "knuckles" on his fists.[126]

92. On one occasion, the Accused entered the hangar and told Fikret Arnaut to kneel on the floor, put his hands behind his head and tilt his head back. The Accused put a bayonet in Fikret Arnaut's mouth and asked him about Fikret Arnaut's brother, who the Accused claimed had joined a group of "usta{a"[127]. Two men entered the hangar later that same day and took Fikret Arnaut outside. When Fikret Arnaut returned, he had been severely beaten and was bleeding from his mouth. The Accused came to Fikret Arnaut in the hangar a short while later and said words to the effect: *"What? They did not beat you enough; if it had been me, you would not be able to walk. They are not as well trained to beat people as I am."*[128]

93. One another occasion the Accused took Fikret Arnaut outside the hangar and beat him with the metal knuckles. When Fikret Arnaut fell to the ground, the Accused kicked him in the ribs and on the back around the kidney area. Throughout this beating Dragan Nikoli} accused Fikret Arnaut of organizing Muslims.[129]

94. On a subsequent occasion, the Accused approached Fikret Arnaut in the hangar and said words to the effect: *"I can't believe how an animal like this can't die; he must have two hearts."*[130] The Accused then beat Fikret Arnaut again and stomped on his chest.[131]

(ii) The torture of Sead Ambeskovi} and Hajrudin Osmanovi}

95. Sead Ambeskovi} was arrested in Vlasenica on 11 June 1992. Police first interrogated him and then took him to the Su{ica detention camp. Once in the camp, the Accused and others beat him with axe handles, iron bars and rifle butts.[132]

96. On the morning of 14 June 1992, guards took Sead Ambeskovi} and Hajrudin Osmanovi} out of the hangar. The two men were ordered to kneel with their hands behind their heads. The Accused asked them where their weapons were and to identify others who had weapons.[133]

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[126] Indictment, para. 23.
[127] Used in a derogatory manner.
[128] Indictment, para. 24 (emphasis added).
[129] *Ibid*., para. 25.
[130] *Ibid*. (emphasis added).
[131] *Ibid*., para. 26.
[132] *Ibid*., para. 27.

97. During the interrogation, the Accused and others then beat Sead Ambeskovi} and Hajrudin Osmanovi} with iron bars, wooden bats and rifle butts for approximately 90 minutes. As a result of this beating, the back of Sead Ambeskovi}'s head was cut, four teeth on the left side of his mouth were knocked out, and three ribs were broken.[134]

98. On or about 16 June 1992, the Accused again called Sead Ambeskovi} and Hajrudin Osmanovi} out of the hangar. Once again the Accused interrogated the two men, demanding to know if they or anyone else had weapons. Dragan Nikoli} and two other guards immediately began beating Sead Ambeskovi} and Hajrudin Osmanovi} with bats for 10 to 15 minutes.[135]

99. On 3 July 1992, Hajrudin Osmanovi} was taken from the Su{ica detention camp to perform forced labour. He has never been seen since.[136]

(iii) The torture of Suad Mahmutovi}

100. From about 13 June to about 3 July 1992, Dragan Nikoli} frequently, sometimes daily, beat Suad Mahmutovi} in Su{ica detention camp. Dragan Nikoli} beat Suad Mahmutovi} with iron bars, rifle butts and rubber tubing with lead inside. During one beating, seven of Suad Mahmutovi}'s were broken. On a separate occasion, the Accused kicked Suad Mahmutovi} in the face with his boot which caused a cut that left permanent scars.[137]

101. On one occasion, the Accused put a cocked pistol into Suad Mahmutovi}'s mouth and tried to force Suad Mahmutovi} to admit that his neighbour had a weapon. Suad Mahmutovi} refused to admit that and the Accused pulled the trigger, but the gun was not loaded.[138]

(iv) The torture of Re|o ^akisi}

102. Re|o ^akisi} was arrested on 2 June 1992 and taken to Su{ica detention camp. Upon arrival, the Accused and other guards searched him. Re|o ^akisi} was then taken to the hangar where, with other detainees, he was ordered to line up and lean against a wall with his hands behind his back. The Accused then hit Re|o ^akisi} and other detainees with his rifle butt and kicked them with his boots.[139]

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[133] *Ibid*., para. 28.
[134] *Ibid*.
[135] *Ibid*., para. 29.
[136] *Ibid*., para. 30.
[137] *Ibid*., para. 31.
[138] *Ibid*., para. 32.
[139] *Ibid*., para. 33.

103. Approximately ten days later, the Accused called Re|o ^akisi} out of the hangar during the night. Two men who were not camp guards were waiting outside with Dragan Nikoli}. Dragan Nikoli} said to them words to the effect: "*Here, I brought you something for dinner*."[140]

104. The two men hit Re|o ^akisi} on the back with rifle butts and kicked him in the stomach and sides. During this beating, Dragan Nikoli} was approximately five metres away in the guard house. The beating lasted about 20 minutes.[141]

B. Additional Facts Emanating From the Sentencing Hearing

105. In the Sentencing Hearing held between 3 and 6 November 2003 additional circumstances surrounding the aforementioned details of the Indictment were heard. They describe in greater detail the conduct of the Accused and the impact that his conduct had on surviving victims and their relatives. They will only be given due consideration in the discussion of aggravating and mitigating factors (section VIII) insofar as they may carry significant weight. The Trial Chamber has no doubt as to the veracity of this additional evidence. However, the Trial Chamber reemphasizes that these facts can and will not be considered as constituting new crimes not included in the Indictment.

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[140] *Ibid*., para. 34.
[141] *Ibid*.

VI. THE LAW

A. Legal Basis

106. In the terms of the Plea Agreement, by pleading guilty the Accused acknowledged that the Prosecutor had the onus to prove the following elements beyond a reasonable doubt.[142] The Trial Chamber feels it is necessary at this point to reiterate that it is bound by the assessment provided by the Prosecution in the Plea Agreement and will therefore refrain from other possible assessments.[143]

1. Common Elements

107. The common elements were set out in paragraph 5 of the Plea Agreement which states:

> Dragan Nikoli} understands that the Prosecution has to prove each of the following common elements in Counts 1 – 4 beyond a reasonable doubt for him to be found guilty:
>
> (1) the existence of an armed conflict;
>
> (2) the existence of a widespread or systematic attack directed against a civilian population;
>
> (3) the accused's conduct was related to the widespread or systematic attack directed against a civilian population;
>
> (4) the accused had knowledge of the wider context in which his conduct occurred.

2. Count 1, Persecutions

108. The elements required for persecution were set out in paragraph 6 of the Plea Agreement. It provides:

> 6. In relation to Count 1, Persecutions, Dragan Nikoli} understands that the Prosecution has to prove each of the following elements beyond a reasonable doubt for him to be found guilty:
>
> (1) the accused committed acts or omission against a victim or victim population violating a basic or fundamental human right;
>
> (2) the accused intended to commit the violation;
>
> (3) the accused's conduct was committed on political, racial or religious grounds and;

[142] Annex A -Plea Agreement, para. 4.
[143] See *supra* para. 48.

(4) the accused's conduct was committed with a deliberate intent to discriminate.

109. Murder, rape and torture, as set out in paragraph 4 of the Indictment, are contained within the count of persecutions and are among the crimes listed in Article 5 of the Statute. However, the Trial Chamber has to consider whether forcible transfer[144], sexual violence,[145] subjection to inhumane conditions and atmosphere of terror may be taken as additional acts of persecution.

110. The Trial Chamber reiterates what it stated in *Staki}*:

> The acts of persecution not enumerated in Article 5 or elsewhere in the Statute must be of an equal gravity or severity as the other acts enumerated under Article 5. When considering whether acts or omissions satisfy this threshold, they should not be considered in isolation but in their context and with consideration to their cumulative effect. An act which may not appear comparable to the other acts enumerated in Article 5 might reach the required level of gravity if it had, or was likely to have, an effect similar to that of the other acts because of the context in which it was undertaken.[146]

111. The Trial Chamber finds that the situation in Su{ica camp, as previously described, was that serious that the acts of forcible transfer, sexual violence, subjection to inhumane conditions and atmosphere of terror rise without further explanation to a level of gravity that falls within the ambit of Article 5 of the Statute.[147]

3. Count 2, Murder

112. With regard to Murder, the Plea Agreement states:

> 7. In relation to Count 2, Murder, Dragan Nikoli} understands that the Prosecution has to prove each of the following elements beyond a reasonable doubt for him to be found guilty:
>
> (1) the accused committed acts or omissions that caused the death of the victims;
>
> (2) the accused intended to kill the victim, or;
>
> (3) the accused intended to inflict serious injury to the victim and should have reasonably known that it would lead to the death of the victim.

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[144] The Trial Chamber adopts the terminology contained within the Indictment but notes that forcible transfer is an equivalent term to forcible displacements, forcible transfer and deportations as discussed in *Krnojelac* Appeal Judgement, paras 217-223, *Staki}* Trial Judgement, paras 671-684 and *Krsti}* Trial Judgement, paras 520-523.
[145] See *supra* subsection V. A. 2. (a)
[146] *Staki}* Trial Judgement, para. 736 (footnotes omitted).
[147] See *supra* subsection V. A. 2.

4. Count 3, Rape

113. With regard to Count 3, aiding and abetting rape, paragraph 8 of the Plea Agreement provides:

> In relation to Count 3, Rape, Dragan Nikoli} understands that the Prosecution has to prove each of the following elements beyond a reasonable doubt for him to be found guilty of aiding and abetting:
>
> (1) the perpetrator committed a sexual penetration of the vagina or anus of the victim by his penis or any other object used by him, or;
>
> (2) the perpetrator committed a sexual penetration by the mouth of the victim by his penis;
>
> (3) the perpetrator intended to effectuate the sexual penetration of the victim;
>
> (4) the perpetrator intended the sexual penetration and knew that it was committed against the will of the victim.

5. Count 4, Torture

114. With regard to the count of torture, paragraph 9 of the Plea Agreement states:

> In relation to Count 4, Torture, Dragan Nikoli} understands that the Prosecution has to prove each of the following elements beyond a reasonable doubt for him to be found guilty:
>
> (1) the accused inflicted, by act or omission, sever pain or suffering, whether physical or mental;
>
> (2) the accused acted or omitted to act deliberately;
>
> (3) the accused acted or omitted for a prohibited purpose, including to obtain information, or a confession, to punish, intimidate, or coerce the victim or a third person, or for discrimination, on any ground against the victim or a third person.

B. Cumulative Convictions

115. Recently, *inter alia*, in the *Simi}*[148] and *Staki}* trial judgements, the question "whether and in which circumstances multiple convictions against an accused may be entered under separate heads of liability based on the same underlying conduct"[149] was addressed. Both Chambers referred to the

[148] *Simi} et al.* Trial Judgement, paras 1056-1057.
[149] *Staki}* Trial Judgement, para. 869.

two-pronged test devised by the Appeals Chamber in *^elebi}i* and later affirmed in *Kunarac*,[150] which, when met, permits cumulative convictions. The Appeals Chamber stated:

> [… M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> […] the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[151]

116. In *Staki}* it was said that a Trial Chamber could in the exercise of its discretion further limit cumulative convictions by convicting an accused for the crime "that most closely and comprehensively reflects the totality of the accused's criminal conduct."[152]

117. In the present case, Dragan Nikoli} pleaded guilty to the Indictment which charged him with, *inter alia*, individual criminal responsibility for committing Murder (Count 2), aiding and abetting Rape (Count 3)[153] and committing Torture (Count 4)[154] as crimes against humanity. The criminal conduct underlying these charges also forms the basis, in part, for the charge of Persecutions as a crime against humanity in Count 1.

118. As the charges in Count 1 are based on the same underlying facts as Counts 2, 3, and 4, the Trial Chamber must evaluate whether cumulative convictions are permissible under the applicable test. The Trial Chamber is satisfied by the Accused's guilty plea that the acts of murder, torture and aiding and abetting rape were committed by him with the discriminatory intent required for them to be included in the count of Persecutions.

119. Therefore, based on the Plea Agreement, the Trial Chamber enters a single conviction for (Count 1) Persecutions, a Crime Against Humanity under Article 5 of the Statute, committed by acts of:

(i) Murder (Count 2),

(ii) Torture (Count 4),

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[150] *Kunarac et al.* Appeal Judgement, para. 168.
[151] *^elebi}i* Appeal Judgement, paras 412-413 cited from *Krsti}* Trial Judgement, para. 664 (emphasis added).
[152] *Staki}* Trial Judgement, para. 870.
[153] Statement by the Accused, T. 189-192.
[154] *Ibid.*, T. 195-196.

(iii) Sexual Violence (Count 1),

(iv) Forcible Transfer (Count 1),

(v) Subjection to Inhumane Conditions (Count 1),

(vi) Creating and Maintaining an Atmosphere of Terror (Count 1), and

(vii) Aiding and Abetting Rape (Count 3).

VII. SENTENCING LAW

120. Acting under Chapter VII of the Charter of the United Nations, this Tribunal[155] is not only mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia, but also to bring justice to both victims and their relatives and to perpetrators. Truth and justice should also foster a sense of reconciliation between different ethnic groups within the countries and between the new States on the territory of the former Yugoslavia.

121. A guilty plea indicates that an accused is admitting the veracity of the charges contained in an indictment. This also means that the accused acknowledges responsibility for his actions. Undoubtedly this tends to further a process of reconciliation. A guilty plea protects victims from having to relive their experiences and re-open old wounds. As a side-effect, albeit not really a significant mitigating factor, it also saves the Tribunal's resources.

122. As opposed to a pure guilty plea (Rule 62 *bis* of the Rules), a plea agreement (Rule 62 *ter* of the Rules), while having its own merits as an incentive to plead guilty, has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle "*do ut des*" (give and take). Therefore, the reason why an accused entered a plea of guilt need to be analysed: were charges withdrawn, or was a sentence recommendation given? In any event, a plea agreement pursuant to Rule 62 *ter* and 62 *bis* of the Rules does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia. Neither the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement.[156] This might create an unfortunate gap in the public and historical record of the concrete case, although, when coupled with an accused's substantial co-operation with the prosecution, an agreement grants more insights into previously undiscovered areas. However, while treating plea agreements with appropriate caution,[157] it should be recalled that this Tribunal is not the final arbiter of historical facts. That is for historians. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done.

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[155] See *supra* Introduction.

[156] In the present case, the Parties merely agreed on the factual basis of the Indictment as the agreed facts in the Plea Agreement.

[157] For a detailed discussion on the appropriateness of plea agreements in cases involving serious violations of international humanitarian law see *Momir Nikolić* Sentencing Judgement, paras 57–73.

A. The Individual Guilt of an Accused and the Principle of Proportionality

123. The individual guilt of an accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits defined by individual guilt.[158]

124. In *Staki}* this Trial Chamber recalled that:

> [T]he International Tribunal was set up to counteract impunity and to ensure a fair trial for the alleged perpetrators of crimes falling within its jurisdiction. […] The Tribunal is mandated to determine the appropriate penalty, often in respect of persons who would never have expected to stand trial. While one goal of sentencing is the implementation of the principle of equality before the law, another is to prevent persons who find themselves in similar situations in the future from committing crimes.[159]

125. The Statute explicitly vests the judges with discretion to determine the appropriate punishment for each accused and each act charged.[160] Thus, when the Trial Chamber evaluates the different sentencing factors, it does so in the interest of the nature and gravity of the crimes committed, the circumstances surrounding the acts themselves, the degree of responsibility of an accused for the act and the personality of the accused.

126. Finally the fundamental principle of proportionality[161] has to be taken into account.

B. Principles and Purposes

1. Submissions of the Parties

127. The Prosecution submits that the primary principles for the Trial Chamber to consider are retribution and deterrence. It submits that the goal of retribution is not revenge "but, to express the

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[158] *Staki}* Trial Judgement, para. 899.
[159] *Ibid.*, para. 901.
[160] R. *v. Bloomfield* [1999] NTCCA 137, para. 17: "Individualised justice is the touchstone of judicial sentencing, tailoring the sentence in each case to the circumstances of the offence and of the offender."
[161] In the Canadian Supreme Court decision of *R. v. Martineau*, the Court stated:

> [The] punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in Punishment and Responsibility (1968), at p. 162, the fundamental principle of a morally based system of law [is] that those causing harm intentionally be punished more severely than those causing harm unintentionally. (*R. v. Martineau*, [1990] 2 S.C.R. 633, p. 645).

This position was applied and further expanded in the subsequent decision of *R. v. Arkell* in which the Court declared:

> [W]here a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. [… The] decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender. (*R. v. Arkell*, [1990] 2 S.C.R. 695, p. 704).

outrage of the international community at heinous crimes".[162] Furthermore, the Prosecution argues that retribution aims to ensure that the punishment is proportional to the crimes committed while deterrence serves to dissuade others from committing similar crimes.[163]

128. The Defence submits that the elements of punishment, i.e. prevention, deterrence and rehabilitation must be carefully balanced. Punishment is in itself is a legitimate sentencing consideration, but, the Defence submits, it is often confused with retribution. Whereas retribution is often equated with revenge, most lawyers "understand retribution to be a rather more personalized way of describing punishment as experienced subjectively by the defendant and viewed objectively by an observer." [164]

129. With regard to prevention, the Defence argues that the preventive element that is attached to sentencing is negated in the current case because it submits that the Accused is neither a person with a psychopathic tendency to commit crimes nor a person who has the intention to continue committing offences whenever the opportunity arises.[165]

130. The Defence disputes the relevance of deterrence. "Although frequently cited, this element, it is submitted, is the least logical and least credible reasoning behind any sentencing exercise in any jurisdiction either national or supranational."[166] The Trial Chamber notes that these remarks are primarily made in the context of the Defence's example regarding the death penalty, a sanction to be abolished according to the policies of the United Nations and the Council of Europe and, for good reasons, not envisaged in the Statute.

131. The Defence submits that the Trial Chamber should take rehabilitation into consideration as a mitigating factor. It argues that rehabilitation has two main components: individual rehabilitation that comes from an accused admitting responsibility and showing remorse; and the "rehabilitative effect of sentencing upon the community…[which] is further influenced by how an individual defendant has contributed towards such rehabilitation."[167]

2. Discussion

132. Fundamental principles taken into consideration when imposing a sentence are deterrence and retribution. The Appeals Chamber in "*Čelebići*" held, *inter alia*, that:

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[162] *Staki}* Trial Judgement, para. 900, as quoted in Prosecution Sentencing Brief, para. 7.
[163] Prosecution Sentencing Brief, para. 7.
[164] Defence Sentencing Brief, pp. 3-4.
[165] *Ibid*., pp. 4-5.

> the Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution.[168]

133. Regarding rehabilitation, the Appeals Chamber in "*Čelebići*" held that:

> [A]lthough rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight.[169]

(a) Deterrence

134. Individual and general deterrence has an important function in principle and serves as an important goal of sentencing.[170]

135. Individual deterrence refers to the specific effect of the sentence upon the accused which should be adequate to discourage him from re-offending once the sentence has been served and he has been released. The Trial Chamber finds, however, that individual deterrence has no relevance in this case.

136. The sentence imposed must also be sufficient in order to dissuade others from committing the same crime, in other words it must have a general deterrent effect. The Trial Chamber in the *Todorovi}* sentencing judgement stated:

> The Appeals Chamber has held that deterrence "is a consideration that may legitimately be considered in sentencing" and has further recognised the "general importance of deterrence as a consideration in sentencing for international crimes". The Chamber understands this to mean that deterrence is one of the principles underlying the determination of sentences, in that the penalties imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.[171]

137. In *Staki}* the Trial Chamber stated that:

> [i]n the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society.[172]

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[166] *Ibid.*, p. 5.
[167] *Ibid.*, p. 8.
[168] *Čelebići* Appeal Judgement, para. 806 (footnotes omitted).
[169] *Ibid*.
[170] *Staki}* Trial Judgement, para. 900.
[171] *Todorovi}* Sentencing Judgement, para. 30 (footnotes omitted).
[172] *Staki}* Trial Judgement, para. 902; see *Aleksovski* Appeal Judgement, para. 185; *^elebi}i* Appeal Judgement, para. 806; for *Integrationsprävention* see German Constitutional Court, BVerfGE 90, 145 (173); BVerfGE 45, 187 (255f). *See also Radke* in Münchener Kommentar, Strafgesetzbuch, Vol. 1, §§1-51 (München, 2003).

138. It is important to note that courts in various national jurisdictions recognise the principle of deterrence. An example can be found in the Court of Appeal of the Northern Territory of Australia decision *R. v. Bloomfield* which ruled that:

> [t]he greater the harm, the greater its weight in the balance of conflicting interests against the offender by way of punishment as a general deterrent. It must be made clear, both to the offender and others with similar impulses, that if they yield to them they will meet with severe punishment: "in all civilized countries, in all ages, that has been the main purpose of punishment and continues to be so"[173]

139. One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody. "All persons shall be equal before the courts and tribunals."[174] This fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.

(b) <u>Retribution</u>

140. "An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes."[175] The principle or theory of retribution has long been confused with the notion of vengeance as submitted by both the Prosecution and Defence. By contrast, this Trial Chamber agrees that retribution should solely be seen as:

> an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] <u>culpability</u> of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offenders conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and <u>nothing more</u>.[176]

C. <u>Article 24 of the Statute and Rule 101 of the Rules</u>

141. Neither the Statute nor the Rules specify a concrete range of penalties for offences under the Tribunal's jurisdiction. Determination of the appropriate sentence is left to the discretion of each

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[173] *R. v. Bloomfield* [1999] NTCCA 137 para. 19 (footnotes omitted).
[174] Article 14 paragraph 1, sentence 1 of the ICCPR.
[175] *Aleksovski* Appeal Judgement, para. 185.
[176] *R. v. M.(C.A.)* [1996] 1 S.C.R. 500, para. 80 (emphasis in original).

Trial Chamber,[177] although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.

142. Article 24 of the Statute provides a non-exhaustive list of the factors to be taken into account by the Trial Chamber in determining the sentence and reads in its relevant parts:

> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. […]

143. Rule 101 of the Rules further states in its relevant parts:

> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
>
> (i) any aggravating circumstances;
>
> (ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction;
>
> (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; […]
>
> (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

D. Gravity of the Crime, Aggravating and Mitigating Factors

144. The gravity of the offence is a factor of primary importance, and "may be regarded as the litmus test" in the imposition of an appropriate sentence.[178] It is necessary to consider the nature of the crime and "the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime" in order to determine the gravity of the crime.[179] "A

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[177] See *supra* para. 4.

[178] *^elebi}i* Trial Judgement, para. 1225 endorsed in *Aleksovski* Appeal Judgement, para. 182, *Čelebići* Appeal Judgement, para. 731 and *Jelisić* Appeal Judgement, para. 101. See also *Furundžija* Appeal Judgement, para. 249.

[179] *Kupreškić et al.* Trial Judgement, para. 852 endorsed in *Aleksovski* Appeal Judgement, para. 182, *Čelebići* Appeal Judgement, para. 731 and *Jelisić* Appeal Judgement, para. 101. In *Staki}* this Trial Chamber stated that "The sentence must reflect the gravity of the criminal conduct of the accused. This requires consideration of the underlying crimes as well as the form and degree of the participation of the individual accused" and "The Trial Chamber recalls that if a particular circumstance is included as an element of the offence under consideration, it cannot be regarded also as an aggravating factor since each circumstance may only justly be considered once", *Staki}* Trial Judgement, paras 903-904.

sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[180]

145. In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances, but the weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber.[181] The aggravating circumstances should be proven beyond reasonable doubt,[182] while "the standard to be met for mitigating factors is the balance of probabilities"[183] and "mitigating circumstances may also include those not directly related to the offence".[184]

146. The Rules specify only "substantial co-operation with the Prosecutor" as a mitigating factor, other factors often taken into account by this Tribunal in mitigating a sentence are, *inter alia*, a plea of guilty,[185] acceptance of a certain degree of guilt,[186] expression of genuine remorse,[187] compassion by an accused and any assistance given to the victims by an accused,[188] the age of the accused,[189] absence of previous criminal record and the accused's family and social situations.[190]

E. Sentencing Ranges

147. Rule 101 (A) of the Rules, which grants the power to imprison for a term up to and including the remainder of the convicted person's life, shows that "a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system."[191]

148. Pursuant to Article 24 (1) of the Statute and Rule 101 (B) (iii) of the Rules, Trial Chambers shall have recourse, in determining sentence, to the "general practice regarding prison sentences in the courts of the former Yugoslavia." However, it is settled in the jurisprudence of this Tribunal that Trial Chambers are not bound by this "general practice". The Trial Chamber notes that it is difficult to identify such "general practice" in the absence of a functioning judiciary during the period in question, especially in relation to those crimes heard before this Tribunal. Rather, Trial Chambers

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[180] *Akayesu* Trial Judgement, para. 40 endorsed in *Akayesu* Appeal Judgement, para. 414.
[181] *Čelebići* Appeal Judgement, para. 777.
[182] *Čelebići* Appeal Judgement, para. 763.
[183] *Staki}* Trial Judgement, para. 920 cited from *Kunarac et al.* Trial Judgement, para. 847 and *Sikirica et al.* Sentencing Judgement, para. 110.
[184] *Staki}* Trial Judgement, para. 920.
[185] This factor is considered in more details in sub-section VIII. B. 1. (b).
[186] *Kupreškić et al.* Appeal Judgement, para. 464.
[187] *Čelebići* Appeal Judgement, para. 788, *Erdemovi}* 1998 Sentencing Judgement, para. 16.
[188] *Čelebići* Appeal Judgement, paras 775-776, *Serushago* Appeal Judgement, para. 24.
[189] *Jelisi}* Appeal Judgement, para. 131, *Erdemovi}* 1998 Sentencing Judgement, para. 16.
[190] *Kunarac et al.* Appeal Judgement, para. 408, *Erdemovi}* 1998 Sentencing Judgement, para. 16.

should take into account the applicable written law and today's practice – if any – of courts of the States in the territory of the former Yugoslavia in relation to serious violations of International Humanitarian Law.[192]

149. For this purpose and to seek guidance based on comparative research in this terrain, the Trial Chamber called an expert witness, Prof. Sieber, who presented the aforementioned Sentencing Report.[193]

1. Former Yugoslavia

150. The section of the Sentencing Report relating to the former Yugoslavia comprises both a normative and an empirical section, the latter being based on semi-standardized interviews with 17 judges from different parts of the former Yugoslavia[194] on questions relevant to the punishment of the crimes encompassing the acts alleged in the Indictment.[195] With respect to the legal significance of the empirical data, Prof. Sieber stated that "this study can give you some indication, but definitely […] it's not a sample where you can do analysis, especially based on the various republics."[196] The Trial Chamber shares this view.

151. The crimes to which the Accused pleaded guilty occurred in Vlasenica now part of BiH and Republika Srpska, its entity. The Trial Chamber is therefore particularly interested in the sentencing laws and practices in this region.

152. The Trial Chamber will begin with a brief chronology of the applicable law in the territory of the former Yugoslavia, starting in 1992 when the crimes to which the Accused has pleaded guilty were committed, until the present day.

153. The sentencing law in BiH was regulated in 1992 by the Criminal Code of the SFRY, adopted by the Federal Assembly on 28 of September 1976, and in force since 1 July 1977 (hereinafter the "Federal Criminal Code of 1976/77"), and by the Criminal Code of the Socialist Republic of Bosnia and Herzegovina of 10 June 1977 (hereinafter the "Criminal Code of BiH of 1977"). The Federal Criminal Code of 1976/77 regulated the general aspects of criminal law and a

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191 *Kunarac et al.* Appeal Judgement, para 377.
192 *Tadić* Judgement in Sentencing Appeals, para. 21, *Kupreškić et al.* Appeal Judgement, para 418, *Jelisić* Appeal Judgement, para 117, *Čelebići* Appeal Judgement, para 813.
193 See *supra* para. 38.
194 Of the 17 judges interviewed, 6 were from BiH (3 from the Federation of Bosnia and Herzegovina and 3 from the Republika Srpska), 5 judges from Croatia, 3 judges from the former Yugoslav Republic of Macedonia, and 3 judges from Montenegro, Prof. Sieber, T. 368.
195 Sentencing Report, pp. 17-20.
196 Prof. Sieber, T. 413.

few specific offences, such as crimes against the security of the SFRY, genocide, and war crimes, while the Criminal Code of BiH of 1977 regulated primarily the specific offences, and some general matters not addressed by the Federal Criminal Code of 1976/77.[197] Both criminal codes initially remained in force after BiH declared independence in 1992.[198]

154. In 1998 BiH's constituent entity of the Federation of Bosnia and Herzegovina adopted its own criminal code, consisting of its own general and special parts. The Republika Srpska entity and the Br~ko District followed suit shortly thereafter, adopting their own criminal codes in 2000.[199] In March 2003 the Office of the High Representative enacted a new Criminal Code for both entities within the State of BiH and the Br~ko District (hereinafter "OHR Criminal Code of 2003").[200] In August 2003 the Federation of Bosnia and Herzegovina and Republika Srpska adopted new Criminal Codes (hereinafter "FedBiH Criminal Code of 2003" and "RS Criminal Code of 2003" respectively). While the OHR Criminal Code of 2003 and the Criminal Codes of the two entities within BiH of 2003 each contained their own general and special parts, the Criminal Codes of the entities dealt with specific offences only, while the OHR Criminal Code of 2003 was applicable to crimes relevant to the whole state, such as, *inter alia*, war crimes and crimes against humanity.[201]

155. The Trial Chamber will now turn to consider the range of sentences available under the aforementioned laws in BiH in 1992 when the crimes to which the Accused has pleaded guilty were committed. Under the Federal Criminal Code of 1976/77, the range of penalties existing in 1992 was a fine, confiscation of property, imprisonment, and capital punishment. The maximum term of imprisonment was 15 years, except for offences punishable with the death penalty, committed under "particularly aggravating circumstances," or causing "especially grave consequences," in which cases the maximum term of imprisonment was 20 years.[202]

156. The punishments for the specific offences in 1992 were regulated by the Criminal Code of BiH of 1977. Murder was punishable with imprisonment of not less than five years, and in aggravated cases, which included murder in a cruel way, carried out violently, by endangering the

[197] Sentencing Report, pp. 27, 29.
[198] *Ibid.*, p. 27, citing Presidential Decree of 8 April 1992 on the state of war, Presidential Decree of 11 August 1992 on the application of traditional laws, and Law of 1 June 1994 on the Retroactive Confirmation of the later Presidential Decree. BiH was recognized by the United Nations as of 22 May 1992.
[199] *Ibid.*, p. 35.
[200] *Ibid.*, p. 35.
[201] Prof. Sieber, T. 373.
[202] Article 38 of the Federal Criminal Code of 1976/77; Sentencing Report, p. 30. In this context, the Trial Chamber wishes to emphasize that it does not share the view that a sentence of life imprisonment is the harsher sentence as

life of others, or by motive of greed, with imprisonment of not less than 10 years or the death penalty.[203] Rape was punishable with one to 10 years of imprisonment, in aggravated cases the lower limit being set to three years of imprisonment.[204] Grievous bodily injury was punishable with six months to five years of imprisonment, which in aggravated cases could go above the set limit.[205] If the above crimes were committed in "time of war, armed conflict or occupation," under the Federal Criminal Code of 1976/77 these offences were qualified as war crimes and were punishable with imprisonment of a minimum of five years or the death penalty.[206]

2. The Applicability of the Principle of *lex mitior*

157. The Defence argues that the principle of *lex mitior* should apply in the present case.

158. The Trial Chamber recalls that on the territory of the former Yugoslavia in 1992, the maximum term of imprisonment was 15 years, except for offences punishable with the death penalty, committed under "particularly aggravating circumstances," or causing "especially grave consequences," in which cases the maximum term of imprisonment was 20 years.[207] According to the OHR Criminal Code of 2003, applicable in the territory of Vlasenica where the crimes were committed, the maximum penalty available for the gravest cases of serious criminal offences was "long term imprisonment", defined as 20 to 45 years' imprisonment.[208] The crimes of murder, rape or torture, when committed as part of a widespread or systematic attack against civilians[209] attract the maximum penalty of long term imprisonment (i.e. between 20 and 45 years' imprisonment). Killing of a civilian committed in violation of rules of international law in time of war, armed conflict or occupation attracts the same maximum sentence,[210] as does the murder of a wounded or sick person in violation of the rules of international law in time of war or armed conflict[211] and the murder of a prisoner of war.[212] The RS Criminal Code of 2003 also adopted the punishment of

capital punishment, cf. John R.W.D. Jones/Steven Powles, International Criminal Practice, 3rd ed., Oxford (2003), 9.119.

[203] Article 36 of the Criminal Code of BiH of 1977; Sentencing Report, pp. 32-33.

[204] Article 88; *ibid.*

[205] Article 42; *ibid.*

[206] Article 142 (war crime against the civilian population), Article 143 (war crime against the wounded and sick) and Article 144 (war crime against prisoners of war) of the Federal Criminal Code of 1976/77; Sentencing Report, p. 34.

[207] Article 38; *ibid.,* p. 30.

[208] Article 42 of the OHR Criminal Code of 2003; Sentencing Report, p. 36.

[209] Article 172; *ibid.*, p. 37.

[210] Article 173; *ibid*.

[211] Article 174; *ibid*.

[212] Article 175; *ibid*.

long-term imprisonment consisting of 20 to 45 years of imprisonment which also may only be imposed for the gravest forms of serious criminal offences.[213]

159. Based on this overview, the Trial Chamber notes that if the principle of *lex mitior* were applicable in the present case, as submitted by the Defence, the sentencing range would be restricted to a fixed term of imprisonment instead of a term up to and including the remainder of the convicted person's life as provided for in Rule 101 (A) of the Rules. Therefore, the Trial Chamber has to examine whether the principle of *lex mitior* is applicable at all in the case before it.

160. The principle of *lex mitior* is enshrined in international covenants and national legislations.[214] In this context, the Trial Chamber recalls the Secretary-General's Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), in which he stated that

> [it] is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[215]

161. Thus, the Trial Chamber finds that the principle of *lex mitior* as contained in, *inter alia*, the International Covenant on Civil and Political Rights of 1966[216] and the American Convention on Human Rights of 1978 constitutes such an internationally recognized standard regarding the rights of the accused. Article 15 paragraph 1 sentence 3 of the ICCPR states that:

> If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[217]

162. This principle also forms part of the criminal law applicable in BiH throughout the relevant period. Article 4 of the Federal Criminal Code of 1976/77 stated:

> (1) The law that was in force at the time when a criminal act was committed shall be applied to the person who has committed the criminal act.
>
> (2) **If the law has been amended one or more times after the criminal act was committed, the law which is less severe in relation to the offender should be applied.**

The principle is also contained in the present national criminal codes of BiH, the Republika Srpska, and the Federation of Bosnia and Herzegovina.[218]

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213 Article 32 (2) of the RS Criminal Code of 2003; Sentencing Report, p. 42.
214 Cf. Article 15 (1) of the ICCPR; Article 9 of the ACHR; Chapter 2 (2) (3) of the Swedish Criminal Code; Article 2 (3) of the German Criminal Code. The Trial Chamber notes that Article 7 (1) of the ECHR only provides explicitly that no heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed.
215 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 106.
216 BiH succeeded to the ICCPR on 1 September 1993.
217 Article 9 of the ACHR has almost an identical wording.

163. However, when closer examining the content of the principle of *lex mitior*, the Trial Chamber is convinced that the principle applies only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction.

164. The Trial Chamber notes that the provisions mentioned above do not state that the principle of *lex mitior* also applies in cases where the offence was committed in a jurisdiction different from the one under which the offender receives his punishment. The Trial Chamber is aware that, for example, under Swiss law the national courts are required in such cases to apply the law of the country where the offence was committed if that jurisdiction provides for a more lenient penalty.[219] The Trial Chamber holds, however, that this does not form part of the principle of *lex mitior* as an internationally recognized standard. In the event of concurrent jurisdictions, no state is generally bound under international law to apply the sentencing range or sentencing law of another state where the offence was committed. With respect to the concurrent jurisdiction of the Tribunal and the jurisdictions in the former Yugoslavia,[220] the Appeals Chamber adopted without further explanation the same approach when it stated that the principle that Trial Chambers are not bound in sentencing by the practice of courts in the former Yugoslavia

> applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed.[221]

165. In conclusion, the Tribunal, having primacy *vis à vis* national jurisdictions in the former Yugoslavia, is not bound to apply the more lenient penalty under these jurisdictions. However, such penalties shall be taken into consideration, but as only one factor among others when determining a sentence.

3. Other Countries

166. In addition to the section relating to sentencing law and practice in the former Yugoslavia, the Sentencing Report provided an overview of the law relating to sentencing in 23 other countries. The Sentencing Report focused on the sentencing law of serious crimes, such as murder, torture,

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[218] Emphasis in the quote of Article 4 (2) of the Federal Criminal Code of 1976/77 added. See also: Article 4 (2) of the OHR Criminal Code of 2003; Article 5 (2) of the FedBiH Criminal Code of 2003; Article 4 (2) of the RS Criminal Code of 2003; Sentencing Report, pp. 35-36, 38-39 and 42.

[219] Articles 5 (1) (2), 6 (1) (2) and 6 *bis* (1) (2) of the Swiss Criminal Code; Chapter 2 (2) (3) of the Swedish Criminal Code provides that Swedish courts must not impose a heavier punishment than the maximum penalty provided for the offence in the jurisdiction of the state in which the offence was committed.

[220] Article 9 (1) of the Statute provides that the Tribunal and national courts have concurrent jurisdiction to prosecute persons for the statutory crimes.

[221] *^elebi}i* Appeal Judgement, para. 816.

rape, and persecution, to which the Accused has pleaded guilty, but without going into the specifics of the particular case. The Sentencing Report identifies the penalties applicable in 1992, the year the crimes were committed, as well as penalties in 2003. Generally speaking, the close analysis shows that in almost all countries studied, murder attracts rather severe penalties. In particular, a large number of the legal systems studied prescribe a mandatory sentence of life imprisonment in the case of murder by sustained beatings involving the use of weapons. A comparison between the law in effect in the year 1992 and the current law shows that only a few countries have changed the sentencing range applicable for these crimes during this period. Most of these changes relate to a replacement of the death penalty by life imprisonment as the maximum punishment.[222]

167. From a general perspective, the minimum penalty to be imposed for one act of murder committed by sustained beatings and motivated by ethnic bias (hereinafter "Aggravated Murder") ranges from a fixed term of imprisonment up to life imprisonment in countries such as Argentina, Canada, Chile, England, Finland, France, Germany, Greece, South Africa, Sweden, Turkey and the U.S.A.

168. The maximum penalties for such one act of Aggravated Murder in the various countries range from a prison sentence of 25 years to the death penalty.

169. In Argentina,[223] Belgium,[224] Canada,[225] Germany,[226] England,[227] Finland,[228] Italy,[229] and South Africa,[230] one act of Aggravated Murder attracts a mandatory life sentence.

170. The sentence of life imprisonment or, in the alternative, a maximum fixed term of years is envisaged by the relevant statutory provisions of the following countries: Austria,[231] Poland,[232] and Sweden.[233] In Chile and France, Aggravated Murder attracts sentences from a minimum of five years' imprisonment – Chile – and 2 years' imprisonment – France[234] – up to life imprisonment.

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[222] For example, Country Report Greece, p. 3; Country Report Poland, p. 2; Country Report South Africa, p.2; Country Report Turkey, p. 2.
[223] Country Report Argentina, pp. 5, 11.
[224] Country Report Belgium, p. 17.
[225] Country Report Canada, p. 2.
[226] Country Report Germany, p. 2.
[227] Country Report England, pp. 8, 14.
[228] Country Report Finland, p. 2.
[229] Country Report Italy, pp. 9, 18.
[230] Country Report South Africa, p. 9.
[231] Country Report Austria, pp. 8, 14.
[232] Country Report Poland, p. 14.
[233] Country Report Sweden, pp. 10, 17.
[234] Country Report Chile, p. 15; Country Report France, p. 10.

171. Finally, it appears that Brazil, Mexico, Spain, and Portugal[235] limit sentencing to a fixed term of imprisonment, even in the most serious cases. The Trial Chamber notes, however, that the abolition of life imprisonment does not necessarily mean that the sentence to be finally served is less than in States providing for life imprisonment with optional or mandatory review after 15 or 20 years.

172. The overview shows that in most countries a single act of murder attracts life imprisonment or the death penalty, as either an optional or a mandatory sanction. When adopting the Statute in 1993, the Security Council was apparently cognisant of this practice and decided to vest broad discretion to the judges in determining sentences, instead of giving concrete sentencing ranges for specific offences. In line with the general UN policy on the abolition of the death penalty, the Security Council limited the applicable sentences to imprisonment.[236] Acting pursuant to Article 15 of the Statute, the Plenary of this Tribunal specified Article 24 (1) of the Statute by phrasing Rule 101 of the Rules in its relevant part:

> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

173. With regard to torture, rape and the issue of combined offences,[237] the Trial Chamber refers to the Sentencing Report and the Country Reports annexed thereto which show a similar broad range of applicable sentences.

4. Previous Jurisprudence of the Tribunal

174. Since its establishment, the Tribunal has rendered more than twenty judgements, of which some are pending on appeal.[238] The scale of sentences has been very broad as each case has its own merits and deserves to be considered individually.

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[235] See already *Stakić* Trial Judgement, para. 932 (footnote 1660).

[236] Article 24 (1) of the Statute: see Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty of 15 December 1989 and already Protocol No. 6 to the ECHR, concerning the abolishing of the death penalty of 28 April 1983. Cf. *Stakić* Trial Judgement, para. 932.

[237] "The category of 'combined offences' includes the combination of […] three types of acts [murder, rape, torture] involving five to ten victims", Sentencing Report, p. 58, footnote 41.

[238] *Bla{ki}* Trial Judgement, *Kordi} and ^erkez* Trial Judgement, *Staki}* Trial Judgement, *Kvo~ka et al.* Trial Judgement, *Vasiljevi}* Trial Judgement, *Krsti}* Trial Judgement, *Naletili} and Martinovi}* Trial Judgement.

VIII. FACTORS RELATED TO INDIVIDUAL RESPONSIBILITY

175. Considering the principles outlined above, the Trial Chamber will now turn to the factors relating individually to the Accused in order to determine the sentence appropriate to the specific circumstances of this case.[239]

A. Gravity of the Offence and Aggravating Circumstances

1. Submissions of the Parties

176. The Prosecution submits that the gravity of the crimes is a primary consideration for the Trial Chamber.[240] It further submits that the Trial Chamber should consider as aggravating circumstances (i) the position of Dragan Nikoli} as a commander in Su{ica detention camp, (ii) the vulnerability of the victims, (iii) the depravity of the crimes, (iv) the fact that there were multiple victims, and (v) that the victims were known by the Accused.

177. The Prosecution submits that

> […] the Trial Chamber must consider the magnitude of [the victims'] suffering of murder, rape and torture victims. The Trial Chamber must consider in their assessment, the despair of men and women who were separated from their loved ones, the terror experienced by those who watched fellow detainees die, and the agony experienced by those who did not perish immediately but died slowly of injuries and exposure. These assaults were conducted against the weak and vulnerable victims, who existed completely at the mercy of Dragan Nikoli}.[241]

178. The Defence made no submissions on aggravating circumstances.

2. Discussion

(a) Position of Dragan Nikoli} as a Commander in Su{ica Detention Camp

179. The Accused admitted having been a commander in Sušica camp. Testimony provided at the sentencing hearing disclosed more detail as to his position of authority and responsibility in the camp. Witness SU-032 and Habiba Hadžić stated that "Jenki" was the main commander in the camp.[242] As a commander in Su{ica camp, he had an overall responsibility to protect the detainees from abuse and to ensure that the conditions under which they were forced to live were humane.

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[239] In the *Krsti}* Trial Judgement the Trial Chamber stated that the Trial Chamber had a duty to decide on the appropriate punishment according to the facts of each case, and, "the Trial Chamber must assess the seriousness of the crimes in the light of their individual circumstances and consequences", paras 700 and 701.
[240] Prosecution Closing Statement, T. 466.
[241] Prosecution Sentencing Brief, para. 38.
[242] Witness SU-032, T. 278; Habiba Hadžić, T. 229.

Instead he chose to mistreat the detainees, thereby setting an example for the guards to follow and contributing to an environment of impunity.

180. He was at the camp most of the time, both in the evening and in the afternoons.[243] He was armed with a variety of weapons including machine-guns and knives and was accompanied by two trained Doberman guard-dogs.[244] The Accused was in charge of the camp at night, and was heard on one occasion saying *"I am the commander here now"*.[245] He had everything under his control and issued orders. Eight to twelve guards were guarding the detainees.[246] Although the Accused had "the main say" in the camp, he used to "co-operate" with Mi~o Kraljević[247] and on one occasion he told the detainees words to the effect: *"I have to do what Mi~o tells me to do. He is my god and I am yours."*[248]

181. The Accused ordered detainees to sleep in locations outside the camp, in the surrounding houses or lorries.[249] Those within the camp were not allowed to move around in the compound outside the hangar without his order.[250]

182. The Accused deliberately and callously committed the crimes in the Indictment. He was not under any orders from his superiors, nor was he under any compulsion or pressure to behave in this manner. When asked about the Accused's position in the camp, Witness SU-032 replied: "All I knew was that Dragan Nikoli} was there at the camp and did whatever he wanted to do, whatever he pleased."[251] When asked if Dragan Nikoli} held the survival of the detainees in his hands, Witness SU-032 answered in the affirmative.[252] The Trial Chamber has no reasonable doubts as to the veracity of this testimony.

183. Dragan Nikoli} used his position of authority to intimidate the detainees and prevent them from resisting. The Accused's abuse of his superior position in the camp in principle aggravates his crimes. The detainees lived and died by the hand and at the whim or will of Dragan Nikoli}.

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[243] Habiba Hadžić, T. 230.
[244] Witness SU-032, T. 286 and 283.
[245] Witness SU-202, T. 269.
[246] Habiba Hadžić, T. 230.
[247] *Ibid.*, T. 248-249. According to Habiba Hadžić's testimony, Mi~o Kraljević had "his own specials from Rogosija". They would occasionally go to Sušica camp, roast a lamb or two and play loud music.
[248] *Ibid.*, T. 260.
[249] *Ibid.*, T. 231.
[250] *Ibid.*, T. 229.
[251] Witness SU-032, T. 287.
[252] *Ibid.*, T. 279.

Witness Habiba Hadžić stated on the other hand that he on one occasion saved her life,[253] an aspect that as such will later be taken into account as a seriously mitigating factor.

(b) Vulnerability of the Victims

184. The Trial Chamber in *Banovi}* accepted that "the position of inferiority and the vulnerability of the victims as well as the context in which the offences were committed are relevant factors in assessing the gravity of the crime."[254] The Trial Chamber recognises that the victims were subjected to a position of special vulnerability. They were illegally detained in Su{ica camp without any contact to outsiders which could substantially assist them. In the camp the detainees were guarded by men armed with machine guns, grenades, knives and other weapons.[255] There were mothers and daughters, fathers and sons, the young (e.g. one detainee was only one year old[256]), the infirm and the elderly, all detained together in the hangar at Su{ica camp.

185. The detainees were powerless and could not avoid daily humiliation, degradation or physical and mental abuse. Witness SU-115 stated:

> […] In Su{ica I was detained for 9 days and exposed to witness when my neighbours and friends from town were tortured and murdered. […] Women and girls were taken out at nights to be sexually abused and some of them never came back. People were taken out for forced labour and some of them never came back. […] I was in severe mortal fear during my entire stay at the camp and I will never be the same person again after what I experienced in the Su{ica camp. […][257]

(c) Depravity of the Crimes

(i) Immediate effects of the conditions in the camp

186. The manner in which the crimes were committed is an important consideration in assessing the gravity of the offence. This Trial Chamber finds it hard to imagine how murder, torture and sexual violence could be committed in a harsher and more brutal way than employed by the Accused, assisted by others.

187. Not one single day and night at the camp passed by without Dragan Nikoli} and other co-perpetrators committing barbarous acts.[258] He played with the emotions of the inmates and tortured them with his words. After guards had beaten a detainee, the Accused exclaimed: "*What? They did*

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[253] Habiba Hadži}, T. 251.
[254] *Banovi}* Sentencing Judgement, para. 50
[255] Witness SU-032, T. 278.
[256] *Ibid.*
[257] Exh. P1, Witness SU-115, para. 4 (emphasis added).
[258] *Ibid.*

not beat you enough; if it had been me, you would not be able to walk", and: "*I can't believe how an animal like this can't die; he must have two hearts.*"[259]

188. On another occasion he took a detainee to men who were not camp guards. The Accused was heard saying to the men words to the effect: "*Here, I brought you something for dinner.*"[260]

189. The Accused brutally and sadistically beat the detainees. He would kick and punch detainees and use weapons such as iron bars, axe handles, rifle butts, metal "knuckles", truncheons, rubber tubing with lead inside, lengths of wood and wooden bats to beat the detainees.[261] The Accused even ignored his brother who would often plead with him to stop his criminal conduct by saying: "Don't beat people, Dragan. They are to blame for nothing. Why are you doing this?"[262] The other detainees, including the children, observed the Accused's criminal conduct and were afraid the same might happen to them.[263]

190. After Dragan Nikolić finished beating a detainee named Djidje, he would spill water on the concrete floor in the hangar and make him sit there. The victim would also not be given any food.[264]

191. On one occasion, the Accused entered the hangar and started to shoot at the walls. All the detainees lay on the floor. He said that the Green Berets were attacking the camp. The Accused continued to fire his weapon until he had emptied the entire magazine and then left the hangar.[265]

192. One of the most chilling aspects of the Accused's behaviour was the enjoyment he derived from his acts. Witness SU-032 stated that the Accused "enjoyed himself while he was beating people. I know firsthand that he enjoyed beating Arnaut Fikret. He used to beat him five times a day." [266] When two of the victims passed out due to a beating, the Accused and other guards had buckets of water thrown on them to revive them.[267] When detainees who were being beaten begged to be shot, the Accused would reply: *"A bullet is too expensive to be spent on a Muslim."*[268]

193. Such behaviour recalls that commented upon by the Trial Chamber in "*^elebi~i"* with which this Trial Chamber fully agrees:

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[259] Indictment, paras 24 and 26.
[260] *Ibid*., para. 34.
[261] *Ibid*., paras 8, 23, 27, 28, 31; Witness SU-202, T. 270.
[262] Witness SU-032, T. 283.
[263] *Ibid.*, T. 278, 279.
[264] Habiba Hadžić, T. 234.
[265] Witness SU-202, T. 273-274.
[266] Witness SU-032, T. 279.
[267] Witness SU-202, T. 270. See *infra* para. 208.
[268] Witness SU-032, T. 279.

> […] The most disturbing, serious and thus, an aggravating aspect of these acts, is that [Mr. …] apparently enjoyed using this device upon his helpless victims. […] There is little this Trial Chamber can add by way of comment to this attitude, as its depravity speaks for itself.[269]
>
> […]
>
> The manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity. This is only amplified by the fact that [Mr. …] was the deputy commander of the prison-camp. His victims were captive and at his mercy, he abused his position of power and trust […] [T]hese circumstances are considered significant aggravating factors in the sentencing of [Mr. …].[270]

194. The Accused abused his personal position of power especially *vis à vis* the female detainees of Su{ica camp. He personally removed and returned women of all ages from the hangar, handing them over to men whom he knew would sexually abuse or rape them.[271] Witness SU-032 believes had they resisted, they would have been liquidated.[272] Witness SU-032 would have to agonize throughout the day, knowing what was to be her fate in the coming night.[273]

195. The Accused subjected the detainees to particularly humiliating and degrading treatment. This was especially true for female detainees. Like all other detainees, they had to relieve themselves in front of all the others in the hangar in buckets placed near the hangar door.[274] For example, Habiba Hadži}, was ordered by the Accused to wash and put cream on his feet for his personal refreshment.[275]

196. On one occasion, Habiba Hadži} gave Fikret Arnaut[276] some cookies because he had not been given any food. She did not see that Dragan Nikoli} was at the door to the hangar. He walked up and crushed the biscuits with his boot, and he ordered her to go outside to the external toilet where he slapped her once then hit her with a rifle butt, knocking her out.[277]

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[269] *^elebi~i* Trial Judgement, para. 1264 (emphasis added).
[270] *Ibid*., para. 1268.
[271] Witness SU-032, T. 279-280: "Dragan Nikoli} took girls and women out of the hangar. In the evening, he would take girls out, and they would return in the morning, dishevelled, sad. They were not allowed to speak to the rest of us.[…] But eventually each of them would confide in her sister or mother and tell them what had happened to them the previous night.[…] You can imagine what happened to them. They were removed against their own will, and they were unable to resist. They could not defend themselves, and they had to do what they were told and ordered to do. They were forced to – and I don't know how to put it – to have intercourse with strangers or sometimes men they even knew. They had to do every single thing they were told to do"; Witness SU-202, T. 273
[272] Witness SU-032, T. 280-281.
[273] *Ibid.*, T. 281.
[274] *Ibid*., T. 246.
[275] Habiba Hadži}, T. 237-238.
[276] See *supra* subsection V. A. 2. (d) (i)
[277] Habiba Hadži}, T. 236-237; see *supra* para. 105.

197. The people who were brought to the camp were primarily Muslims. They included infirm people who suffered from various diseases and illnesses.[278] Habiba Hadžić testified that two men died because they were not given medical care.[279] Habiba Hadžić lost weight[280] at the camp because the limited food that was given to the detainees was foul and indigestible.[281]

198. Sleeping conditions at the camp were described as horrendous or awful. The detainees were made to sleep cramped together on the bare concrete floor of the hangar or wooden boards. Those lucky enough to be sleeping on the wooden boards could find themselves on the bare concrete because when the Accused was angry, he would have the wooden boards removed from the hangar.[282]

199. In the hangar building, the stench was terrible.[283] The detainees were unable to wash themselves or their clothes.[284] In addition, the detainees had no access to hygiene products.[285]

(ii) Long term effects of the conditions in the camp

200. The effects of Su{ica did not end once a detainee left the camp.[286] Many of the then detainees suffer to this day from the lasting not only physical effects of the treatment they received at the hands of the Accused or by his will. Witness SU-115 lost some of her teeth after having them kicked out at Su{ica and she "still suffer[s] [the] consequences of the beating"[287] she received at the camp. Habiba Hadži} has constant pain in her elbow and is unable to take a bath without assistance due to a wound inflicted by the Accused with a rifle butt.[288]

201. The emotional effects of Su{ica on the detainees are in some cases more permanent than the physical effects. Witness SU-115 stated additionally:

> By witness[ing] all of the torture and killings that happened next to me at the camp I was being mentally tortured and I suffers physiologically of the memories and back flashes. When I thinks

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[278] Witness SU-032, T. 278.
[279] Habiba Hadžić referred to Fikret Arnaut (see *supra* subsection V. A. 2. (d) (i)), and Fadil Huremović, who died "because his wife was abused and he was no longer able to suffer that; he just couldn't get up", T. 234-235.
[280] *Ibid.*, T. 233; see *supra* para. 105.
[281] *Ibid.*, T. 232 and T. 246; Witness SU-202, T. 267 and T. 273; Witness SU-032, T. 278.
[282] Habiba Hadžić, T. 232.
[283] *Ibid.*, T. 246.
[284] *Ibid.*, T. 233.
[285] *Ibid.*, T. 233-234.
[286] *Krnojelac* Trial Judgement, para. 512: "Consideration of the consequences of a crime upon the victim who is *directly* injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences." (emphasis is in the original).
[287] Exh. P1, Witness SU-115, para. 9.
[288] Habiba Hadži}, T. 239.

> of what happened to people in Su{ica, how they were beaten and killed I often cries and had to take medicine. […][289]

202. Witness SU-230 recalled:

> During my stay in Su{ica I eye witnessed how my good friends and neighbours were tortured and murdered by Dragan Nikoli} and other Serbs. The inhumane living conditions in the camp was awful and everyone detained lived with a fear of being killed or tortured. […] I am trying to hold back what I experienced but from time to time I have flash backs of what happened. Very rarely I am able to have a full night sleep. I often have nightmares of my experiences […][290]

203. Witness SU-032, who was sexually assaulted at the camp, testified about what she felt after the assault and what effect the assault made on her son:

> I felt miserable, degraded. I wanted to be a good mother, the best I could. I wanted my child to grow up in a beautiful family, but that couldn't be any more. I felt humiliated as a woman and as a mother by the very fact that I was there in that camp in that situation. […] It's been 11 years now, but my son is still pensive, introverted, sad and he knows what had happened to me. He is withdrawn. He doesn't like talking to anyone. He's sad. He often tells me that he doesn't like living anymore. He tells me that he often thinks of suicide. […] [He] was eight years old when we arrived at the camp.[291]

204. Aside from her physical pain, Habiba Hadži} continues to suffer from the time she spent in the camp:

> There are two wounds […] there: [s]adness, pain, everything I went through in the camp. My children were innocent and they lost their lives. They were killed. […] I have nothing to hope for. This mother cannot take it much longer. You will see. I will die of sadness and sorrow. My husband is also sick and he cries often. He hides from me when he cries, but then I follow him and then we cry. What can we do?[292]

205. In the expert statement psychotherapist Maria Zepter makes the following observation, which, although not related to this specific case, is generally applicable to the impact of similar detention on detainees:

> I have counselled detainees who experienced all kinds of atrocities and trauma due to physical abuse, psychological and sexual torture, hunger, beatings, rapes, sexual abuse, forced masturbation, hunger, deprivation of food and hygienic conditions. Detainees were often traumatised because they were forced to watch other detainees, whom they knew well, being beaten, tortured or executed.
>
> […]
>
> In my professional opinion, detainees who saw other detainees being murdered or executed suffer severe post-traumatic disorders.
>
> […]

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[289] Exh. P1, Witness SU-115, para. 11, quoted as it reads in the English version of Exh. P1; see *supra* para. 205.

[290] Exh. P1, Witness SU-230, paras 6 and 12, quoted as it reads in the English version of Exh. P1.

[291] Witness SU-032, T. 282, T. 278.

[292] Habiba Hadži}, T. 247.

> The immediate effect on detainees of being held at a camp, and realising that random violence could be inflicted on one person then another, included feelings of shock, extreme anxiety and fear of death, extreme helplessness and powerlessness, humiliation, shame and fear of what might happen to the relatives at home.[293]

(d) Multiple Victims

206. Although most of the detainees were not direct victims of the Accused's brutal acts of murder, torture and sexual violence as described above, each and every detainee of the camp was an immediate victim of the more insidious forms of abuse, specifically the inhumane living conditions and the atmosphere of terror created by the murders, beatings, sexual violence and other mental and physical abuse.

207. Those who were not in a position to see what was happening in and outside the hangar could hear what was happening[294]. Habiba Hadži} testified that:

> For instance, in the evening, when a white van would come to collect people, people would be loaded inside. You would hear orders, "*Remove this. Remove that. Take this knife away. Throw it onto the ground*." You would hear those orders.[295]

208. The Trial Chamber is convinced that when detainees were beaten outside the hangar at the "A-pole" or when detainees were beaten or "punished" in the "punishment corner" of the hangar, all the detainees, from the very young to the elderly, knew what was happening, heard what was happening and were affected by it. Witness SU-202 testified how he was an eye witness to the beating and killing of Durmo Hand`i} and Asim Zild`i}:

> They [Dragan Nikoli}, Tesi}, nicknamed Goce, a man called Djuro and some soldiers] were all there, at A [pole], that is where the shovels were and the bucket. That is for fire emergencies. And then I saw Dragan beating them with a truncheon and others used handles.
>
> […]
>
> That's where they beat them, and then we carried them from there into the hangar. They were wet because they were throwing water on them, and they had all passed out.
>
> […]
>
> Asim lived for about 40 minutes after the beating, and then he died; whereas Durmo died the next day, around 2.00 because of the beating.[296]

209. Witness SU-032 testified that when Dragan Nikoli} would beat Fikret Arnaut "[w]e were all watching, the children and grown-ups saw him, and we thought the same might happen to us."[297]

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[293] Exh. P6, Expert Statement of Maria Zepter, p. 3.
[294] See *Ibid*.
[295] Habiba Hadži}, T. 252-253.
[296] Witness SU-202, T. 269-270.

(e) Victims known by the Accused

210. Muslims from the municipality of Vlasenica accounted for a large proportion of the thousands of detainees that passed through Su{ica camp. The Accused had lived most of his life up until the war in the town of Vlasenica.[298]

211. Witness SU-202, a former detainee of Su{ica camp, described his prior relationship with the Accused: “We lived together in the same town. We were born there, grew up there. We saw each other every day.”[299] Witness SU-202 testified that he dug a grave for and buried the Accused’s late father and while in Su{ica camp the Accused told him: *“[N]obody is going to have any privileges here, you included*.”[300]

212. The Trial Chamber agrees that under certain circumstances the knowledge of or even the friendship with a victim may amount to an aggravating factor. However, in the absence of more detailed facts about individual relationships, the Trial Chamber cannot base conclusions to the detriment of Dragan Nikoli} solely on these limited findings.

3. Conclusion

213. In conclusion, evaluating the abovementioned circumstances, the Trial Chamber accepts the following factors as especially aggravating:

(i) The acts of the Accused were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts. They expressed his systematic sadism. The Accused apparently enjoyed his criminal acts.

(ii) The Accused ignored the pleadings of his brother to stop.

(iii) The Accused’s role was one of a commander in the camp and the Accused knowingly abused that position.

(iv) The Accused abused his power especially *vis à vis* the female detainees in subjecting them to humiliating conditions in which they were emotionally, verbally and physically assaulted and forced to fulfil the Accused’s personal whims, *inter alia*, washing and putting cream on his feet for his personal

[297] Witness SU-032, T. 279.
[298] Grosselfinger Report, p. 11.
[299] Witness SU-202. T. 268.
[300] *Ibid.*, T. 268-269.

refreshment or having to relieve themselves in front of everybody else in the hangar.

(v) Beatings were placed in the Indictment under the charge of torture. Due to the seriousness and particular viciousness of the beatings, the Trial Chamber considers this conduct as being at the highest level of torture, which has all of the making of *de facto* attempted murder.

(vi) The detainees were particularly vulnerable and treated rather as slaves than as inmates under the Accused's supervision.

(vii) Finally, the high number of victims in Su{ica camp and the multitude of criminal acts have to be taken into account.

214. **In conclusion, taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life. There are, however, mitigating circumstances to which the Trial Chamber will now turn.**

B. Mitigating circumstances

215. The Prosecution submits that "mitigating circumstances relate to the assessment of a penalty but do not derogate the gravity of the crime" and that "it is more a matter of grace than defence."[301]

216. The Defence advocates that "due consideration is given to those elements that are not commonplace but, more particularly, that there is especial recognition of those mitigating elements which are of the greatest importance in international/criminal law in general and the objectives of the International Criminal Tribunal for the Former Yugoslavia in particular."[302] With reference to the Article 42(2) of the Criminal Code of the SFRY the Defence submits that "the judge may determine whether there are mitigating circumstances which are such that they indicate that the objective of the sentence may be achieved equally well by a reduced sentence."[303]

[301] Prosecution Sentencing Brief, para. 58.
[302] Defence Sentencing Brief, para. 2 (b), p. 2.
[303] *Ibid*., para. 5 (i), p. 12.

217. The Trial Chamber will give consideration to all mitigating factors presented by the Parties, but will focus in the now following discussion in greater detail on four factors of special importance, namely (i) the plea agreement and guilty plea, (ii) remorse, (iii) reconciliation and (iv) substantial co-operation with the Prosecution.

1. Plea Agreement and Guilty Plea

(a) Submissions of the Parties

218. The Prosecution submits that "Dragan Nikoli} has voluntarily entered into a plea of guilty prior to the commencement of trial proceedings",[304] although not at the very first opportunity available.[305] It continues by saying that the Accused "was aware of an indictment against him", but entered a plea of guilty "at least two to three years later".[306] The Prosecution points out that "a guilty plea is usually to be regarded as a circumstance in mitigation of sentence because it may save the victims and witnesses from having to give evidence", thus saving "considerable time, effort and resources". It notes, however, that the guilty plea was made "after Prosecution witnesses, scheduled to give deposition evidence had arrived at the Tribunal."[307] The Prosecution also argues that a guilty plea is "always important for the purpose of establishing the truth in relation to a crime and preventing all forms of revisionism."[308]

219. As regards the plea agreement as such, the Prosecution stresses two points: first, the Accused pleaded guilty to a "refined indictment" and that this process of refinement "has accrued to the benefit of the Defence"; and second, the guilty plea was entered by the Accused in the terms of the plea agreement.[309]

220. The Defence submits that "the primary factor to be considered in mitigation" is the "decision to enter a guilty plea" by the Accused.[310] According to the Defence, "most mature national legal systems promote the admission of guilt in part by a recognizable reduction in sentence."[311] The Defence also refers to the previous jurisprudence of this Tribunal, where "a guilty plea gave rise to a reduction in the sentence" for the following reasons:

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[304] Prosecution Sentencing Brief, para. 59.
[305] Prosecution Closing Statement, T. 473.
[306] *Ibid*., T. 474.
[307] Prosecution Sentencing Brief, para. 59 and footnote 35.
[308] *Ibid.*, para. 59.
[309] Prosecution Closing Statement, T. 475.
[310] Defence Sentencing Brief, para. 5 (ii), p. 12
[311] With reference to the sentencing law in England, Defence argues that "the usual reduction is one third of the sentence that would otherwise be passed following conviction after trial". *Ibid*., para. 5 (iii), p. 12.

> a. 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.
> b. A guilty plea contributes to the fundamental mission of the Tribunal to establish the truth in relation to crimes subjected to its jurisdiction.
> c. An admission of guilt and acceptance of the facts provides a unique and unquestionable fact-finding tool that greatly contributes to peace-building and reconciliation among the affected communities. Individual accountability which leads to a return to the rule of law, reconciliation, and the restoration of true peace across the territory of the former Yugoslavia is an integral part of the mission of this Tribunal. […]
> d. A plea of guilt contributes to public advantage and the work of the Tribunal by providing considerable saving of resources for, *inter alia*, investigation, counsel fees and the general costs of a trial. […]
> e. An admission of guilt may in the case of some victims and witnesses relieve them from the stress of giving evidence.[312]

221. The Defence submits that an accused entering a guilty plea before the commencement of the trial "will usually receive full credit for that plea" because it contributes to the public advantage and the work of the Tribunal.[313]

222. The Defence argues that the guilty plea demonstrates the Accused's honesty, self-awareness and personal rehabilitation and responsibility for his actions. Moreover, the Accused accepts the need for punishment and expresses remorse.[314] The increased value of this acceptance of responsibility is strengthened by the fact that the Accused is the only person from the area of Vlasenica who was brought to the Tribunal, whereas many others "who are at least as culpable as Dragan Nikoli}" are still at large.[315]

223. The Defence argues that the Accused's guilty plea "allows for the vital, indeed essential, element of reconciliation between the Muslim and Serb community"[316] and thus "extends to the core mission of the Tribunal – to restore peace and security to the region".[317] The Defence further argues that "[f]inding people guilty who obdurately refuse to accept it, is of extraordinarily limited potential for reconciliation."[318] Therefore, it is essential for the Tribunal to establish the conditions where people can plead guilty when confronted with the evidence of their own actions, and where they can have "the inherent integrity to meet up to their faults and their responsibilities".[319]

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312 *Ibid*., para. 5 (iii), pp. 12-15.
313 *Ibid*., para. 5 (iv), p. 15.
314 Defence Closing Statement, T. 485-486.
315 *Ibid*., T. 497.
316 *Ibid*., T. 486.
317 Defence Sentencing Brief, para. 2 (c), p. 2.
318 Defence Closing Statement, T. 486.
319 *Ibid.*; The Defence's argument is that "hopes for individual rehabilitation are infinitely higher when someone has freely admitted culpability and shows remorse" as opposed to the situation of a defendant "being convicted without showing any sign of responsibility or contrition". Defence Sentencing Brief, para. 3 (d), p. 8.

224. The Defence refutes the argument that the "late" plea of guilty could be "detrimental" to the Accused.[320] It submits that the Accused has pleaded guilty to the entire indictment and "has not sought to plead to less" or contest his guilt, and therefore this case can not be regarded as a plea bargain.[321] It argues that although the indictment was reduced from 88 counts to four, "the gravity of the offences is equally contained within those four counts as it was within the original 88".[322]

225. Finally, the Defence concludes by stating:

> It is submitted that the fact of pleas of guilty and the recognition of culpability and contrition that that involves, coupled with the desire to, and effect of, genuine subsequent co-operation with the prosecuting authorities to make their task easier is of vital importance to the aims of the ICTY in particular and the promotion of international criminal law in general. It is submitted that such an attitude needs to be encouraged, and actively be seen to be encouraged, by a substantial reduction in any sentence in recognition of the value of admission and co-operation and, vitally, the promotion of such recognition in the eyes and acts of other accused persons.[323]

(b) Discussion

226. In order to make an assessment of the mitigating effect of the guilty plea, the Trial Chamber turns first to a discussion of the concept of the guilty plea or confession in different legal jurisdictions, basing its analysis on the Country Reports submitted by the Max Planck Institute.[324] Thereafter, the Trial Chamber will analyse the relevant jurisprudence of the Tribunal and the ICTR.

(i) Analysis of the country reports submitted by the Max Planck Institute

227. In those countries where a guilty plea is provided by law or exists in practice, it is accepted as a mitigating factor leading to a reduction of the sentence up to the following level: in Canada, within the sentencing range of each offence;[325] in China, either within the lower part of the prescribed sentencing range or even under this range;[326] in England, up to one-third of a

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[320] The following observations were presented: 1) a very large passage of time was taken up with the essential consideration of the question of *male captus*; 2) about 12 months ago it became obvious already that there was likely to be a plea of guilty; 3) the delay in reaching the plea agreement did not lie at the foot of the defendant, as was conceded by Michael Johnson, the Chief of Prosecutions; 4) the fact that the Accused pleaded guilty when the deposition witnesses were here is not due to his fault or intention; he had no control over the timing of those depositions. Defence Closing Statement, T. 487.
[321] A Plea Bargain is the process when "a person […] confronted with a multitude of charges […] offers pleas to a certain number of those charges in spite of the fact that there is perfectly good evidence in respect of all of the charges, but in order to avoid a trial, the costs and difficulties of a trial, the Prosecution accept[s] that partial plea and […] a sentence agreed upon.", *Ibid.*, T. 487-488.
[322] *Ibid.*, T. 488.
[323] Defence Sentencing Brief, para. 3 (d), p. 8.
[324] See *supra* paras 38 and 43.
[325] Assuming the facts were not so horrific as to demand the maximum punishment. The sentence may be reduced as a result of a plea bargain, i.e. when the accused is convicted of a lesser charge than murder. Country Report Canada, pp. 4-5.
[326] The Procedure, which functionally resembles a guilty plea, is called a voluntary surrender and applies only for minor offenses. It means that a perpetrator after having committed an offense voluntarily tells the truth about his own offense

sentence;[327] in Poland, up to the level agreed between the parties, but applicable only for misdemeanors when the penalty does not exceed ten years of imprisonment;[328] in Russia, by one-third, but only for crimes for which the punishment does not exceed ten years of imprisonment;[329] in the United States, a decrease of the offense level by two levels for the acceptance of responsibility, and additionally by one level for timely provision of complete information to the government concerning the offender's involvement in the offense or timely notification to the authorities of the intention to enter a plea of guilty.[330] However, in the majority of the countries covered by the study a guilty plea does not affect the maximum statutory penalty and does not apply for serious cases, e.g. first degree murder.[331]

228. There are primarily pragmatic grounds for reducing the sentence if a guilty plea results from the willingness of an offender to co-operate in the administration of justice.[332] Additional justifications for a reduction are remorse, acknowledgment of responsibility, and sparing the victims from testifying and being cross-examined.[333] In considering the reduction of a sentence, the relevant factor is the stage of proceedings at which the offender pleads guilty[334] and the circumstances in which the plea is tendered[335].

229. Similar provisions on guilty pleas or plea bargaining exist in other countries examined, e.g., Argentina,[336] Brazil,[337] Chile,[338] and Italy.[339] However, these provisions are usually applicable for

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and therefore helps the judicial organs to find the truth about the offense. Prior to 1997 the punishment varied only within the originally regulated range of sentences for this offense, e.g. within the lowest third of that range. Country Report China, pp. 3-4.

[327] Country Report England, p. 4. In Australia, up to 35% in Western Australia and between 10-25% in New South Wales. Country Report Australia, p. 4.

[328] A plea bargain became available only under the new Polish Criminal Code. Country Report Poland, p. 4.

[329] Country Report Russia, p. 3.

[330] Sentencing Guidelines 1997 Federal Sentencing Guideline Manual, Chapter 3, Part E, p. 280; see also Country Report U.S.A.: The judge may impose a sentence more or less severe than the guideline range, i.e. "depart" from the guideline sentencing range. A departure is justified by existence of an aggravating or mitigating circumstance which is not adequately taken into consideration in the guidelines. p. 5.

[331] See also Country Report Australia, p. 6; Country Report Canada, p. 4; Country Report England, p. 9.

[332] Country Report Australia, p. 4.

[333] Country Report Canada, p. 5.

[334] Country Report Australia, p. 4; Country Report England, p. 4.

[335] Country Report England, p. 4.

[336] If there is an agreement between the prosecutor and the accused with regard to offences with a sentence inferior to six years and by which the suspect/accused recognizes the existence of the conduct and his/her participation in it, the sentence finally imposed by the Tribunal *must* not exceed the one demanded by the Prosecutor (and accepted by the accused). Country Report Argentina, p. 3.

[337] The procedure similar to plea bargain is called a criminal transaction, which was introduced in 1995. It is admitted, however, only in less serious offenses, in which the maximum possible imprisonment does not exceed two years. Country Report Brazil, p. 3.

[338] The newly introduced (on 12 October 2000) procedure of *procedimiento abreviado* (abbreviated trial) has a system with bargaining elements. The defendant agrees to have his case put on trial under the abbreviated procedure and accepts the facts as established in the indictment. In the event that his guilt is established through this procedure he receives a sentence fixed previously by the public prosecutor. Nevertheless this procedure is limited only to those cases

minor crimes and therefore cannot be taken into account in the present case. In Germany, a "consensual solution" (*Verständigung im Strafverfahren*) takes place only under the control of the Judge(s) in order to avoid any abuse or unsupported confession.[340]

230. In some countries under survey, the mere confession – as opposed to a guilty plea that enables the Trial Chamber immediately to enter a finding of guilt and to instruct the Registrar to set a date for the sentencing hearing without any further trial proceedings – is regarded as a mitigating factor. In Belgium, a voluntary confession, if accepted by the court, leads to a mandatory reduction of the sentencing range.[341] In Chile, a confession is a mitigating factor if the responsibility of the accused could only be established through his spontaneous confession *or* because he collaborated in the interests of justice.[342] In Finland, any effort of the accused to cooperate with the judicial organs in order to help solving the crime itself and/or its consequences might be taken into account as a mitigating factor.[343] In Germany, a credible confession, even if not made out of genuine feelings of remorse and guilt, but supplied for tactical reasons at trial, must be considered as mitigating in every case, although not necessarily "significantly mitigating".[344] In Spain, a confession by the perpetrator prior to knowing that legal proceedings are being taken against him, or attempts at restitution before or during the procedure are regarded as mitigating factors.[345] In Sweden, a confession after apprehension can only attract mitigation if there is another factor requiring a milder sentence.[346] In Greece, a confession as such is not recognized as a mitigating factor, although it may be indirectly taken into account in the court's assessment of the Accused's showing of remorse and willingness for reparation.[347]

(ii) Jurisprudence of the International Tribunals

where the previously fixed final sentence is below 5 years; therefore this procedure only applies to cases where the minimum sentencing range is lower than 5 years. Country Report Chile, p. 4.

[339] The procedure of so-called "*patteggiamento*" involves a defendant and a public prosecutor applying to the judge for a sentence which they agree upon amongst themselves. A sentence reduced by up to one-third, may be imposed if this sentence does not exceed five year's imprisonment. Country Report Italy, p. 5; Cf. Italian Code of Penal Procedure, Article 444 as amended by the Law of 12 June 2003, No 134.

[340] BGH, BGHSt 43, p. 195 (198).

[341] Life imprisonment will be commuted to fixed-term imprisonment. Country Report Belgium, pp. 3-4.

[342] Since 2002 the substantive collaboration of the accused to the clarification of the facts is now a specific mitigating factor. Country Report Chile, p. 3.

[343] Country Report Finland, p. 3.

[344] Mitigation for confession is not applied if a mandatory sentence of life imprisonment is provided. Country Report Germany, pp. 2-3 and 5.

[345] Country Report Spain, p. 3.

[346] The fact of a voluntary surrender may lead to a less severe sentence than the sentence set out for that offence. Country Report Sweden, p. 5.

[347] Country Report Greece, pp. 6-7.

231. In the jurisprudence of the Tribunal and the ICTR, several reasons have been given for the mitigating effect of a guilty plea, such as the showing of remorse[348] and repentance,[349] the contribution to reconciliation[350] and establishing the truth,[351] the encouragement of other perpetrators to come forth,[352] and the fact that witnesses are relieved from giving evidence in court.[353] Furthermore, Trial Chambers took into account that a guilty plea saves the Tribunal the "effort of a lengthy investigation and trial",[354] and special importance was attached to the timing of the guilty plea.[355]

(c) Conclusion

232. The Trial Chamber accepts that a guilty plea has to be taken into account for mitigation when considering an appropriate sentence since it reflects the accused's acceptance of responsibility for his crimes. In most of the national jurisdictions outlined above, a guilty plea or confession mitigates the sentence. However, the mitigating effect is limited to less serious crimes in jurisdictions where the courts are obliged to apply a maximum statutory penalty for serious crimes.

233. The Trial Chamber finds that, in contrast to national legal systems where the reasons for mitigating a punishment on the basis of a guilty plea are of a more pragmatic nature,[356] the rationale behind the mitigating effect of a guilty plea in this Tribunal is much broader, including the fact that the accused contributes to establishing the truth about the conflict in the former Yugoslavia and contributes to reconciliation in the affected communities. The Trial Chamber recalls that the Tribunal has the task to contribute to the "restoration and maintenance of peace" and to ensure that serious violations of international humanitarian law are "halted and effectively redressed".[357]

234. Having been arrested in 2000, Dragan Nikoli} pleaded guilty only after three years of detention and just prior to the hearing of the testimonies by six deposition witnesses, some of whom were very old and in poor health. However, the Trial Chamber holds that an accused is under no obligation to plead guilty and finds that the "lateness" of Dragan Nikolić's guilty plea can not be

[348] *Plavšić* Sentencing Judgement, para. 70.
[349] *Ruggiu* Judgement and Sentence, para. 55. See also *Jelisić* Trial Judgement, para. 127: "[A]lthough the Trial Chamber considered the accused's guilty plea out of principle, it must point out that the accused demonstrated no remorse before it for the crimes he committed."
[350] *Plavšić* Sentencing Judgement, para. 70; *Obrenović* Sentencing Judgement, para. 111.
[351] *Momir Nikolić* Sentencing Judgement, para. 149.
[352] *Erdemović* 1998 Sentencing Judgement, para. 16.
[353] *Momir Nikolić* Sentencing Judgement, para. 150; *Todorović* Sentencing Judgement, para. 80.
[354] *Erdemović* 1998 Sentencing Judgement, para. 16; *Todorović* Sentencing Judgement, para. 81.
[355] *Sikirica et al*. Sentencing Judgement, para. 150. In the *Simić* Sentencing Judgement, "some credit" was given for the guilty plea despite its lateness, paras 87.
[356] *See infra* subsection VIII. B. 1. (b) (i)
[357] Security Council Resolution 827 (1993), S/3217, 25 May 1993.

considered to be to his detriment. In contrast, his "late" change to a plea guilty, i.e. 11 years after commission of the crimes, could be regarded as a consequence of a thorough analysis and reflection by the Accused of his criminal conduct, which reveals his genuine awareness of his guilt and a desire to assume responsibility for his acts. The Accused confessed to Dr. Grosselfinger and to his close relatives that after pleading guilty he felt relieved, and that a burden he had been carrying was gone.[358] Moreover, by pleading guilty prior to the commencement of the trial the Accused relieved the victims of the need to open old wounds.[359]

235. Dragan Nikoli} has pleaded guilty to the entire indictment. The importance of this fact is strengthened by the consideration that this is the first case at this Tribunal in which the events in Su{ica camp have been recounted. In this respect the Trial Chamber recalls what Dragan Nikoli} declared in his final statement:

> […] I am fully aware of all the things with which I am charged. I am aware of the acts that I have committed, and I confess to them count by count as they were read out to me here. I pleaded guilty and I assume full responsibility for the acts that I have committed.
>
> […]
>
> […] I genuinely feel shame and disgrace. […] The question arises why did I do all that? I had enough time to think about it, 11 years. But it is still hard to find an answer to that question. I can tell you with complete sincerity I never felt sorry for myself because I was not too young to understand at the time […].[360]

236. This is also pointed out by Dr. Grosselfinger who states that Dragan Nikoli} "did not attempt to avoid responsibility or taking responsibility",[361] that he really could not explain to himself why he did it, and that he agreed that "he had done it, but that it represented a dark side of his character which he did not know previously had existed".[362] Moreover, he accepted responsibility entirely and in "a faithful presentation".[363] She thinks that Dragan Nikoli} was open and truthful with her.[364]

237. Therefore, the Trial Chamber recognises the importance of Dragan Nikolić's guilty plea as an expression of his honesty and readiness to take responsibility, and coupled with his expression of remorse and his co-operation with the Prosecution, as a contribution to reconciliation in Vlasenica

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[358] Dr. Grosselfinger, T. 345, Jovo Deli}, T. 309 and Ljiljana Rikanovi}, T. 325.
[359] The Trial Chamber notes that three Prosecution victim witnesses who came to testify during the sentencing hearing were at a high level of emotional discharge and suffering.
[360] Statement by the Accused, T. 500.
[361] Dr. Grosselfinger, T. 341.
[362] *Ibid.*, T. 342.
[363] *Ibid.*, T. 439; Grosselfinger Report reads: "He provided further detail of his knowledge of the individuals, the nature of their acquaintanceship and any possible previous animosity between them. There were virtually no antecedent conflicts.", Executive Summary, p. A.

municipality. As remorse and the contribution to reconciliation are two specifically important mitigating factors, the Trial Chamber now turns to these two factors in greater detail.

2. Remorse

(a) Submissions of the Parties

238. The Prosecution's submission is that "genuine remorse may be a mitigating factor".[365] The Prosecution notes that "Dragan Nikoli} does express remorse in the court-ordered criminologist's report"[366] and that he expresses his remorse, his guilty feeling, his desire to tender an apology in the interviews with Dr. Grosselfinger.[367]

239. The Defence submits "[r]emorse is a mitigating factor, if the Trial Chamber is satisfied that the expressed remorse is sincere," which is not doubted in the present case.[368] According to the Defence, "the element of remorse is well founded and genuine."[369]

240. The Defence further argues that Dragan Nikoli} expressed remorse not only "in the narrow sense" by admitting his personal guilt, but that he attempts to give effect to the process of co-operative reconciliation, which is an essential prerequisite for the fuller remorse.[370] These two factors underscore the view formed by Dr. Grosselfinger that Dragan Nikoli} "was being honest and straightforward".[371] The Defence relies upon her opinion as highly qualified, mature and experienced professional.[372]

(b) Discussion

241. The Trial Chamber accepts that remorse was shown during the sentencing hearing. The Trial Chamber recalls, in particular, the following statement by the Accused:

> I repent sincerely […]. I genuinely repent. I am not saying this *pro forma*, this repentance and contrition comes from deep inside me, because I knew most of those people from the earliest stage. […] I want to avail myself of this opportunity to say to all of those whom I hurt, either directly or indirectly, that I apologise to everyone who spent any time in Sušica, be it a month or several months. I would like, now that I have this opportunity to speak in public, to make even those victims feel the sincerity of my apology and my repentance, even those who were never at

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364 Dr. Grosselfinger, T. 439.
365 Prosecution Sentencing Brief, para. 62.
366 *Ibid*.
367 Prosecution Closing Statement, T. 473.
368 Defence Sentencing Brief, para. 5 (v), p. 15.
369 *Ibid*., para. 5 (vi), p. 16.
370 Defence Closing Statement, T. 486.
371 *Ibid*., T. 490.
372 *Ibid*., T. 489-490.

> the Sušica camp and who are now scattered all over the word as a result of that conflict and the expulsions which made it impossible for them to return home.[373]

242. The Trial Chamber accepts his expression of remorse as one mitigating factor among others.

3. Reconciliation

(a) Submissions of the Parties

243. The Prosecution submits that reconciliation is "a major factor" and that it was taken into account when considering the sentencing principles and recommendation.[374]

244. The Defence states that "[v]ictims may get some satisfaction out of seeing people punished, but it does not go very much further than that"[375] hereby arguing that a harsher punishment does not necessarily contribute to more reconciliation. The Defence points out that the Accused has contributed to reconciliation primarily through his co-operation with the Prosecution.[376]

(b) Discussion

245. The Trial Chamber partly concurs with the submission of the Defence that too harsh or too lenient a sentence would have a counter-productive effect on the communities concerned. No doubt, the attempt to achieve reconciliation can only be fostered if the punishment, as it has always to be, is proportionate to the gravity of the crime. The limited contribution of the punishment to reconciliation, however, was highlighted by victims and their relatives who were heard during the sentencing hearing.[377]

246. The Trial Chamber nevertheless accepts that by admitting guilt and responsibility the Accused contributes to reconciliation. The importance of the acceptance of responsibility in the process of reconciliation was expressed by Witness SU-230, who stated:

> I would like to say to that in Vlasenica are still another 50 Dragan Nikoli} that have to admit their guilt of what happened there. They have to surrender and take responsibility of what they did to us. A sincere reconciliation is not possible as long as they are pretending that nothing happened. Dragan Nikoli} know[s] personally every single one of those who committed the crimes.[378]

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[373] Statement by the Accused, T. 501.
[374] Prosecution Closing Statement, T. 480.
[375] Defence Closing Statement, T. 486.
[376] *Ibid*., T. 484.
[377] "There is no penalty, no punishment bad enough to make up for the death of a single child, for the rape of a single girl, let alone all the things that actually happened." Witness SU-032, T. 285.
[378] Exh. P2, Witness SU-230, para. 17.

247. The Accused was asked by Habiba Had`i} whether or not he could provide information on the whereabouts of both her sons whom she last saw at Sušica camp and who have been missing since then. The Accused satisfied her request after consultation with counsel by answering to the best of his knowledge on that issue[379] and additionally stated:

> Even earlier I expressed my desire to meet certain persons, including victims, and people like Mrs. Had`i} in order to provide them with some of the information that I have and tell them what I know. Certain things I only heard about, and other things I know for a fact. […] I wanted to tell this lady even before, but the circumstances were not favourable. I wanted to speak to her even before this, because I knew that she was anxious to know the fate of her sons, as some other people were to find out about their relatives.[380]

248. The Trial Chamber considers this fact as an attempt to achieve reconciliation by the Accused and his readiness and willingness to contribute to the truth-finding mission of the Tribunal.

249. Moreover, in his final statement the Accused expressed the hope that all three parties to the conflict would be encouraged by his confession to assume their part of the responsibility for the terrible crimes because "that […] is the only thing that would make it possible for people to become close again […] in those parts. It should be clear to all of us that we are after all an important factor in this reconciliation and peaceful coexistence."[381]

250. Finally, the Accused concluded:

> I hope I will get a chance to redeem myself and to alleviate their suffering. […] [M]ere words are not enough. Acts are needed, and I do intend to act for reconciliation for the return of those people who were displaced and expelled. That is my deepest wish.[382]

251. This was in fact confirmed by Dr. Grosselfinger, who stated that the Accused acknowledged the extreme gravity of the crimes and expressed concern that his attempts to serve the victims would be too late and too little and might be seen as disingenuous, self-seeking and self-serving.[383] Dr. Grosselfinger reported that he also expressed his willingness to meet and talk to the victims "at a time when it would not advantage him in any legal way",[384] and he offered to contact persons who were friendly towards him and elicit their mediation in approaching others in order to "repair the social fabric".[385]

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[379] According to the Accused on 30 September 1992 a group of about 40 people was taken to Debelo Brdo and was liquidated there. Among this group were two sons of Habiba Had`i}. Sentencing Hearing, T. 257; see *supra* para. 105.
[380] *Ibid.*, T. 256-257.
[381] Statement by the Accused, T. 502.
[382] *Ibid.*
[383] Dr. Grosselfinger, T. 342-343.
[384] *Ibid.*, T. 345.
[385] *Ibid.*, T. 440.

252. The Trial Chamber opines that these statements, confirmed by Dr. Grosselfinger, are a strong recognition by the Accused of the importance of his admission of guilt, and that they serve well as another example of his willingness to contribute to the peace-building process and reconciliation in his region. Therefore, the Trial Chamber takes this into account for mitigation.

4. Substantial Co-operation with the Prosecution

(a) Submissions of the Parties

253. The Prosecution submits that "substantial co-operation with the Prosecutor before or after conviction is a mitigating factor."[386] By referring to the test established in the *Blaški}* Trial Judgement that the substantial co-operation "depends on the extent and quality of the information he provides", the Prosecutor submits that she "recognises that after, not before his guilty plea, Dragan Nikoli} has given substantial co-operation."[387] The evaluation by the Prosecution of the "extent and quality of the information" provided by the Accused was summarised as follows:

> Although the Accused was not questioned at any length with regards to his criminality as charged in the indictment, when discussed, he did not resile from his previously admitted guilt. The Accused provided detailed and extensive information about crimes and perpetrators in his municipality, as well as their relationship to leadership figures and objectives. Such information is not typically accessible except through a participant in the process and the Accused's testimony is expected to be of unique and considerable value in future cases. The Prosecution also notes that the Accused provided the information in a forthcoming and co-operative manner. Based on the quality and quantity of the information the Accused has provided, the Office of the Prosecutor is of the view that his co-operation has and will be substantial.[388]

254. The Prosecution finally submits that this "very significant factor" was one of the conditions "attached to the recommendation that was made by the Prosecution."[389]

255. The Prosecution states that the co-operation of the Accused with the Prosecution started after the plea agreement, whereas before there was no "co-operation" as such, but rather "a cordial relationship", without antagonism or contention.[390]

256. The Defence submits that the co-operation is "extensive, genuine and on going" and that "substantial co-operation with the Prosecutor will mitigate penalty and will do so irrespective of the motives behind the co-operation".[391]

257. The Defence submits that:

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[386] Prosecution Sentencing Brief, para. 61.
[387] *Ibid.*
[388] Exh. P7.
[389] Prosecution Closing Statement, T. 475.
[390] *Ibid.*, T. 476.
[391] Defence Sentencing Brief, para. 5 (vi), p. 16.

> The defendant has at all times in his dealings with the OTP through his representatives always done his best to be reasonable and cooperative. That included giving lengthy interviews under caution in 2001/2 when he was not obliged so to do and could not have been validly criticized for failing to do, the indictment already having been drafted and he having already been arraigned.[392]

(b) Discussion

258. The Trial Chamber requested the Prosecution to provide the documents that would enable the Trial Chamber to review them *in camera* in order to assess if the Accused's co-operation with the Prosecution could be regarded as being substantial.[393] The Prosecution provided the transcripts of two days of interviews held with the Accused on 25 and 26 September 2003, the contents of which "would illustrate the type of co-operation that the Accused offered". In all, as was stated by the Prosecution, ten days of interviews were conducted.[394]

259. After having reviewed the documents *in camera*, the Trial Chamber is not able to judge whether or not the co-operation provided by the Accused was substantial. The transcripts of interviews with the Accused provided by the Prosecution, taken out of the context of the entire testimony, present only a part of his testimony and are therefore difficult to assess, especially in their ambiguity. The Trial Chamber is not seized with the question whether or not the accused was involved in other crimes not mentioned in the Indictment, but forming part of the information provided to the Prosecution. Applying, *inter alia*,[395] the principle *in dubio pro reo*, this Trial Chamber does not regard this information, obtained *in camera* only, to the detriment of the Accused. However, even this small portion of testimony shows that information provided by Dragan Nikoli} will assist the Prosecutor of the ICTY and prosecutors of the yet to be established war crimes chambers in his home country. Furthermore, the Trial Chamber relies upon the Accused's continued co-operation with the Prosecution of the ICTY and of the home country. The latter fact no doubt has to have a substantial impact on the question of early release.

260. Therefore, the Trial Chamber accepts that the Prosecution is satisfied that the Accused's co-operation until now was substantial and considers this factor as being of some importance for mitigating the sentence, especially since the information about Su{ica camp and Vlasenica municipality was heard for the first time before this Tribunal. Thus, the Accused has contributed and will contribute to the fact-finding mission of the Tribunal and the to be established war crimes chambers in his home country.

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392 *Ibid*., para. 7 (ii), p. 23.
393 Sentencing Hearing, T. 453-454.
394 *Ibid*., T. 481. The Defence had no objections.
395 See also para. 105.

5. Joint Submission of the Parties on the Personality and Character of Dragan Nikoli}

261. The Prosecution submits that "Article 24(2) of the Statute allows the personal status of the accused to be taken into account in determining the sentence".[396] The Prosecution submits that "the sanction must fit the crime's perpetrator and not merely the crime itself."[397]

262. The Prosecution is not contesting that "before the war, Dragan Nikoli} was a gainfully employed resident of Vlasenica who was well-liked by many of the victims" and "participated in no illegal conduct in Vlasenica prior to his position at the camp."[398] However, the Prosecution submits that the previous character of Dragan Nikoli} and the evidence presented thereof, i.e. that the Accused "had no propensity to violence previously", is "of not great value".[399]

263. The Defence submits that before the war Dragan Nikoli} was "an ordinary man leading an ordinary life", with no criminal record, well-liked, a friendly person with friends from both sides of the community.[400] "[H]e found himself effectively in the wrong place at the wrong time, and he can now not understand what it was that caused him to commit those horrid acts."[401] The Defence submits that now he has "come back to the man he was before".[402]

264. The Trial Chamber notes the testimony of Defence witnesses who testified that before the war Dragan Nikoli} was a person "not inclined to violence" and causing no incidents. He also associated with persons of all nationalities and religious beliefs.[403] He was a responsible and conscientious worker.[404] As regards his post criminal behaviour, nothing negative has been noted. He was of great help to his mother and provided her with financial support.[405]

265. The Accused has no previous criminal record,[406] a factor to be taken into account for mitigation.

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[396] Prosecution Sentencing Brief, para. 64.
[397] *Ibid*.
[398] *Ibid.*, para. 63.
[399] Prosecution Closing Statement, T. 473.
[400] Defence Closing Statement, T. 484.
[401] *Ibid*., T. 485.
[402] *Ibid*., T. 492.
[403] Exh. D2, para. 3; Exh. D3, p. 1; Jovo Deli}, T. 302.
[404] Exh. D3, p. 1.
[405] The mother of the Accused, Milica Nikoli}, writes in her statement: "We shared the same household where he was of a great help to me. He also helped me financially […]. […] I am all alone now and my greatest wish would be if my Dragan were released and came home. I only wish to see him again and then to die in peace. I am living for that day and what still keeps me up in life is the belief in and the hope for justice and truth in the proving of innocence of my son.", Exh. D1, pp.1-2.
[406] Sentencing Hearing, T. 335.

266. Although the behaviour of the Accused in the camp was in general extremely cruel, there were some, however limited, positive aspects in his behaviour, which the Trial Chamber will not hesitate to mention. Habiba Had`i} testified about some positive acts by the Accused in Su{ica camp. On one occasion she found a pillow that she wanted to deliver to a baby in the camp. Car, a camp guard, stopped her and ordered her to go to his car. She thinks that Car wanted to take her to his car and kill her. Dragan interfered: *"What do you mean? A baby needs a blanket and a pillow? Well, let her take it."* It is her view that the Accused saved her life on this occasion. He also allowed the baby to have that pillow.[407] Additionally, the Trial Chamber heard her testimony that the Accused would often get milk from a neighbour and distribute it to the children in the camp.[408] The Accused would also permit the detainees to receive food that was sometimes brought to the camp. Veljko Basi} would prevent it, but as soon as he was gone Dragan Nikoli} would order that the food be given to those for whom it had been brought. Dragan Nikolić would say: *"Wait for him to leave and then take this food."*[409]

267. The Trial Chamber will consider these positive sides of the Accused's behaviour when finally determining the sentence.

268. The Trial Chamber will also take into account the behaviour and demeanour of Dragan Nikoli} at the UNDU, which was described in the Grosselfinger Report:

> McFadden [Head of the UNDU] indicated Nikoli} had not been a problem detainee. His physical and mental health was relatively good and he had not distinguished himself in any negative way.[410]

6. Length of Proceedings / Time Between Crime and Judgement

269. The problem arising from lengthy court proceedings and the long period of time between the criminal conduct and its subsequent trial, has been discussed by the European Court of Human Rights, as well as in decisions of several national courts.[411] Common to all leading decisions is that any disproportionate length of procedures may be considered as a mitigating factor in sentencing.

270. However, in most of the cases it was held that, in light of Article 6 (1), sentence 1 of the [European] Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "ECHR"), the "reasonable time" requirement generally comprises solely the time

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[407] Witness Habiba Had`i}, T. 251-252.
[408] *Ibid*., T. 253.
[409] *Ibid*., T. 232-233 and T. 250.
[410] Grosselfinger Report, p. 9.
[411] ECHR in *Frydlender v. France*, Application No. 30979/96, § 43, ECHR 2000-VII, *Vass v. Hungary*, Application No. 57966/00 of 25 November 2003; U.S. Supreme Court in *Baker v. Wingo*, 407 U.S. 514 (1972); BGH, NStZ, 1986, pp. 217-218.

frame starting from the indictment and/or arrest of the accused, and ending with a legally binding, final decision of the court.[412] Moreover, it has been held that the violation of the accused's basic right to a fair and speedy trial should only be remedied and compensated if the perpetrator is not himself responsible for the delay of the proceedings.[413]

271. In the present case the Accused was already well informed about the indictment against him at the end of 1994 or beginning of 1995, of course not having any obligation to surrender voluntarily to this Tribunal.[414] The Accused was apprehended by SFOR only in the year 2000.[415] Taking into account, *inter alia*, the lengthy period of time necessary for preparing and deciding his motions on jurisdiction,[416] the time spent in the United Nations Detention Unit cannot be regarded as disproportional.

272. In a case of murder recently decided by the German Federal Supreme Court, reference was made to the length of the time span between the criminal conduct and the subsequent judgement as a possible mitigating factor. However, it was emphasised by that court that due to the seriousness of the crimes committed during World War II in 1943-44 by a former camp commander, now 90 years old, extraordinary circumstances mitigating the accused's guilt were not applicable.[417]

273. Therefore, the Trial Chamber concludes that neither the length of time between the criminal conduct and the judgement nor the time between arrest and judgement can be considered as a mitigating factor.

7. General Conclusion

274. Considering all the above-mentioned mitigating circumstances together and giving particular importance to such factors as the guilty plea, expression of remorse, reconciliation and the disclosing of additional information to the Prosecution, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted.

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[412] U.S. Supreme Court in *Doggett v. United States* (90-0857), 505 U.S. 647 (1992); ECHR in *Ferrantelli and Santangelo v. Italy*, Application No. 19874/92 of 7 August 1996; BVerfG, BVerfGE 63, 45 (69); BGH, StV, 1992, p. 452.
[413] BVerfG, 2 BvR 153/03, Decision of 25 July 2003, para. 33 in: http://www.bverfg.de
[414] Jovo Deli}, T. 305-306.
[415] See *supra* para. 10.
[416] See *supra* subsection III. A. 2.
[417] BGH, 1 StR 538/01, Judgement of 21 February 2002, II, 4 b, p. 13 in: http://www.bundesgerichtshof.de

IX. DETERMINATION OF SENTENCE

A. Submissions of the Parties

275. The Prosecution had recommended a term of imprisonment of fifteen years,[418] with the caveat that the recommendation was contingent on the Accused's "full and substantial co-operation with the Prosecutor's investigations and prosecutions."[419] The Prosecution later has acknowledged that the Accused has indeed co-operated in a substantial manner.[420] Additionally, the Prosecution took into account such factors as reconciliation and individual rehabilitation when recommending the sentence.[421] The Prosecution maintained its prior recommendation during its closing arguments by stating:

> [W]e have recommended a term of 15 years that should be imposed on the Accused. [...] This is what is in the Plea Agreement and […] we stand by that recommendation.[422]

276. The Defence submits that "the Prosecutor has advocated a sentence to reflect the pleas and anticipated co-operation of the defendant". Furthermore, the Defence argues that this sentence is "not the product of an arbitrary or immature consideration" but one that has taken into account:

a. The range of sentences passed at the ICTY following guilty pleas;

b. The expected co-operation of the defendant;

c. The essential desirability to encourage guilty pleas for jurisprudential, rehabilitative, resource and financial constraint purposes, particularly at this temporal point in the Tribunal's mandate.[423]

277. Furthermore, the Defence argues that,

> [I]t is a recommendation that emanates from the consideration of the Prosecutor personally having made all necessary consultation with her staff. The recommendation is a consensual, sober and mature reflection of the desires of the Prosecutor being aware of all her rights, obligations and duties both to the Tribunal and to the international community at large and the former Yugoslavia in particular. In those regards it is submitted that it is a powerful indicator of the sentence that is deemed just by those responsible for executing the prosecutorial mandate of the Security Council of the United Nations in establishing the ICTY."[424]

278. Finally, in its Addendum to the Defence Sentencing Brief, Defence it reiterates this position and adds:

[418] Prosecution Sentencing Brief, para. 75; Annex A – Plea Agreement, para. 12 (1).
[419] Annex A – Plea Agreement, para. 13.
[420] See *supra* subsection VIII. B. 4.
[421] Prosecution Closing Statement, T. 480.
[422] *Ibid*., T. 476.

> Allowing for *lex mitior* and proper and fair reductions for comprehensive guilty pleas, unique cooperation, remorse that goes to the heart of the requirements of reconciliation and the other matters advocated it is submitted that the sentence of 15 years posited by the Prosecutor is a proper sentence which would fall in the midrange of some sentencing brackets in some national jurisdictions according to the report and is consistent with sentences passed in other cases at the ICTY.[425]

B. Discussion and Conclusion

279. The Trial Chamber is not bound by a recommended sentence specified in a plea agreement. The Accused was defended by a highly professional Defence Counsel and was explicitly cautioned by the Trial Chamber in open court that the Trial Chamber is not bound by the recommendation.[426] The Accused understood the terms of the plea agreement and fully recognised his understanding and acceptance of the rule that the Trial Chamber is not bound by this recommendation and that the sentence has to be determined on the basis of the gravity of the crime and all relevant aggravating and mitigating factors.[427]

280. It has to be recalled that in absence of the mitigating factors discussed above the only possible sanction would have been imprisonment for a term up to and including the remainder of the Accused's life.

281. Balancing the gravity of the crimes and aggravating factors against mitigating factors and taking into account the aforementioned goals of sentencing, the Trial Chamber is not able to follow the recommendation given by the Prosecution. The brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that recommended unjust. The Trial Chamber believes that it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties.

282. The Trial Chamber is aware that from a human rights perspective each accused, having served the necessary part of his sentence, ought to have a chance to be reintegrated into society in the event that he no longer poses any danger to society and there is no risk that he will repeat his crimes.[428] However, before release and reintegration, at least the term of imprisonment

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[423] Defence Sentencing Brief, para. 7 (iv), p. 24.
[424] *Ibid*., para. 7 (v), p. 25.
[425] Defence Addendum to the Defence Sentencing Brief, 19 November 2003, para. 5.
[426] Recalling Rule 62 *ter* (B) that reads as follows: "The Trial Chamber shall not be bound by any agreement specified in paragraph (A)". Plea Hearing, T. 175.
[427] *Ibid.*
[428] BVerfGE 45, 187 (245).

recommended by the Prosecutor has in fact to be served. In conclusion, the Trial Chamber finds that the sentence declared in the following Disposition is adequate and proportional.

C. Credit for Time Served

283. Pursuant to Rule 101(C) of the Rules, "credit shall be given to the convicted person for the period […] during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

284. The Trial Chamber regards 20 April 2000, the date of the factual deprivation of liberty of the Accused, as the decisive date and recognizes that the Accused is entitled to credit for all the days since that day.

X. DISPOSITION

We, Judges 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, established by United Nations Security Council Resolution 827 of 25 May 1993, elected by the General Assembly and mandated to hear this case against Dragan Nikoli} and find the appropriate sentence,

HAVING HEARD the guilty plea of Dragan Nikoli}, and

HAVING ENTERED A FINDING OF GUILT for the crimes contained in Counts 1 through 4 of the Third Amended Indictment,

HEREBY ENTER A SINGLE CONVICTION against Dragan Nikoli} for **Count 1: Persecutions**, a Crime against Humanity,

incorporating

Count 2: Murder, a Crime against Humanity,

Count 3: Rape, a Crime against Humanity,

Count 4: Torture, a Crime against Humanity,

SENTENCE Dragan Nikoli} to 23 years of imprisonment and

STATE that Dragan Nikoli} is entitled to credit for 3 years, 7 months and 29 days, as of the date of this Sentencing Judgement, calculated from the date of his deprivation of liberty, i.e. the twentieth of April 2000, together with such additional time as he may serve pending the determination of any appeal.

Pursuant to Rule 103 (C) of the Rules, Dragan Nikoli} shall remain in the custody of the 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.

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Judge Wolfgang Schomburg, Presiding

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Judge Carmel A. Agius

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Judge Florence Ndepele Mwachande Mumba

Dated this eighteenth day of December 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

XI. ANNEXES

A. List of Cited Court Decisions

1. ICTY

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

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

BANOVI]
Prosecutor v. Predrag Banovi}, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banovi}* Sentencing Judgement").

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

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

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

ERDEMOVI]
Prosecutor v. Dražen Erdemovi}, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemovi}* 1996 Sentencing Judgement").

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

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

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

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

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Trial Judgement").

JELISIĆ

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

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

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement").

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement").

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

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

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement").

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

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

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

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka et al.* Trial Judgement").

NALETILI] AND MARTINOVI]
Prosecutor v. Mladen Naletili} and Vinko Martinovi}, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletili} and Martinovi}* Trial Judgement")

M. NIKOLIĆ
Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Momir Nikolić* Sentencing Judgement").

OBRENOVIĆ
Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement").

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

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

B. SIMIĆ, M. TADI], S. ZARI]
Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari}, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simi} et al.* Trial Judgement").

M. SIMIĆ
Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002 ("*Simić* Sentencing Judgement").

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement").

D. TADIĆ
Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement").

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

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2. ICTR

AKAYESU
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Prosecutor v. Omar Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 ("*Serushago* Appeal Judgement").

3. Other Decisions

(a) ECHR

FRYDLENDER v. FRANCE
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C. List of Abbreviations

According to Rule 2 (B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

Accused	Dragan Nikolić
ACHR	American Convention of Human Rights of 22 November 1969
a.k.a.	Also known as
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Federal Supreme Court in criminal matters) <accessible through website: http://www.bundesgerichtshof.de>
BiH	Bosnia and Herzegovina (consisting of two entities: the Republika Srpska and the Federation of Bosnia and Herzegovina, and the Br~ko District)
Br~ko District	District of the state of BiH
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Bundesverfassungsgerichtsentscheidung (Decisions of the German Federal Constitutional Court) <accessible through website: http://www.bverfg.de>

cf.	[Latin: *confer*] (Compare)
Criminal Code of BiH of 1977	Criminal Code of the Socialist Republic of Bosnia and Herzegovina adopted on 10 June 1977
D.	Defence Exhibit
Defence	The Accused, and/or the Accused's counsel
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention of Human Rights)
Exh.	Exhibit
FedBiH Criminal Code of 2003	Criminal Code of the Federation of Bosnia and Herzegovina adopted on 1 August 2003
Federal Criminal Code of 1976/77	Criminal Code of the Socialist Federal Republic of Yugoslavia adopted on 28 of September 1976 and entered into force on 1 July 1977
Federation of Bosnia and Herzegovina	Entity of BiH
FRY	Federal Republic of Yugoslavia (*now*: Serbia and Montenegro)
Grosselfinger Report	Expert report on the Accused's socialisation provided by Dr. Nancy Grosselfinger, filed on 20 October 2003.
ICCPR	International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966. Entry into force on 23 March 1976.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTR Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indictment	Third Amended Indictment of 31 October 2003 in this case.
inter alia	Among other things
J.	Trial Chamber Exhibit
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Max Planck Institute	"Max-Planck-Institut für ausländisches und internationales Strafrecht", Günterstalstraße 73, D-79100 Freiburg i. Br., Germany, <www.iuscrim.mpg.de>
NStZ	Neue Zeitschrift für Strafrecht
OHR	Office of the High Representative (BiH)
OHR Criminal Code of 2003	The Criminal Code of Bosnia and Herzegovina enacted by the OHR on 1 March 2003.
P.	Prosecution Exhibit

p.	Page
pp.	Pages
para.	Paragraph
paras	Paragraphs
Plea Agreement	Joint Plea Agreement Submission, 2 September 2003, *Prosecutor v. Nikoli},* Case No. IT-94-2-PT
Plea Hearing	Status Conference held on 4 September 2003 at which the Accused pleaded guilty
Principle of *lex mitior*	Principle according to which an accused has the right to benefit from the most lenient penalty in cases where the law has changed between the time of the criminal conduct and the date of sentencing.
Prof.	Full Professor
Prosecution	Office of the Prosecutor
Republika Srpska	Entity of BiH
RS Criminal Code of 2003	Criminal Code of Republika Srpska adopted on 1 August 2003
Rules	Rules of Procedure and Evidence of the ICTY
Sentencing Hearing	Hearing held from 4 to 7 November 2003 to assist the Trial Chamber in determining an appropriate sentence.
Sentencing Report	"The Punishment of Serious Crimes: a comparative analysis of sentencing law and practice" provided by Prof. Dr. Ulrich Sieber from the Max Planck Institute, filed on 12 November 2003, in its final version including Country Reports (the latter on CD-Rom).
SFOR	Multinational Stabilisation Force (BiH)
SFRY	*Former*: Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
StV	Der Strafverteidiger
T.	Transcript page from hearings. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Trial Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In doubt the video-tape of a hearing is to be revisited.
Tribunal	See: ICTY
UN	United Nations
UNDU	United Nations Detention Unit for persons awaiting trial or appeal before the ICTY

Non-authoritative SUMMARIES in

- English
- French
- B/C/S

1. The following is the summary of the Trial Chamber's Judgement, which will be made available in English, French and B/C/S at the end of this session. The only valid version of this summary is the one that will be read out right now. This summary, however, forms no part of the Judgement. The only authoritative account of the Trial Chamber's findings and of its reasons for those findings is to be found in the written Judgement, copies of which will also be made available to the Parties and the public immediately following the hearing.

2. The Accused, Dragan Nikoli}, also known as "Jenki", a 46 year-old Bosnian Serb, was the first person indicted by this Tribunal on 4 November 1994. A First Amended Indictment was confirmed on 12 February 1999 and contained 80 counts of Crimes against Humanity, Grave Breaches of the Geneva Conventions, and Violations of the Laws or Customs of War. This case deals with his individual responsibility for particularly brutal crimes committed in the Sušica detention camp near the town of Vlasenica in the Municipality of the same name. Dragan Nikoli} was a commander in this camp, established by Serb forces in June 1992.

3. Already on 4 November 1994, arrest warrants for Dragan Nikoli} were issued. Following the failure to execute the arrest warrants, proceedings pursuant to Rule 61 of the Rules were initiated on 16 May 1995. On 20 October 1995, the Trial Chamber issued its decision determining that there were reasonable grounds for believing that Dragan Nikoli} had committed all the crimes in the indictment. The Trial Chamber stated that the failure to effect service of the indictment and to execute the arrest warrant was due to the failure or refusal of the then Bosnian Serb administration in Pale to co-operate.

4. The Accused was finally apprehended on or about 20 April 2000 by SFOR in Bosnia and Herzegovina and immediately transferred to the Tribunal on 21 April 2000.

5. Dragan Nikoli} pleaded guilty on 4 September 2003 to the Third Amended Indictment which charged him with, *inter alia*, individual criminal responsibility for committing Murder (Count 2), aiding and abetting Rape (Count 3) and committing Torture (Count 4) as crimes against humanity. The criminal conduct underlying these charges also forms the basis, in part, for the final charge of Persecutions as a crime against humanity in Count 1. It has to be recalled that at the time of the Accused's guilty plea the commencement of his trial was already scheduled and the first witnesses had arrived in The Hague to testify in the form of depositions to be taken during the week of 1 to 5 September 2003.

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6. For a considerable period of time during the pre-trial proceedings, the Trial Chamber had to deal with jurisdictional matters.

7. On 17 May 2001 and 29 October 2001, the Defence filed motions challenging the jurisdiction of the Tribunal based upon the alleged illegality of the arrest of the Accused. The Defence submitted that the allegedly illegal arrest of the Accused by unknown individuals on the territory of what was at that time the Federal Republic of Yugoslavia should be attributable to SFOR and the Prosecution, thereby barring the Tribunal from exercising its jurisdiction over the Accused. SFOR had arrested him on the territory of Bosnia and Herzegovina after he had been handed over by these unknown individuals. The Defence further submitted that, irrespective of whether or not this conduct was attributable to the Prosecution, the illegal character of the arrest should in and of itself bar the Tribunal from exercising jurisdiction.

8. On 9 October 2002, the Trial Chamber dismissed the relief sought by the Defence. The Trial Chamber decided on whether the arrest of the Accused and his subsequent transfer to the Tribunal violated the principle of State sovereignty and/or international human rights and/or the rule of law.

9. The Trial Chamber held that there was no collusion or involvement by SFOR or the Prosecution in the alleged illegal acts. The Trial Chamber held that SFOR was, in accordance with Article 29 of the Statute and Rule 59 *bis* of the Rules, obliged to arrest Dragan Nikolić and to hand the Accused over to this Tribunal.

10. The Trial Chamber decided that there was no violation of State sovereignty in the current case and based its decision on three grounds: First, the Trial Chamber held that in the vertical relationship between the Tribunal and States, sovereignty cannot by definition play the same role as in the horizontal relationship between States. Second, the Trial Chamber recalled that neither SFOR nor the Prosecution were at any time prior to Dragan Nikolić's crossing the border between the then Federal Republic of Yugoslavia and Bosnia and Herzegovina involved in this transfer. Third, the Trial Chamber held that, in contrast to cases involving horizontal relationships between States, even if a violation of State sovereignty had occurred, the then Federal Republic of Yugoslavia would have been obliged, under to Article 29 of the Statute, to surrender the Accused after his return to the then Federal Republic of Yugoslavia. In this context, the Trial Chamber recalled the maxim "*dolo facit qui petit quod [statim] redditurus est*", which means that "a person acts with deceit who seeks what he will have to return immediately."

11. The Trial Chamber re-emphasised the close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. The Trial Chamber held, however, that the facts assumed by the Parties did not at all show that the treatment of the Accused by the unknown individuals was of such an egregious nature that it would constitute a legal impediment to the exercise of jurisdiction over the Accused.

12. The Defence filed an interlocutory appeal against this decision on 24 January 2003, following certification of the appeal by the Trial Chamber. The appeal was dismissed by the Appeals Chamber in its decision of 5 June 2003. First, the Appeals Chamber held that, even if the conduct of the unknown individuals could be attributed to SFOR, thus making SFOR responsible for a violation of State sovereignty, there was no basis upon which the Tribunal should not exercise its jurisdiction in the present case. In reaching this conclusion, the Appeals Chamber weighed the legitimate expectation that those accused of universally condemned offences will be brought to justice against the principle of State sovereignty and the fundamental human rights of the accused.

13. Second, the Appeals Chamber held that certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. The Appeals Chamber concurred, however, with the Trial Chamber's evaluation on the gravity of the alleged violation of the Accused's human rights and found that the rights of the Accused were not egregiously violated in the process of his arrest.

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14. On 2 September 2003 the Parties submitted a Plea Agreement, based on the factual basis of the new Third Amended Indictment, which was accepted by the Trial Chamber at the Plea Hearing of 4 September 2003.

15. A Sentencing Hearing was held between 3 and 6 November 2003, at which the Prosecution called three witnesses and submitted the written statements of two victims and one expert into evidence. The Defence called two witnesses and tendered into evidence written statements of three Defence witnesses.

16. Prior to the Sentencing Hearing, the Trial Chamber ordered, *proprio motu,* two expert reports, one on sentencing practices and the other on the socialisation of the Accused. During the Sentencing Hearing, Professor Dr. Ulrich Sieber of the Max Planck Institute for foreign and international criminal law in Freiburg, Germany, testified as an expert witness regarding the

sentencing report and Dr. Nancy Grosselfinger testified regarding the socialisation report.

17. The Accused was given the final word. He made a statement expressing remorse and he accepted responsibility for his crimes.

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18. The Trial Chamber will now turn to a brief summary of the factual background.

19. On or about 21 April 1992 the town of Vlasenica was taken over by Serb forces consisting of the JNA, paramilitary forces and armed locals. Many Muslims and other non-Serbs fled from the Vlasenica area, and beginning in May 1992 and continuing until September 1992, those who had remained were either deported or arrested.

20. In late May or early June 1992, Serb forces established a detention camp run by the military and the local police militia at Sušica. It was the main detention facility in the Vlasenica area and was located approximately one kilometre from the town.

21. From early June 1992 until about 30 September 1992, Dragan Nikoli} was a commander in Su{ica camp.

22. The detention camp comprised two main buildings and a small house. The detainees were housed in a hangar which measured approximately 50 by 30 meters. Between late May and October 1992, as many as 8,000 Muslim civilians and other non-Serbs from Vlasenica and the surrounding villages were successively detained in the hangar at Su{ica camp. The number of detainees in the hangar at any one time was usually between 300 and 500. The building was severely overcrowded and living conditions were deplorable.

23. Men, women and children were detained at Su{ica camp, some being detained as entire families. Women and children as young as eight years old, were usually detained for short periods of time and then forcibly transferred to nearby Muslim areas.

24. Many of the detained women were subjected to sexual assaults, including rape. Camp guards or other men who were allowed to enter the camp frequently took women out of the hangar at night. When the women returned, they were often in a traumatised state and distraught.

25. By September 1992, virtually no Muslims or other non-Serbs remained in Vlasenica.

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26. The Trial Chamber recalls that the Accused admitted the veracity of each and every particular fact contained in the Third Amended Indictment that forms the factual basis of the Plea Agreement. The Trial Chamber also recalls that it is bound by the assessment contained in the Plea Agreement and the factual basis underlying that Agreement, in this instance the Third Amended Indictment.

27. Regarding **murder**, Dragan Nikoli} admitted his individual criminal responsibility for the killing of nine human beings: Durmo Handžić; Asim Zildžić; Rašid Ferhatbegović; Muharem Kolarević; Dževad Sarić; Ismet Zekić; Ismet Dedić; Mevludin Hatunić and Galib Musić.

28. Concerning the charge of **aiding and abetting rape**, from early June until about 15 September 1992, Dragan Nikoli} personally removed and otherwise facilitated the removal of female detainees from the hangar, which he knew was for purposes of rapes and other sexually abusive conduct. The sexual assaults were committed by camp guards, special forces, local soldiers and other men.

29. Female detainees were sexually assaulted at various locations, such as the guardhouse, the houses surrounding the camp, at the Panorama Hotel, a military headquarters, and at locations where these women were taken to perform forced labour. Dragan Nikoli} allowed female detainees, including girls and elderly women, to be verbally subjected to humiliating sexual threats in the presence of other detainees in the hangar. Dragan Nikoli} facilitated the removal of female detainees by allowing guards, soldiers and other males to have access to these women on a repeated basis and by otherwise encouraging the sexually abusive conduct.

30. Regarding **torture**, Dragan Nikoli} admitted to his individual criminal responsibility stemming from his criminal conduct in the torture of five human beings: Fikret Arnaut; Sead Ambesković; Hajrudin Osmanović; Suad Mahmutović andReđo Čakisić. Dragan Nikoli} admitted to saying to the tortured detainees words to the effect of: *"What? They did not beat you enough; if it had been me, you would not be able to walk. They are not as well trained to beat people as I am"* and

"I can't believe how an animal like this can't die; he must have two hearts."

31. As part of the **persecutions**, Dragan Nikoli} subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities. As a result of the atmosphere of terror and the conditions in the camp, detainees suffered psychological and physical trauma.

32. The Accused persecuted detained Muslims and other non-Serbs by assisting in their forcible transfer from the Vlasenica municipality. Most of the women and children detainees were transferred either to Kladanj or Cerska in Bosnian Muslim controlled territory.

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33. The Trial Chamber will now turn to the sentencing law. A guilty plea indicates that an accused admits the veracity of the charges contained in an indictment and acknowledges responsibility for his acts. Undoubtedly this tends to further the process of reconciliation. A guilty plea protects victims from having to relive their experiences and re-open old wounds. As a side-effect, albeit not really as a significant mitigating factor, it also saves the Tribunal's resources.

34. As opposed to a pure confession or guilty plea, a plea agreement, while having its own merits as an incentive to plead guilty, has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle "*do ut des*" (give and take). Therefore, the reason why an accused entered a plea of guilt has to be analysed: were charges withdrawn, or was a sentence recommendation given? In any event, a plea agreement does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia. While treating plea agreements with appropriate caution, it should be recalled that this Tribunal is not the final arbiter of history. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done.

35. When considering the appropriate sentence to be imposed in each case, the Trial Chamber emphasises that the individual guilt of an accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits defined by individual guilt.

36. The Trial Chamber considers that the fundamental principles to be taken into consideration when imposing a sentence are deterrence and retribution. When combating serious international crimes, general deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be made aware that they have to respect the fundamental global norms of substantive criminal law or – otherwise – face not only prosecution but also sanctions imposed by international tribunals.

37. In the view of this Trial Chamber, retribution should not be understood as fulfilling a desire for

vengeance, but solely as duly expressing the outrage of the international community at these crimes.

38. Another main purpose of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the victims, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody. “All persons shall be equal before the courts and tribunals.” This fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.

39. With regard to the applicable range of sentences, the Defence in this case has raised the question of the applicability of the principle of *lex mitior* meaning that if the law has been amended one or more times after the criminal act was committed, the law which is less severe in relation to the offender should be applied. The Trial Chamber notes that if the principle of *lex mitior* were to be applicable in the present case, the sentencing range would be restricted to a fixed term of imprisonment instead of a term up to and including the remainder of the convicted person’s life.

40. The Trial Chamber recalls that the principle of *lex mitior* is enshrined, *inter alia*, in Article 15 paragraph 1 sentence 3 of the International Covenant on Civil and Political Rights, which reads :

> If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

41. The Trial Chamber holds, however, that this obligation does not apply in cases where the offence was committed in a jurisdiction different from the one under which the offender receives his punishment. In the event of concurrent jurisdictions, no state is generally bound under international law to apply the sentencing range or sentencing law of another state where the offence was committed. The Trial Chamber finds therefore that it is not bound to apply the more lenient sentencing range applicable under the law of the Republika Srpska entity of Bosnia and Herzegovina. According to the Statute, they have merely to be taken into consideration.

42. In addition to an analysis of the range of sentences for the crimes to which the Accused has pleaded guilty, applicable in the States on the territory of the former Yugoslavia, and of the sentencing practice in relation to these crimes, the Sentencing Report provided by Professor Dr. Sieber also focused on the relevant sentencing ranges in the national jurisdictions of 23 other countries from all over the world. This overview shows that in most of these countries a single

act of murder committed by sustained beatings and motivated by ethnic bias attracts life imprisonment or even the death penalty, as either an optional or a mandatory sanction. Apparently based on this and on the United Nations' general policy, aiming at the abolition of the death-penalty on a global level, the Security Council provided for imprisonment as the only sanction without any limitation and gave primacy to this Tribunal also in relation to sentencing.

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43. The Trial Chamber now turns first to the gravity of the offences and the aggravating circumstances only.

44. The Trial Chamber finds that Dragan Nikolić's abuse of his position as a commander in Sušica camp is a substantial aggravating factor. He abused the especially vulnerable detainees who lived and died by the hand and at the whim or will of Dragan Nikolić.

45. Furthermore, the immediate and the long term effects of the conditions in Sušica camp aggravate the crimes of the Accused. Not one single day and night at the camp passed by without Dragan Nikolić and others committing barbarous acts. The Accused brutally and sadistically beat the detainees. He would kick and punch them and use weapons such as iron bars, axe handles, rifle butts, metal knuckles, metal pipes, truncheons, rubber tubing with lead inside, lengths of wood and wooden bats to beat the detainees. One of the most chilling aspects of these acts was the enjoyment he derived from this criminal conduct.

46. The Accused personally removed women of all ages from the hangar, handing them over to men whom he knew would sexually abuse or rape them, and thereafter returned them to the hangar. As a result, women would have to agonize throughout the day, not knowing what was to be their personal fate in the coming night.

47. The effects of Sušica camp did not end once a detainee left the camp. Witnesses testified that they suffer psychologically from their memories to this very day.

48. Furthermore, the number of victims is a serious aggravating factor.

49. In conclusion, the Trial Chamber accepts the following factors as especially aggravating:

    (i) The acts of the Accused were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts, but an expression of systematic sadism.

(ii) The Accused ignored the pleadings of his brother to stop. He apparently enjoyed his criminal acts.

(iii) The Accused abused his power. He did so especially *vis à vis* the female detainees in subjecting them to humiliating conditions in which they were emotionally, verbally and physically assaulted and forced to fulfil the Accused's personal whims, *inter alia*, washing and putting cream on his feet for his personal refreshment or having to relieve themselves in front of everybody else in the hangar.

(iv) Due to the seriousness and particular viciousness of the beatings, the Trial Chamber considers the conduct charged as torture as being at the highest level of torture, which has all the making of *de facto* attempted murder.

(v) The detainees were treated rather as slaves than as inmates under the Accused's supervision.

(vi) Finally, the high number of victims in Su{ica camp and the multitude of criminal acts have to be taken into account.

50. **In conclusion, taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life. - There are, however, mitigating circumstances to which the Trial Chamber will now turn.**

51. The Trial Chamber will focus on four factors of special importance, namely (i) the plea agreement and the guilty plea, (ii) remorse, (iii) reconciliation and (iv) substantial co-operation with the Prosecution.

52. In order to make an assessment of the mitigating effect of the guilty plea, the Trial Chamber considered the country reports submitted by the Max Planck Institute and the jurisprudence of the International Tribunals. In conclusion, the Trial Chamber accepts that a guilty plea should be taken into account for mitigation since it reflects the Accused's acceptance of responsibility for his crimes. The Trial Chamber notes that in most of the national jurisdictions surveyed, a guilty plea or confession mitigates the sentence.

53. The Trial Chamber finds that the rationale behind the mitigating effect of a guilty plea

in this Tribunal includes the fact that the accused contributes to establishing the truth about the conflict in the former Yugoslavia and tends to foster reconciliation in the affected communities. The Trial Chamber recalls that the Tribunal, acting under Chapter VII of the Charter of the United Nations, has the task to contribute to the restoration and maintenance of peace and security in the former Yugoslavia, one prerequisite for this being to come as close as possible to truth and justice.

54. The Trial Chamber accepts that remorse was shown during the Sentencing Hearing. In this respect, the Trial Chamber recalls that the Accused declared in his final statement that he genuinely feels shame and disgrace.

55. The Trial Chamber also accepts that the Prosecution is satisfied that the Accused's co-operation with the Prosecution was substantial. The Trial Chamber considers this factor to be of some importance for mitigating the sentence, especially since the information about Su{ica camp and Vlasenica municipality was heard for the first time before this Tribunal. Thus, the Accused contributed to the truth- and fact-finding mission of the Tribunal.

56. Considering all the above-mentioned mitigating circumstances together, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted.

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57. The Trial Chamber will now turn to the concrete determination of the sentence.

58. The Prosecution has recommended a term of imprisonment of fifteen years. The Trial Chamber is, however, under the Rules, explicitly not bound by a recommended sentence specified in a plea agreement. Balancing now the gravity of the crimes and the aggravating factors against the mitigating factors and taking into account the aforementioned goals of sentencing, the Trial Chamber is not able to follow the recommendation given by the Prosecution. The brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that which was recommended unjust. The Trial Chamber believes that it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties.

59. The Trial Chamber is aware that from a human rights perspective each accused, having served the necessary part of his sentence, ought to have a chance to be reintegrated into society in the event that he no longer poses any danger to society and there is no risk that he will repeat

his crimes. However, before release and reintegration, at least the term of imprisonment recommended by the Prosecutor has in fact to be served. In conclusion, the Trial Chamber finds that the sentence declared in the now following Disposition is adequate and proportional.

DISPOSITION

We, Judges 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, established by United Nations Security Council Resolution 827 of 25 May 1993, elected by the General Assembly and mandated to hear the case against you, Mr. Dragan Nikoli}, and find the appropriate sentence,

HAVING HEARD your guilty plea and

HAVING ENTERED A FINDING OF GUILT for the crimes contained in Counts 1 through 4 of the Third Amended Indictment,

HEREBY ENTER A SINGLE CONVICTION against you, **Mr. Dragan Nikoli},** for

Count 1: Persecutions, a Crime against Humanity,

incorporating

Count 2: Murder, a Crime against Humanity,

Count 3: Rape, a Crime against Humanity, and

Count 4: Torture, a Crime against Humanity.

WE SENTENCE you, Mr. Dragan Nikoli}, to 23 years of imprisonment and

STATE that you are entitled to credit for 3 years, 7 months and 29 days, as of the date of this Sentencing Judgement, calculated from the date of your deprivation of liberty, that is the twentieth of April 2000, together with such additional time as you may serve pending the determination of any appeal.

Pursuant to Rule 103 (C) of the Rules, you shall remain in the custody of the Tribunal pending the finalisation of arrangements for your transfer to the State where this sentence will be served.

1. Nous allons à présent donner lecture du résumé du jugement rendu par la Chambre de première instance. Le texte de ce résumé, qui ne fait pas partie intégrante du jugement, sera disponible en anglais, en français et en B/C/S, à l'issue de l'audience. Seul fait autorité le texte du jugement dans lequel sont exposées les constatations et les conclusions de la Chambre de première instance, ainsi que ses motifs. Le jugement sera également mis à la disposition des parties et du public à l'issue de cette audience.

2. L'accusé Dragan Nikolić, alias « Jenki », Serbe de Bosnie âgé de 46 ans, a été la première personne mise en accusation par ce Tribunal le 4 novembre 1994. Le premier acte d'accusation modifié dressé à son encontre a été confirmé le 12 février 1999 ; il comptait 80 chefs d'accusation pour crimes contre l'humanité, infractions graves aux Conventions de Genève et violations des lois ou coutumes de la guerre. En l'espèce, l'accusé est tenu responsable des crimes particulièrement odieux commis au camp de détention de Sušica, situé près de la ville de Vlasenica dans la municipalité du même nom. Dragan Nikolić était l'un des commandants du camp, créé par les forces serbes en juin 1992.

3. Dès le 4 novembre 1994, des mandats d'arrêts ont été délivrés contre Dragan Nikolić. Ces mandats étant restés sans suite, la procédure prévue par l'article 61 du Règlement a été engagée le 16 mai 1995. Le 20 octobre 1995, la Chambre de première instance a jugé qu'il existait des raisons suffisantes de croire que Dragan Nikolić avait commis toutes les infractions mises à sa charge dans l'acte d'accusation. La Chambre disait en outre que le défaut de signification de l'acte d'accusation et l'inexécution des mandats d'arrêts étaient imputables au défaut et au refus de coopération de l'ancien gouvernement serbe de Bosnie à Pale.

4. L'accusé a finalement été arrêté vers le 20 avril 2000 par la SFOR en Bosnie-Herzégovine, et immédiatement transféré au Tribunal, le 21 avril 2000.

5. Le 4 septembre 2003, Dragan Nikolić a plaidé coupable des différents chefs du troisième acte d'accusation modifié, dans lequel il était tenu individuellement pénalement responsable, notamment, d'assassinat (chef 2), de complicité de viol (chef 3) et de torture (chef 4), en tant que crimes contre l'humanité. Le comportement criminel à l'origine de ces accusations servait également, en partie, de fondement à l'accusation ultime de persécutions

portée au chef 1 sous la qualification de crime contre l'humanité. Il convient de rappeler qu'au moment où l'accusé plaidait coupable, la date de son procès était fixée et les premiers témoins déjà arrivés à La Haye pour déposer hors audience dans la semaine du 1er au 5 septembre 2003.

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6. La Chambre de première instance a consacré beaucoup de temps durant la phase préalable au procès à statuer sur les questions de compétence.

7. Le 17 mai 2001 et le 29 octobre 2001, la Défense a soulevé des exceptions préjudicielles d'incompétence en arguant de l'illégalité de l'arrestation de l'accusé. La Défense soutenait que l'arrestation, selon elle illégale, de l'accusé par des inconnus sur le territoire de l'ancienne République fédérale de Yougoslavie devait être imputée à la SFOR et à l'Accusation, et que, de ce fait, le Tribunal ne pouvait juger l'accusé. La SFOR avait arrêté celui-ci sur le territoire de la Bosnie-Herzégovine après qu'il lui eut été remis par des inconnus. La Défense ajoutait que, quel qu'ait pu être en l'occurrence le rôle de l'Accusation, le Tribunal était, du fait même de l'illégalité de l'arrestation, incompétent en l'espèce.

8. Le 9 octobre 2002, la Chambre de première instance a rejeté la demande de la Défense. Dans sa décision, elle devait juger si l'arrestation de l'accusé et son transfert ultérieur au Tribunal portaient atteinte à la souveraineté d'un État, aux droits de l'homme et/ou à la primauté du droit.

9. La Chambre de première instance a conclu qu'il n'y avait eu ni collusion ni implication de la SFOR et de l'Accusation dans les actes illicites en cause. Elle a jugé qu'aux termes de l'article 29 du Statut et de l'article 59 *bis* du Règlement, la SFOR était tenue d'appréhender Dragan Nikolić et de le remettre au Tribunal.

10. La Chambre de première instance a décidé qu'en l'espèce, il n'y avait pas eu de violation de souveraineté d'un État, et ce, pour trois motifs : premièrement, elle a estimé qu'en raison de la relation verticale qu'entretenait le Tribunal avec les États, la souveraineté ne pouvait, par définition, jouer le même rôle que dans les relations horizontales d'État à État. Deuxièmement, la Chambre de première instance a rappelé qu'à aucun moment, avant

que Dragan Nikolić ne franchisse la frontière séparant l'ancienne République fédérale de Yougoslavie de la Bosnie-Herzégovine, ni la SFOR ni l'Accusation n'avaient été mêlées à ce transfert. Troisièmement, elle a jugé que contrairement à ce qui se passe dans les affaires mettant en jeu les relations horizontales d'État à État, même s'il y avait eu violation de sa souveraineté, l'ancienne République fédérale de Yougoslavie aurait été, en l'espèce, tenue, aux termes de l'article 29 du Statut, de livrer l'accusé au Tribunal après le retour de celui-ci sur son territoire. C'est dans ce contexte que la Chambre a rappelé l'adage « *dolo facit qui petit quod [statim]redditurus est* », qui signifie « Agit avec tromperie celui qui demande ce qu'il devra rendre [immédiatement] ».

11. La Chambre de première instance a tenu à rappeler le lien étroit qui existe entre l'obligation faite au Tribunal de respecter les droits de l'homme dont jouit l'accusé et celle qu'il a de veiller à la régularité de la procédure. Elle a conclu, toutefois, que les faits tenus pour acquis par les Parties n'établissaient en aucun cas que le traitement réservé à l'accusé par ses ravisseurs inconnus constituait une violation à ce point flagrante de ses droits qu'il interdisait en droit au Tribunal de juger celui-ci.

12. La Défense a formé, le 24 janvier 2003, un appel interlocutoire contre cette décision, après que la Chambre de première instance l'eut certifié. La Chambre d'appel a rejeté l'appel de la Défense dans sa décision du 5 juin 2003. En premier lieu, la Chambre a conclu que même si la conduite des ravisseurs de l'accusé était imputable à la SFOR, auquel cas cette dernière devrait répondre d'une atteinte à la souveraineté d'un État, rien ne justifiait qu'en l'espèce, le Tribunal décline sa compétence. Pour parvenir à cette conclusion, la Chambre d'appel a mis en balance, d'une part, l'espoir légitime de voir traduites en justice les personnes accusées de crimes universellement réprouvés et, d'autre part, le principe de souveraineté des États et les droits fondamentaux de l'homme dont pouvait se prévaloir l'accusé.

13. En second lieu, la Chambre d'appel a déclaré que certaines violations des droits de l'homme étaient à ce point graves qu'elles appelaient un déclinatoire de compétence. Cependant, souscrivant à l'appréciation portée par la Chambre de première instance sur la

gravité de la violation présumée des droits fondamentaux de l'accusé, elle a conclu que ces droits n'avaient pas été violés de manière flagrante lors de son arrestation.

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14. Le 2 septembre 2003, les Parties ont présenté un accord sur le plaidoyer reposant sur les faits reprochés dans la dernière version du troisième acte d'accusation modifié. La Chambre de première instance a accepté cet accord lors de l'audience consacrée au plaidoyer de culpabilité, le 4 septembre 2003.

15. Les audiences consacrées à la peine se sont tenues du 3 au 6 novembre 2003. L'Accusation a cité trois témoins à comparaître et a présenté les déclarations écrites de deux victimes, ainsi que le rapport d'un témoin expert. La Défense a cité, pour sa part, deux témoins et produit les déclarations écrites de trois autres.

16. Avant ces audiences, la Chambre de première instance avait d'office exigé la présentation de deux rapports d'expert, le premier sur l'application des peines et le deuxième sur le comportement social de l'accusé. À l'audience, M. Ulrich Sieber, professeur à l'Institut Max Planck de Droit pénal international et étranger de Fribourg, en Allemagne, a présenté, en sa qualité de témoin expert, le rapport sur l'application des peines, et Mme Nancy Grosselfinger, celui sur le comportement social de l'accusé.

17. Prenant la parole en dernier, l'accusé a fait une déclaration dans laquelle il a exprimé ses remords et accepté l'entière responsabilité de ses actes.

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18. La Chambre de première instance va à présent exposer brièvement les faits.

19. Vers le 21 avril 1992, des forces serbes, comprenant des soldats de la JNA, des paramilitaires et des personnes armées originaires de la région, ont pris le contrôle de la ville de Vlasenica. De nombreux Musulmans et d'autres non-Serbes ont fui la région de Vlasenica, et, de mai 1992 à septembre 1992, ceux qui étaient restés ont été soit expulsés soit arrêtés.

20. Vers la fin de mai 1992 ou le début de juin 1992, les forces serbes ont créé, à Sušica, un camp de détention géré par l'armée et la milice locale. Le camp de Sušica était le principal centre de détention de la région de Vlasenica et se trouvait à environ un kilomètre de la ville.

21. Du début du mois de juin 1992 jusqu'au 30 septembre 1992 environ, Dragan Nikolić a été l'un des commandants du camp de détention de Sušica.

22. Le camp de détention comportait deux bâtiments principaux et une petite maison. Les détenus étaient incarcérés dans un hangar de 50 mètres sur 30 environ. Entre la fin de mai et octobre 1992, pas moins de 8 000 civils musulmans et autres non-Serbes de Vlasenica et des villages environnants ont été détenus dans le hangar du camp de Sušica. Le nombre de personnes détenues en même temps dans le hangar variait généralement de 300 à 500. Le bâtiment était surpeuplé à l'extrême et les conditions de vie déplorables.

23. Des hommes, des femmes et des enfants ont été détenus au camp de Sušica, parfois des familles entières. Les femmes et des enfants âgés de huit ans à peine étaient généralement détenus pendant de courtes périodes avant d'être transférés de force vers des territoires voisins contrôlés par les Musulmans.

24. Bon nombre des détenues ont été victimes de violences sexuelles, et notamment de viol. Les gardiens du camp et d'autres hommes qui y étaient admis faisaient fréquemment sortir des femmes du hangar pendant la nuit. Lorsque ces femmes revenaient dans le hangar, elles étaient souvent en état de choc et de détresse.

25. Dès septembre 1992, il ne restait quasiment plus de Musulmans ni d'autres non-Serbes à Vlasenica.

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26. La Chambre de première instance rappelle que l'accusé a reconnu l'exactitude de chacun des faits exposés dans le troisième acte d'accusation modifié et sur lesquels repose l'accord sur le plaidoyer. Elle rappelle, en outre, qu'elle est liée par la qualification retenue dans l'accord sur le plaidoyer et par les faits sur lesquels repose cet accord, et qui sont ceux exposés dans le troisième acte d'accusation modifié.

27. S’agissant du chef d’**assassinat**, Dragan Nikolić a reconnu qu’il était individuellement pénalement responsable de la mort de neuf personnes : Durmo Handžić, Asim Zildžić, Rašid Ferhatbegović, Muharem Kolarević, Dževad Sarić, Ismet Zekić, Ismet Dedić, Mevludin Hatunić et Galib Musić.

28. S’agissant du chef de **complicité de viol**, Dragan Nikolić a reconnu que du début de juin au 15 septembre 1992 environ, il avait lui-même fait sortir du hangar des détenues en sachant qu’elles allaient être violées ou victimes d’autres violences sexuelles, ou a de toute autre manière favorisé de telles pratiques. Ces violences sexuelles étaient le fait, entre autres, des gardiens du camp, des membres des forces spéciales et des soldats de la région.

29. Des détenues ont été victimes de violences sexuelles dans des lieux divers, tels que la maison des gardiens, les maisons situées autour du camp, l’hôtel Panorama, qui servait de quartier général militaire, et là où ces femmes étaient emmenées pour être soumises au travail forcé. Dragan Nikolić a permis que des détenues, notamment des jeunes filles et des femmes âgées, fassent l’objet de menaces sexuelles dégradantes en présence des autres détenus se trouvant dans le hangar. Dragan Nikolić a favorisé ces pratiques en permettant aux gardiens, aux soldats et à d’autres hommes d’approcher régulièrement ces femmes ou en les incitant de toute autre manière à commettre ces violences sexuelles.

30. S’agissant du chef de **tortures**, Dragan Nikolić a reconnu qu’il était pénalement responsable, du fait de ses agissements, des tortures infligées à cinq personnes. Dragan Nikolić a reconnu avoir déclaré, entre autres, à des détenus qui avaient été torturés : « *Quoi ? Ils ne vous ont pas donné assez de coups. Si j’avais été à leur place, vous ne pourriez plus marcher. Ils ne savent pas y faire aussi bien que moi.* » Il a également dit : « *Je ne comprends pas que cet animal soit encore vivant. Il doit au moins avoir deux cœurs.* »

31. Dans le cadre des **persécutions**, Dragan Nikolić a soumis les détenus à des conditions de vie inhumaines (privation de nourriture, d’eau, de soins médicaux, de literie et de toilettes). Les détenus ont gravement souffert, psychologiquement et physiquement, du climat de terreur et des conditions de vie qui régnaient dans le camp.

32. L'accusé a persécuté des détenus musulmans et non serbes en prêtant son concours à leur transfert forcé hors de la municipalité de Vlasenica. La plupart des femmes et enfants détenus ont été transférés soit à Kladanj soit à Cerska, en territoire contrôlé par les Musulmans de Bosnie.

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33. La Chambre de première instance va à présent examiner le droit applicable à la peine. En plaidant coupable, l'accusé reconnaît l'exactitude des faits qui lui sont reprochés dans l'acte d'accusation et accepte de répondre de ses actes, ce qui favorise incontestablement la réconciliation. Lorsque l'accusé plaide coupable, les victimes n'ont pas à revivre leurs épreuves au risque de rouvrir d'anciennes blessures. Qui plus est, et même s'il ne s'agit pas là véritablement d'une circonstance atténuante importante, cela ménage les ressources du Tribunal.

34. À la différence des aveux ou d'un simple plaidoyer de culpabilité, l'accord sur le plaidoyer offre l'avantage d'inciter les accusés à plaider coupable, mais présente deux inconvénients. En premier lieu, l'accusé ne reconnaît que les faits qui font l'objet de l'accord, lequel peut ne pas prendre en compte tous les points de fait et de droit en jeu. En second lieu, on pourrait penser que, selon le principe *do ut des* (donnant, donnant), l'accusé n'a pas accepté sans contrepartie de reconnaître sa responsabilité. En conséquence, il faut analyser les raisons qui ont poussé l'accusé à plaider coupable : Certains chefs d'accusation ont-ils été retirés ? Une peine a-t-elle été requise ? En tout état de cause, un accord sur le plaidoyer n'autorise pas la Chambre de première instance à manquer à sa mission qui est d'établir la vérité et de rendre justice aux peuples de l'ex-Yougoslavie. Tout en considérant les accords sur les plaidoyers avec la plus grande prudence, il convient de rappeler que le Tribunal n'est pas l'ultime juge de l'Histoire. Pour les juges tout absorbés par les points essentiels d'une affaire portée devant le Tribunal international, il importe que justice soit faite et perçue comme telle.

35. S'agissant de la peine, la Chambre de première instance tient à souligner que la culpabilité d'un accusé détermine la fourchette des peines applicables. Les autres fonctions et finalités de la peine ne peuvent jouer que dans le cadre de cette fourchette.

36. La Chambre de première instance considère que la dissuasion et la rétribution sont des principes fondamentaux qui doivent être pris en compte dans la sentence. Dans la lutte contre les crimes internationaux graves, la dissuasion générale constitue une tentative d'intégrer ou de réintégrer dans la société des personnes qui se croient hors de portée du droit international pénal. Ces personnes doivent être avisées qu'à moins de respecter les normes universelles fondamentales du droit pénal, elles s'exposent non seulement à des poursuites, mais aussi à des sanctions de la part des tribunaux internationaux.

37. La présente Chambre de première instance estime que la rétribution, loin d'assouvir un désir de vengeance, n'a pour finalité que d'exprimer comme il se doit l'indignation de la communauté internationale face à ces crimes.

38. Une peine infligée par un tribunal international a également pour but essentiel de favoriser la prise de conscience des accusés, des victimes, des témoins et de l'opinion publique, et de les conforter dans l'idée que le droit est effectivement appliqué. En outre, une condamnation vise à rappeler à tout un chacun qu'il doit se plier aux lois et aux règles universellement acceptées. « Tous sont égaux devant les tribunaux et les cours de justice. » C'est là une règle fondamentale qui favorise l'intériorisation par les législateurs comme par le public de ces lois et de ces règles.

39. S'agissant de la fourchette des peines applicables, la Défense a soulevé en l'espèce la question de l'applicabilité du principe de la *lex mitior*. La Chambre de première instance fait observer que si ce principe devait s'appliquer en l'espèce, c'est une peine d'emprisonnement déterminée qui devrait être prononcée et non pas une peine de prison pouvant aller jusqu'à la réclusion à perpétuité.

40. La Chambre de première instance rappelle que le principe de la *lex mitior* est consacré, entre autres, par l'article 15, paragraphe 1, phrase 3 du Pacte international relatif aux droits civils et politiques qui dispose :

> Si, postérieurement à cette infraction, la loi prévoit l'application d'une peine plus légère, le délinquant doit en bénéficier.

41. Toutefois, la Chambre estime que cette règle ne s'applique pas lorsque l'infraction a été commise dans un ressort différent de celui où son auteur est condamné. En cas de compétences concurrentes, aucun État n'est en principe tenu, en droit international, d'appliquer la fourchette des peines ou le droit de la peine de l'État où l'infraction a été commise. La Chambre de première instance estime, en conséquence, qu'elle n'est pas tenue de prononcer les sanctions plus légères prévues par la loi en vigueur dans la Republika Srpska en Bosnie-Herzégovine. Aux termes du Statut, elle doit simplement les prendre en considération.

42. Outre l'analyse de la fourchette des peines applicables aux crimes dont l'accusé a plaidé coupable dans les États créés sur le territoire de l'ex-Yougoslavie et de la grille des peines qui leur sont appliquées, le rapport de M. Sieber relatif à la fixation des peines indique également les fourchettes des peines applicables dans 23 pays de par le monde. Cette étude montre que dans la plupart de ces pays, un meurtre assorti d'exactions prolongées et inspiré par des préjugés ethniques expose ou peut exposer son auteur à la réclusion à perpétuité. C'est sans doute en se fondant sur cette réalité que le Conseil de sécurité a prévu la prison comme seule sanction, sans aucune limite dans le temps, laissant au Tribunal le soin d'en fixer la durée.

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43. La Chambre de première instance va à présent examiner la gravité des infractions et les circonstances aggravantes.

44. La Chambre de première instance conclut que le fait que Dragan Nikolić ait abusé des pouvoirs que lui conféraient ses fonctions de commandant du camp de Sušica constitue une importante circonstance aggravante. Dragan Nikolić a maltraité les plus vulnérables d'entre les détenus qui étaient soumis à ses quatre volontés.

45. En outre, les effets immédiats des conditions de détention dans le camp de Sušica et les séquelles qu'elles ont laissées viennent aggraver les crimes de l'accusé. Il ne se passait pas un seul jour ni une seule nuit sans que Dragan Nikolić et d'autres ne se livrent à des actes barbares dans le camp. L'accusé frappait les détenus de manière brutale et sadique. Il les

frappait à coups de pied, de poing, à l'aide de barres en fer, de manches de haches, de crosses de fusils, de coups-de-poing américains, de tuyaux métalliques, de matraques, de tuyaux de caoutchouc remplis de plomb, de morceaux et de battes de bois. L'un des aspects les plus terrifiants de ces actes était le plaisir que l'accusé y prenait.

46. L'accusé faisait personnellement sortir des détenues de tous âges du hangar et les remettait entre les mains d'hommes dont il savait qu'ils allaient les violer ou leur infliger des violences sexuelles. Ainsi, les détenues passaient leur journée dans la hantise du sort que la nuit leur réservait.

47. Les détenus souffrent encore des séquelles de leur détention à Sušica. Des témoins ont déclaré qu'à ce jour, ils éprouvaient encore des souffrances psychologiques au souvenir de leur détention.

48. En outre, le nombre des victimes constitue une circonstance aggravante importante.

49. Pour conclure, la Chambre de première considère comme particulièrement aggravantes les circonstances suivantes :

i) Les actes de l'accusé étaient d'une brutalité inouïe et se sont poursuivis pendant une période relativement longue. Ces actes n'étaient pas isolés ; ils étaient l'expression d'un sadisme systématique.

ii) L'accusé est resté sourd aux supplications de son frère qui le pressait d'arrêter, prenant, semble-t-il, plaisir à agir de la sorte.

iii) L'accusé a abusé de son pouvoir, et plus particulièrement vis-à-vis des détenues qu'il soumettait à un traitement humiliant et dégradant, et à des violences psychologiques, verbales et physiques. Les détenues étaient ainsi contraintes de satisfaire les caprices de l'accusé, notamment en lui lavant et en lui badigeonnant les pieds de crème pour le détendre, et de se soulager devant les autres personnes présentes dans le hangar.

iv) En raison de la gravité et de la brutalité toute particulière des sévices infligés, la Chambre de première instance considère que le comportement qualifié de torture constitue la forme extrême de ce crime, qui présente en fait tous les éléments essentiels d'une tentative de meurtre.

v) Sous la supervision de l'accusé, les détenus étaient traités comme des esclaves et non comme des prisonniers.

vi) Enfin, le nombre élevé de victimes dans le camp de Sušica et la multiplicité des actes criminels doivent être pris en compte.

50. **Pour conclure, si l'on tient compte uniquement de la gravité du crime et de toutes les circonstances aggravantes retenues, la Chambre de première instance conclut que la seule sanction qui puisse être prononcée est une peine d'emprisonnement pouvant aller jusqu'à la réclusion à perpétuité. Toutefois, il existe des circonstances atténuantes que la Chambre va à présent exposer**.

51. La Chambre de première instance s'attachera à quatre éléments particulièrement importants, à savoir i) l'accord sur le plaidoyer et le plaidoyer de culpabilité, ii) les remords exprimés, ii) la réconciliation et iv) le sérieux et l'étendue de la coopération que l'accusé a fournie à l'Accusation.

52. Pour juger de l'incidence qu'un plaidoyer de culpabilité peut avoir sur la peine, la Chambre de première instance a examiné les rapports-pays présentés par l'institut Max Planck et la jurisprudence des Tribunaux internationaux. En conclusion, la Chambre de première instance convient qu'un plaidoyer de culpabilité devrait être pris en considération dans la sentence, car il exprime la reconnaissance par l'accusé de sa responsabilité dans les crimes commis. La Chambre relève que dans la plupart des systèmes de droit interne étudiés, un plaidoyer de culpabilité ou des aveux constituent une circonstance atténuante.

53. La Chambre de première instance estime que si le Tribunal considère un plaidoyer de culpabilité comme une circonstance atténuante, c'est, entre autres, parce que l'accusé contribue par là à l'établissement de la vérité au sujet du conflit dans l'ex-Yougoslavie et à la réconciliation entre les communautés touchées par ce conflit. La Chambre de première

instance rappelle qu'agissant en vertu du Chapitre VII de la Charte des Nations Unies, le Tribunal a pour mission de contribuer à la restauration et au maintien de la paix et de la sécurité dans l'ex-Yougoslavie, ce qui suppose qu'on arrive, dans la mesure du possible, à l'établissement de la vérité et à la réconciliation.

54. La Chambre de première instance convient que l'accusé a exprimé des remords lors des audiences consacrées à la fixation de la peine. À ce propos, la Chambre rappelle que dans sa déclaration finale, l'accusé a fait savoir qu'il éprouvait un sentiment sincère de honte et de déshonneur.

55. La Chambre de première instance tient également pour acquis que l'Accusation est convaincue du sérieux et de l'étendue de la coopération fournie par l'accusé. La Chambre considère que cet élément doit jouer dans le sens d'une réduction de la peine, car c'est la première fois qu'il était donné au Tribunal d'entendre parler du camp de Sušica et de la municipalité de Vlasenica. Ainsi, l'accusé a permis au Tribunal de remplir sa mission qui est d'établir les faits et la vérité.

56. Compte tenu de l'ensemble de ces circonstances atténuantes, la Chambre de première instance estime qu'une réduction importante de la peine s'impose.

57. La Chambre de première instance va à présent fixer la peine.

58. L'Accusation a requis une peine d'emprisonnement de quinze ans. Toutefois, la Chambre de première instance n'est pas liée, aux termes du Règlement, par les recommandations formulées en matière de peine dans un accord sur le plaidoyer de culpabilité. Après avoir mis en balance la gravité du crime et les circonstances aggravantes d'une part, et les circonstances atténuantes d'autre part, et après avoir pris en compte les finalités de la peine déjà évoquées, la Chambre de première instance conclut qu'elle ne peut pas suivre les réquisitions de l'Accusation. Compte tenu de la brutalité des actes, du nombre des crimes commis et de l'intention sous-jacente d'humilier et d'avilir, la peine requise par l'Accusation serait injuste. La Chambre considère non seulement comme une décision raisonnable et responsable mais également nécessaire dans l'intérêt des victimes, de leurs

proches et de la communauté internationale, d'infliger une peine plus lourde que celle recommandée par les parties.

59. La Chambre de première instance est consciente que du point de vue des droits de l'homme, tout accusé qui a purgé la portion nécessaire de sa peine, doit avoir la possibilité de se réinsérer dès lors qu'il ne représente plus aucun danger pour la société et que tout risque de récidive a été écarté. Toutefois, avant d'être libéré et de pouvoir se réinsérer, l'accusé devra avoir purgé au moins la peine d'emprisonnement requise par l'Accusation. Pour conclure, la Chambre de première instance estime que la peine énoncée dans le dispositif ci-après est une peine juste et proportionnée.

DISPOSITIF

Nous, Juges du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991, créé par le Conseil de sécurité des Nations Unies conformément à la résolution 827 du 25 mai 1993, élus par l'Assemblée générale et compétents pour vous juger, Dragan Nikolić, et prononcer la peine appropriée,

APRÈS AVOIR ENTENDU votre plaidoyer de culpabilité,

APRÈS VOUS AVOIR RECONNU COUPABLE des chefs 1 à 4 du troisième acte d'accusation modifié,

PAR CES MOTIFS,

VOUS CONDAMNONS, Dragan Nikolić, À UNE PEINE UNIQUE pour les chefs suivants :

Chef 1 : Persécutions, un crime contre l'humanité,

incluant

Chef 2 : Assassinat, un crime contre l'humanité,

Chef 3 : Viol, un crime contre l'humanité,

Chef 4 : Torture, un crime contre l'humanité.

NOUS VOUS CONDAMNONS, **Dragan Nikolić, à 23 années d'emprisonnement** et

DISONS que vous avez droit, à compter de la date du présent Jugement, à ce que la période de 3 ans, 7 mois et 29 jours calculée à compter de la date de votre arrestation le

20 avril 2000, ainsi que toute période supplémentaire que vous passerez en détention dans l'attente d'une décision en appel, soient décomptées de la durée de la peine.

En vertu de l'article 103 C) du Règlement, vous resterez sous la garde du Tribunal international jusqu'à ce que soient arrêtées les dispositions nécessaires à votre transfert vers l'État dans lequel vous purgerez votre peine.

1. Tekst koji slijedi je rezime presude Pretresnog vijeća koji će biti dostupan na engleskom, francuskom i bosanskom/hrvatskom/srpskom na kraju ove sjednice. Ovaj rezime nije sastavni dio presude. Jedini mjerodavan prikaz zaključaka Pretresnog vijeća i obrazloženja tih zaključaka nalazi se u pisanoj presudi, primjerci koje će takođe biti na raspolaganju stranama u postupku i javnosti neposredno nakon završetka ove sjednice.

2. Optuženi Dragan Nikolić, zvan "Jenki", 46-godišnji bosanski Srbin, prva je osoba protiv koje je ovaj Međunarodni sud podigao optužnicu 4. novembra 1994. godine. Prva izmijenjena optužnica potvrđena je 12. februara 1999. godine, a sadržavala je 80 tačaka koje su ga teretile za zločine protiv čovječnosti, teške povrede Ženevskih konvencija i kršenje zakona i običaja ratovanja. Ovaj predmet bavi se njegovom individualnom odgovornošću za posebno surove zločine počinjene u zatočeničkom logoru Sušica nedaleko od mjesta Vlasenice u istoimenoj opštini. Dragan Nikolić je bio komandant tog logora koji su srpske snage osnovale u junu 1992. godine.

3. Tada, 4. novembra 1994. godine, izdani su i nalozi za hapšenje Dragana Nikolića. Zbog neizvršenja naloga za hapšenje, 16. maja 1995. godine pokrenut je postupak u skladu s pravilom 61 Pravilnika. Pretresno vijeće je 20. oktobra 1995. godine donijelo odluku kojom utvrđuje postojanje osnovane sumnje da je Dragan Nikolić počinio sve zločine koji se navode u Optužnici. Pretresno vijeće je izjavilo da su neuspješno uručenje Optužnice i neizvršenje naloga za hapšenje posljedica nepostojanja odnosno odbijanja saradnje od strane tadašnje uprave bosanskih Srba na Palama.

4. Na kraju, optuženog je otprilike 20. aprila 2000. uhapsio SFOR u Bosni i Hercegovini, te je odmah 21. aprila 2000. godine sproveden pred Međunarodni sud.

5. Dragan Nikolić se izjasnio krivim 4. septembra 2003. u odnosu na Treću izmijenjenu optužnicu koja ga je teretila, između ostalog, i individualnom krivičnom odgovornosti za počinjenje ubistva (tačka 2), pomaganje i podržavanje silovanja (tačka 3) i počinjenje mučenja (tačka 4), kao zločina protiv čovječnosti. Krivično ponašanje koje je u osnovi tih optužbi djelimično tvori i osnov optužbe koja ostaje za

progone kao zločin protiv čovječnosti iz tačke 1 optužnice. Valja podsjetiti na činjenicu da je u trenutku kad se optuženi potvrdno izjasnio o krivici već bio zakazan početak suđenja u njegovom predmetu i da su prvi svjedoci veće bili stigli u Hag kako bi dali vanpretresni iskaz tokom sedmice od 1. do 5. septembra 2003.

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6. Pretresno vijeće se znatan dio vremena u pretpretresnoj fazi postupka bavilo pitanjima iz domena nadležnosti.

7. Odbrana je 17. maja 2001. i 29. oktobra 2001. predala podneske kojima osporava nadležnost Međunarodnog suda na osnovu navodno protivzakonitog hapšenja optuženog. Prema riječima odbrane, navodno protivzakonito hapšenje optuženog, koje su izvršili nepoznati pojedinci na teritoriji države koja je u to vrijeme bila Savezna Republika Jugoslavija, treba pripisati SFOR-u i Tužilaštvu, što je prepreka da Međunarodni sud ostvari svoju nadležnost nad optuženim. SFOR je optuženog uhapsio na teritoriji Bosne i Hercegovine nakon što su mu ga predali ti nepoznati pojedinci. Odbrana je nadalje tvrdila da protivzakonitost ovog hapšenja, bez obzira na to da li se taj postupak može pripisati Tužilaštvu ili ne može, sama po sebi sprečava ostvarivanje nadležnosti Međunarodnog suda.

8. Pretresno vijeće je 9. oktobra 2002. odbilo pravni lijek koji je tražila odbrana. Pretresno vijeće je donijelo odluku o pitanju da li su prilikom lišavanja slobode i dovođenja optuženog pred Međunarodni sud prekršeni principi državne suverenosti, i/ili međunarodnih ljudskih prava, i/ili vladavine prava.

9. Zaključak Pretresnog vijeća bio je da ni SFOR ni Tužilaštvo nisu učestvovali u nekom tajnom dogovoru ni u samim tim navodno protivzakonitim radnjama. Pretresno vijeće je smatralo da je, u skladu s članom 29 Statuta i pravilom 59*bis* Pravilnika, SFOR imao obavezu da uhapsi Dragana Nikolića i da ga preda ovom Međunarodnom sudu.

10. Pretresno vijeće je riješilo da u ovom slučaju nije došlo do povrede državnog suvereniteta, a svoju je odluku temeljilo na tri osnova: prvo, Pretresno vijeće smatra da u vertikalnom odnosu između Međunarodnog suda i država suverenitet po definiciji ne može da ima jednaku ulogu kao u horizontalnom odnosu među državama. Drugo, Pretresno vijeće podsjeća da ni SFOR ni Tužilaštvo ni u jednom trenutku nisu bili uključeni u sprovođenje Dragana Nikolića prije nego što je on prešao granicu između tadašnje Savezne Republike Jugoslavije i Bosne i Hercegovine. Treće, Pretresno vijeće smatra da bi, za razliku od slučajeva u kojima se radi o horizontalnom odnosu među državama, tadašnja Savezna Republika Jugoslavija, čak i da je došlo do povrede državnog suvereniteta, na osnovu člana 29 Statuta imala obavezu da optuženog preda po njegovom povratku u tadašnju Saveznu Republiku Jugoslaviju. Pretresno vijeće je u tom kontekstu podsjetilo na maksimu "*dolo facit qui petit quod [statim] redditurus est*", što znači da "zlonamjerno postupa onaj ko traži ono što će [odmah] morati da vrati."

11. Pretresno vijeće je ponovo istaklo tijesnu povezanost obaveze Međunarodnog suda da poštuje ljudska prava optuženog i obaveze da se poštuje redovan pravni postupak. Pretresno vijeće je, međutim, smatralo da činjenice kojima su baratale strane u postupku uopšte ne pokazuju da je postupanje nepoznatih pojedinaca s optuženim bilo tako flagrantno da bi to činilo pravnu prepreku ostvarivanju nadležnosti nad optuženim.

12. Odbrana je na ovu odluku podnijela interlokutornu žalbu 24. januara 2003. godine, nakon što je Pretresno vijeće dalo potvrdu za ulaganje žalbe. Žalbeno vijeće je odlukom od 5. juna 2003. godine odbilo žalbu. Prvo, prema stavu Žalbenog vijeća, čak i da se ponašanje nepoznatih pojedinaca može pripisati SFOR-u, čime bi SFOR postao odgovoran za povredu državnog suvereniteta, ne postoji osnov po kojem Međunarodni sud ne bi trebao da ostvaruje svoju nadležnost u ovom predmetu. Žalbeno vijeće je došlo do tog zaključka tako što je odvagnulo težinu koju ima legitimno očekivanje da osobe optužene za krivična djela koja su predmet univerzalne osude budu dovedene pred sud, u odnosu na princip državne suverenosti i temeljna ljudska prava optuženog.

13. Drugo, Žalbeno vijeće je iznijelo stav da su određena kršenja ljudskih prava toliko ozbiljna da zahtijevaju uskraćivanje nadležnosti. Međutim, Žalbeno vijeće se i složilo s ocjenom težine navodnog kršenja ljudskih prava optuženog koju je dalo Pretresno vijeće i zaključilo da prava optuženog nisu bila flagrantno prekršena tokom njegovog lišavanja slobode.

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14. Strane u postupku su 2. septembra 2003. godine podnijele Sporazum o izjašnjavanju o krivici, zasnovan na činjeničnoj osnovi nove Treće izmijenjene optužnice, koji je Pretresno vijeće prihvatilo na pretresu povodom izjašnjavanja o krivici održanom 4. septembra 2003.

15. Pretres pred izricanje kazne održan je od 3. do 6. novembra 2003. godine, kojom prilikom je optužba pozvala tri svjedoka i predala na uvrštenje u spis pismene izjave dvaju žrtava i jednog vještaka. Odbrana je pozvala dva svjedoka i ponudila na uvrštenje u sudski spis pismene izjave tri svjedoka odbrane.

16. Uoči pretresa pred izricanje kazne, Pretresno vijeće je naložilo *proprio motu* da se podnesu dva izvještaja vještaka, jedan o praksi izricanja kazne, a drugi o socijalizaciji optuženog. Tokom pretresa pred izricanje kazne, profesor dr. Ulrich Sieber s Instituta za strano i međunarodno krivično pravo Max Planck iz Freiburga u Njemačkoj, svjedočio je kao vještak o izvještaju vezanom za izricanje kazne, a dr. Nancy Grosselfinger svjedočila je u vezi s izvještajem o socijalizaciji.

17. Završnu riječ dao je optuženi. U svojoj izjavi je izrazio kajanje i prihvatio odgovornost za zločine koje je počinio.

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18. Pretresno vijeće će sada iznijeti kratki sažetak činjeničnog konteksta.

19. Približno 21. aprila 1992. godine grad Vlasenicu preuzele su srpske snage u sastavu JNA, paravojnih snaga i naoružanih mještana. Mnogi Muslimani i drugo nesrpsko stanovništvo izbjegli su iz vlaseničkog kraja, a od maja do septembra 1992. godine, deportovani su ili uhapšeni oni koji su ostali.

20. Krajem maja odnosno početkom juna 1992. godine srpske snage osnovale su zatočenički logor kojim je upravljala vojska i lokalna milicija u Sušici. Bio je to glavni zatočenički objekat na području Vlasenice, smješten otprilike jedan kilometar od Vlasenice.

21. Od početka juna 1992. godine sve do 30. septembra 1992. godine, Dragan Nikolić je bio komandant u logoru Sušica.

22. Zatočenički logor sastojao se od dvije glavne zgrade i jedne manje kuće. Zatočenici su bili smješteni u hangaru koji je bio približnih dimenzija 50 sa 30 metara. U periodu od kraja maja do oktobra 1992. godine sveukupno je čak 8.000 Muslimana civila i drugih nesrba iz Vlasenice i okolnih sela na neko vrijeme bilo zatočeno u hangaru logora Sušica. Odjednom je u hangaru obično bilo od 300 do 500 osoba. Zgrada je bila prenatrpana ljudima, a životni uslovi bili su za svaku osudu.

23. U logoru Sušica bili su zatočeni muškarci, žene i djeca, pa čak i cijele porodice. Žene i djeca - a neka su djeca imala samo osam godina - obično su boravili u zatočeništvu kraće vrijeme da bi potom bili prisilno premješteni na obližnja muslimanska područja.

24. Mnoge su zatočenice bile izložene seksualnom zlostavljanju, koje je uključivalo i silovanje. Logorski stražari ili drugi muškarci kojima je bio dozvoljen ulazak u logor često su noću izvodili žene iz hangara. Žene su se često vraćale traumatizovane i van sebe.

25. U septembru 1992. u Vlasenici više nije bilo praktično nijednog Muslimana ni drugih nesrba.

26. Pretresno vijeće podsjeća da je optuženi priznao istinitost svake pojedine činjenice sadržane u Trećoj izmijenjenoj optužnici koja čini činjenični osnov Sporazuma o izjašnjavanju o krivici. Pretresno vijeće takođe podsjeća da je obavezno slijediti ocjenu sadržanu u Sporazumu o izjašnjavanju o krivici i činjenični osnov na kojem se taj Sporazum temelji, a u ovom slučaju, to je Treća izmijenjena optužnica.

27. U pogledu **ubistva**, Dragan Nikolić je priznao svoju individualnu krivičnu odgovornost za ubistvo devet ljudskih bića: Durme Handžića; Asima Zildžića; Rašida Ferhatbegovića; Muharema Kolarevića; Dževada Sarića; Ismeta Zekića; Ismeta Dedića; Mevludina Hatunića; i Galiba Musića.

28. U pogledu optužbe za **pomaganje i podržavanje silovanja**, od početka juna do otprilike 15. septembra 1992. godine, Dragan Nikolić je lično odvodio i na druge načine omogućavao odvođenje zatočenica iz hangara, znajući pritom da se to čini u svrhu silovanja i drugih oblika seksualnog zlostavljanja. Radnje seksualnog nasilja vršili su logorski stražari, pripadnici specijalnih snaga, lokalni vojnici i drugi muškarci.

29. Zatočenice su seksualno zlostavljane na raznim mjestima, kao što su stražarska kuća, kuće u okolini logora, Hotel "Panorama", vojni štab i mjesta kamo su te žene odvođene na prisilni rad. Dragan Nikolić je dopuštao da se zatočenice, među kojima je bilo i djevojaka i starijih žena, verbalno maltretiraju ponižavajućim prijetnjama seksualnog sadržaja u prisustvu drugih zatočenika u hangaru. Dragan Nikolić je omogućio odvođenje zatočenica time što je dopuštao stražarima, vojnicima i drugim muškarcima pristup tim ženama i na druge načine podsticao postupanje koje predstavlja seksualno zlostavljanje.

30. U pogledu **mučenja**, Dragan Nikolić je priznao svoju individualnu krivičnu odgovornost koja proizlazi iz njegovog krivičnog ponašanja u radnjama mučenja pet ljudskih bića. Dragan Nikolić je priznao da je zatočenicima koji su bili žrtve mučenja rekao nešto u smislu: *"Šta? Nisu te dovoljno tukli; da sam to bio ja, ne bi ti bio u stanju da hodaš. Nisu oni tako dobro uvježbani da tuku ljude kao ja"*
i

"Ne mogu da vjerujem kako ovakva životinja ne može da umre, mora da ima dva srca."

31. U okviru **progona**, Dragan Nikolić je zatočenike podvrgavao nehumanim životnim uslovima, uskraćujući im odgovarajuću ishranu, vodu, zdravstvenu njegu, uslove za spavanje i obavljanje nužde. Zatočenici su uslijed atmosfere terora i uslova u logoru pretrpjeli psihičku i fizičku traumu.

32. Optuženi je vršio progon zatočenih Muslimana i drugih nesrba time što je pomagao u njihovom prisilnom premještanju iz vlaseničke opštine. Većina zatočenih žena i djece prebačena je u Kladanj ili u Cersku, na teritoriju pod kontrolom bosanskih Muslimana.

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33. Pretresno vijeće će se sada pozabaviti pravnom normom u vezi s izricanjem kazni. Potvrdno izjašnjavanje o krivici upućuje na to da optuženi priznaje istinitost optužbi sadržanih u optužnici i da prihvata odgovornost za svoja djela. Nema sumnje da se na taj način daje doprinos procesu pomirenja. Potvrdnim izjašnjavanjem o krivici žrtve su pošteđene ponovnog proživljavanja onoga što su doživjele i otvaranja starih rana. Uzgredno se time, premda to i nije neki značajniji olakšavajući faktor, štede sredstva Međunarodnog suda.

34. Za razliku od čistog priznanja ili potvrdnog izjašnjenja o krivici, sporazum o izjašnjavanju o krivici - koji ima svojih dobrih strana kao poticaj da se krivica prizna - ima i dvije negativne popratne pojave. Prvo, priznanje se odnosi samo na činjenice navedene u sporazumu koje ne moraju uvijek biti odraz cjelokupnog dostupnog činjeničnog i pravnog osnova. Drugo, moglo bi se pomisliti da je optuženi priznao krivicu samo zbog principa "*do ut des*" (dajem da bi mi ti dao). Zbog toga treba analizirati razlog zbog kojeg se neki optuženi odlučio za potvrdno izjašnjavanje o krivici: jesu li optužbe povučene, je li data neka preporuka za kaznu? Ni u kojem slučaju činjenica da je sklopljen sporazum o izjašnjavanju o krivici ne dopušta Pretresnom vijeću da se udalji od mandata ovog Međunarodnog suda - a on je da se istina iznese na vidjelo i donese pravda narodima bivše Jugoslavije. Premda sa sporazumima o izjašnjavanju o krivici valja postupati s odgovarajućim oprezom, treba podsjetiti da ovaj Međunarodni sud nije konačni arbitar Historije. Za sudije koji se koncentrišu na pitanja u srži nekog krivičnog predmeta pred ovim Međunarodnim sudom, važno je da pravda bude ostvarena i da se vidi da je pravda ostvarena.

35. Pretresno vijeće ističe da kod izricanja odgovarajuće kazne u pojedinom predmetu raspon kazne ograničava individualna krivica optuženog. Drugi ciljevi i funkcije kojima kazna služi mogu tek uticati na taj raspon definisan individualnom krivicom.

36. Pretresno vijeće smatra da su temeljni principi koje treba uzeti u obzir prilikom izricanja kazne odvraćanje i retribucija. U borbi protiv teških krivičnih djela na međunarodnom nivou, opšte odvraćanje odnosi se na pokušaj da se integrišu ili reintegrišu oni koji misle da su van dosega međunarodnog krivičnog prava. Takve osobe moraju postati svjesne toga da moraju poštovati temeljne globalne norme materijalnog krivičnog prava ili će u suprotnom biti suočene ne samo s krivičnim gonjenjem, već i sa sankcijama koje izriču međunarodni sudovi.

37. Po mišljenju ovog Pretresnog vijeća, retribuciju ne treba shvaćati kao ispunjenje želje za osvetom, već jedino kao primjereni izraz zgražanja međunarodne zajednice nad tim zločinima.

38. Još jedna glavna svrha kazne izrečene od strane nekog međunarodnog suda jeste da utiče na pravnu osviještenost optuženog, žrtava, svjedoka i opšte javnosti kako bi ih se uvjerilo da se pravni sistem sprovodi i primjenjuje. Pored toga, svrha procesa izricanja kazne jeste da se prenese poruka da se svi moraju povinovati opšte prihvaćenim zakonima i pravilima. "Sve su osobe jednake pred sudovima i tribunalima." Ovo temeljno pravilo potiče proces kojim u svijesti zakonodavaca i opšte javnosti dolazi do usvajanja tih zakona i pravila.

39. Kada je riječ o primjenjivom rasponu kazne, odbrana u ovom predmetu postavlja pitanje primjenjivosti principa *lex mitior*. Pretresno vijeće primjećuje da bi se raspon kazne, da je princip *les mitior* primjenjiv u ovom predmetu, sveo na određeni broj godina zatvora, a ne na zatvor do kraja osuđenikovog života.

40. Pretresno vijeće podsjeća da je princip *lex mitior* ugrađen, između ostalog, i u treću rečenicu stava 1 člana 15 Međunarodnog pakta o građanskim i političkim pravima, koja glasi:

> Ako poslije izvršenja ovog krivičnog djela zakon predviđa lakšu kaznu, krivac treba da se koristi time.

41. Međutim, Pretresno vijeće smatra da ta obaveza ne postoji u slučajevima u kojima je krivično djelo počinjeno u pravnom sistemu koji nije onaj u kojem počinilac prima kaznu. U slučaju usporedne nadležnosti, međunarodno pravo generalno ne obavezuje nijednu državu da primijeni raspon kazne odnosno pravne odredbe o izricanju kazni one države u kojoj je počinjeno predmetno krivično djelo. Pretresno vijeće stoga zaključuje da nije obavezno primijeniti blaže sankcije predviđene zakonom Republike Srpske, jednog od entiteta u Bosni i Hercegovini. Prema Statutu, Vijeće jedino treba da ih uzme u obzir.

42. Pored analize raspona kazni za krivična djela za koja se optuženi izjasnio krivim, a koji se primjenjuju u državama s područja bivše Jugoslavije, i prakse izricanja kazni za ta krivična djela, u Izvještaju profesora dr. Siebera razmatraju se odgovarajući rasponi kazni u pravnim sistemima 23 države širom svijeta. Taj pregled pokazuje da u većini tih zemalja jedno jedino djelo ubistva počinjeno neprekidnim

premlaćivanjem i motivisano etničkim predrasudama biva kažnjeno doživotnim zatvorom, pa čak i smrtnom kaznom, kao fakultativnom ili obligatornom sankcijom. Savjet bezbjednosti se očito oslanjao na to kada je predvidio kaznu zatvora kao jedinu sankciju bez ikakvog ograničenja i kada je ovom Međunarodnom sudu dao primat i u odnosu na izricanje kazni.

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43. Pretresno vijeće će sada razmotriti težinu krivičnih djela i otežavajuće okolnosti.

44. Pretresno vijeće zaključuje da činjenica da je Dragan Nikolić zloupotrijebio svoj položaj komandanta predstavlja značajan otežavajući faktor. Zlostavljao je zatočenike koji su bili posebno ranjivi, koji su živjeli ili umirali od ruke Dragana Nikolića, prepušteni njegovom hiru ili volji.

45. Nadalje, trenutne i dugoročne posljedice uslova koji su vladali u logoru Sušica dodatno otežavaju zločine optuženog. U logoru nije prošao nijedan dan i nijedna noć a da Dragan Nikolić i drugi nisu činili barbarska djela. Optuženi je surovo i sadistički tukao zatočenike. Udarao bi ih nogama i pesnicama, a predmeti kao što su željezne šipke, drške od sjekire, kundaci puške, metalni "bokseri", metalne cijevi, pendreci, gumene cijevi punjene olovom, komadi drveta i drvene palice, služili su mu za premlaćivanje zatočenika. Jedan od aspekata tih djela koji najviše ledi krv u žilama jeste to da je u tom krivičnom ponašanju uživao.

46. Optuženi je lično odvodio žene svih životnih dobi iz hangara i predavao ih u ruke muškaraca za koje je znao da će ih seksualno zlostavljati ili silovati, da bi ih zatim vraćao u hangar. Žene su zbog toga cijeli dan proživljavale agoniju znajući kakva će ih sudbina zadesiti s dolaskom noći.

47. Posljedice logora Sušica nisu nestale odlaskom zatočenika iz logora. Svjedoci su u svojim iskazima posvjedočili da i dan danas trpe psihičke posljedice koje proizlaze iz njihovih sjećanja.

48. Nadalje, broj žrtava predstavlja ozbiljan otežavajući faktor.

49. Zaključno, Pretresno vijeće prihvata sljedeće faktore kao posebno otežavajuće:

(i) Djela optuženog bila su strahovito surova i relativno dugog trajanja. Ne radi se o izoliranim postupcima, već o ispoljavanju sistematskog sadizma.

(ii) Optuženi je ignorisao vlastitog brata koji ga je preklinjao da prestane. Reklo bi se da je on uživao u svojim kriminalnim djelima.

(iii) Optuženi je zloupotrijebio svoju moć. Naročito u odnosu na zatočenice koje je podvrgavao ponižavajućim uslovima u kojima su bile izložene emotivnim, verbalnim i fizičkim napadima, prisiljene da ispunjavaju lične hirove optuženog, između ostalog i to da mu peru noge i mažu ih kremom radi njegovog ličnog osvježenja i da budu prisiljene obaviti nuždu pred svima prisutnima u hangaru.

(iv) Zbog teškog i posebno nemoralnog karaktera premlaćivanja Pretresno vijeće smatra da ponašanje koje se tereti kao mučenje pripada najvišem nivou mučenja, koji ima sva svojstva *de facto* pokušaja ubistva.

(v) Sa zatočenicima se postupalo više kao s robovima nego logorašima pod nadzorom optuženog.

(vi) Najzad, treba uzeti u obzir veliki broj žrtava u logoru Sušica i mnoštvo počinjenih krivičnih djela.

50. **Zaključno, ako uzme u obzir samo težinu zločina i sve prihvaćene otežavajuće okolnosti, Pretresno vijeće zaključuje da se ne bi mogla izreći nijedna druga kazna osim kazne zatvora u trajanju do kraja optuženikovog života. Međutim, postoje i olakšavajuće okolnosti koje će Pretresno vijeće sada razmotriti.**

51. Pretresno vijeće će se usredotočiti na četiri posebno važna faktora, a to su (i) sporazum o izjašnjavanju o krivici i potvrdno izjašnjavanje o krivici, (ii) kajanje, (iii) proces pomirenja i (iv) znatna saradnja s tužiocem.

52. Kako bi ocijenilo olakšavajući efekat potvrdnog izjašnjavanja o krivici, Pretresno vijeće je razmotrilo izvještaje pojedinih zemalja koje je podnio Institut Max Planck i jurisprudenciju međunarodnih sudova. Zaključno, Pretresno vijeće prihvata da se potvrdno izjašnjavanje o krivici treba uzeti u obzir kao olakšavajuća okolnost budući da odražava optuženikovo prihvatanje odgovornosti za krivična djela koja je počinio. Pretresno vijeće primjećuje da u većini analiziranih državnih pravnih sistema potvrdno izjašnjavanje o krivici ili priznanje ublažuje kaznu.

53. Pretresno vijeće zaključuje da su razlozi zbog kojih potvrdno izjašnjavanje o krivici pred ovim Međunarodnim sudom predstavlja olakšavajući faktor, između ostalog, i to što optuženi time doprinosi postupku utvrđivanja istine o sukobu u bivšoj Jugoslaviji, a što pomaže u jačanju procesa pomirenja u sukobom zahvaćenim sredinama. Pretresno vijeće podsjeća da Međunarodni sud, koji postupa u skladu s Glavom VII Povelje Ujedinjenih nacija, ima zadatak da doprinese ponovnoj uspostavi i očuvanju mira i sigurnosti u bivšoj Jugoslaviji, a jedan od preduslova za to jeste da se što više približi istini i pomirenju.

54. Pretresno vijeće prihvata da je tokom pretresa pred izricanje kazne pokazano kajanje. U tom pogledu Pretresno vijeće podsjeća da je optuženi u svojoj završnoj izjavi rekao da osjeća iskreni stid i sramotu.

55. Pretresno vijeće takođe prihvata da je tužilac uvjeren da je saradnja optuženog s tužiocem bila znatna. Pretresno vijeće smatra da se radi o faktoru koji ima određenu važnost u smislu ublažavanja kazne, naročito zbog toga što su se po prvi puta pred ovim Međunarodnim sudom čule informacije o logoru Sušica i o opštini Vlasenica. Optuženi je na taj način pridonio ostvarenju misije ovog Međunarodnog suda u smislu utvrđivanja istine i činjenica.

56. Uzimajući u obzir sve pomenute olakšavajuće okolnosti zajedno, Pretresno vijeće je uvjereno da one opravdavaju znatno smanjenje kazne.

57. Pretresno vijeće će se sada pozabaviti konkretnim odmjeravanjem kazne.

58. Tužilac je predložio kaznu zatvora u trajanju od petnaest godina. Međutim, u Pravilniku izričito stoji da Pretresno vijeće nije obavezno slijediti preporučenu kaznu naznačenu u sporazumu o izjašnjavanju o krivici. Odmjeravajući težinu krivičnih djela i otežavajuće faktore nasuprot olakšavajućim faktorima, uzimajući pritom u obzir pomenute ciljeve izricanja kazne, Pretresno vijeće ne može slijediti preporuku koju je dao tužilac. Zbog surovosti, broja počinjenih zločina i namjere s kojom su počinjeni - radi ponižavanja i degradiranja, izreći kaznu kao u preporuci bilo bi nepravično. Pretresno vijeće smatra da je ne samo razumno i odgovorno, već i nužno u interesu žrtava, njihove rodbine i međunarodne zajednice, da se izrekne veća kazna od one koju su preporučile strane u postupku.

59. Pretresno vijeće je svjesno toga da bi, iz perspektive ljudskih prava, svaki optuženi, nakon što odsluži nužni dio svoje kazne, trebao dobiti šansu da bude ponovno integrisan u društvo ako više ne predstavlja opasnost po društvo i ako ne postoji rizik da će ponovo počiniti krivična djela. Međutim, prije puštanja na slobodu i reintegracije, mora se odslužiti barem ona kazna zatvora koju je predložio tužilac. Zaključno, Pretresno vijeće smatra da je kazna izrečena u Dispozitivu koji slijedi adekvatna i proporcionalna.

<u>DISPOZITIV</u>

Mi, sudije Međunarodnog suda za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije od 1991. godine, osnovanog Rezolucijom br. 827 Savjeta bezbjednosti Ujedinjenih nacija od 25. maja 1993. godine, koje je izabrala Generalna skupština i dala nam u mandat da sudimo u postupku protiv vas, gospodine Dragane Nikoliću, i da izreknemo primjerenu kaznu,

SASLUŠAVŠI vaše potvrdno izjašnjavanje o krivici i

PROGLASIVŠI VAS KRIVIM za zločine navedene u tačkama od 1 do 4 Treće izmijenjene optužnice,

OVIME DONOSIMO JEDINSTVENU OSUĐUJUĆU PRESUDU protiv vas, **g. Dragane Nikoliću**, za

tačku 1: progone, zločin protiv čovječnosti,
koja obuhvata
tačku 2: ubistvo, zločin protiv čovječnosti,

tačku 3: silovanje, zločin protiv čovječnosti, i

tačku 4: mučenje, zločin protiv čovječnosti.

IZRIČEMO VAM KAZNU, g. Dragane Nikoliću, od <u>23</u> godina zatvora i

IZJAVLJUJEMO da imate pravo da vam se u trajanje kazne uračuna period od 3 godine, 7 mjeseci i 29 dana, izračunat od dana kada ste lišeni slobode, a to je dvadeseti april 2000. godine, do dana donošenja ove Presude o kazni, u što se ubrajaju svi dodatni dani koje biste još mogli provesti u pritvoru u očekivanju odluke po eventualnoj uloženoj žalbi.

Na osnovu pravila 103 (C) Pravilnika, ostaćete u pritvoru Međunarodnog suda dok se ne privede kraju organizovanje vašeg prelaska u državu u kojoj ćete služiti ovu kaznu.

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