



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

Case No. IT-95-9/2-S
Date: 17 October
2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Sharon A. Williams
Judge Per-Johan Viktor Lindholm

Registrar: Mr. Hans Holthuis

Judgement of: 17 October 2002

PROSECUTOR

v.

MILAN SIMIĆ

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Gramsci Di Fazio
Mr. Philip Weiner
Ms. Aisling Reidy

Counsel for the Accused:

Mr. Slobodan Zečević
Ms. Catherine Baen

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I. INTRODUCTION AND PROCEDURAL HISTORY

A. Introduction

1. Milan Simić, a 42 year-old Bosnian Serb, was first indicted by the Prosecutor 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 (“Tribunal”) with Blagoje Simić, Simo Zarić, Miroslav Tadić, Stevan Todorović and Slobodan Miljković for crimes alleged to have occurred in the area of Bosanski Samac in north-western Bosnia and Herzegovina in 1992. The initial indictment (“Initial Indictment”), issued on 21 July 1995, included three counts related to Milan Simić, namely the beating of Muhamed Bičić, charged as a grave breach of the 1949 Geneva Conventions¹ pursuant to Article 2(c) (wilfully causing great suffering) of the Statute of the Tribunal (“Statute”) (count 24); a violation of the laws or customs of war recognised by Article 3(1)(a) of the 1949 Geneva Conventions and pursuant to Article 3 of the Statute (cruel treatment) (count 25), and a crime against humanity pursuant to Article 5(i) (inhumane acts) of the Statute (count 26).

2. Milan Simić voluntarily surrendered to the Tribunal on 14 February 1998. At his initial appearance on 17 February 1998, Milan Simić pleaded “not guilty” to the charges against him contained in the Initial Indictment.

3. The Initial Indictment against Milan Simić has been amended three times and the most recent version, the Fourth Amended Indictment, was issued on 9 January 2002.² In the Fourth Amended Indictment (“Indictment”), Milan Simić was charged with seven counts: persecutions,³ a crime against humanity pursuant to Article 5(h) of the Statute (count 1), the beatings and torture of Hasan Bičić, Muhamed Bičić, Perica Mišić and Ibrahim Salkić, at the Bosanski Šamac primary

¹ Geneva Convention relative to the Treatment of Prisoners of War, Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 (“1949 Geneva Conventions”).

² With regard to the charges against Milan Simić, the First Amended Indictment (25 August 1998) included the following charges: count 1 (crime against humanity/persecutions), count 4 and count 9 (crime against humanity/inhumane acts), count 5 and count 10 (grave breach/wilfully causing great suffering), count 6 and count 11 (violation of the laws or customs of war/cruel treatment), count 7 and count 12 (crime against humanity/torture), and count 8 and count 13 (grave breach/torture or inhuman treatment); the Second Amended Indictment (11 December 1998) included all the same charges as the First Amended Indictment; the Third Amended Indictment (24 April 2001) included the following charges: count 1 (crime against humanity/persecutions), count 4 and count 7 (crime against humanity/torture), count 5 and count 8 (crime against humanity/inhumane acts), and count 6 and count 9 (violation of the laws or customs of war/cruel treatment).

³ The persecution charge alleged a campaign of “ethnic cleansing” against the non-Serb communities of the Bosanski Šamac and Odžak municipalities on discriminatory grounds that included the implementation of orders, policies, decisions, and other regulations infringing upon basic and fundamental rights of non-Serbs; unlawful detention and confinement of non-Serbs on political, racial, or religious grounds, and not for their protection and safety; and the torture and beating of non-Serbs.

school⁴ in mid-June 1992, charged as torture, a crime against humanity pursuant to Article 5(f) of the Statute (count 4), inhumane acts, a crime against humanity pursuant to Article 5(i) of the Statute (count 5), and cruel treatment, a violation of the laws or customs of war recognised by Article 3(1)(a) of the 1949 Geneva Conventions and pursuant to Article 3 of the Statute (count 6); and the beating and torture of Safet Hadžialijagić at the primary school, charged as torture, a crime against humanity pursuant to Article 5(f) of the Statute (count 7), inhumane acts, a crime against humanity pursuant to Article 5(i) of the Statute (count 8), and cruel treatment, a violation of the laws or customs of war recognised by Article 3(1)(a) of the 1949 Geneva Conventions and punishable under Article 3 of the Statute (count 9). All of the offences charged in the Indictment against Milan Simić were alleged to have been committed in the period from September 1991 to February 1993.⁵

4. The Indictment alleges in relation to counts 4, 5 and 6 that, one night between 10 June and 3 July 1992, in the hallway of the gymnasium of the Bosanski Samac primary school, Milan Simić beat with a variety of weapons and kicked Hasan Bičić, Muhamed Bičić, Perica Misić, and Ibrahim Salkić in their genitals and fired a gun shot over these men. Counts 7, 8 and 9 charge that one night in June 1992, in the hallway of the gymnasium of the Bosanski Samac primary school, Milan Simić kicked and beat Safet Hadžialijagić, and placed the barrel of his gun in Safet Hadžialijagić's mouth. While Milan Simić kicked and beat him, other men repeatedly pulled down Safet Hadžialijagić's pants and threatened to cut off his penis. These counts further charge that Milan Simić was accompanied by other Serb men and carried out these acts while in the position of President of the Executive Board of the Municipal Assembly of Bosanski Samac and a member of the Serb Crisis Staff.

5. Pursuant to Rule 65 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), Milan Simić was provisionally released on 26 March 1998, pending the start of his trial.⁶ The trial was scheduled to commence on 22 June 1999 and Milan Simić was ordered to return to the United Nations Detention Unit ("Detention Unit") two weeks before the anticipated start of trial,⁷ which he did on 7 June 1999. When the start of trial was delayed for reasons related to a co-accused,⁸ and

⁴ In the oral pleadings the term "elementary school" was used synonymously with "primary school".

⁵ *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Simo Zarić*, Case No. IT-95-9, Fourth Amended Indictment.

⁶ Decision on Provisional Release of the Accused, 26 March 1998.

⁷ Order Requiring Attendance of Accused, 10 May 1999.

⁸ The start of trial was delayed due to a challenge to the legality of arrest by co-accused Stevan Todorović. Stevan Todorović subsequently pled guilty and his case was severed from the case *Prosecutor v. Simić et al*, Case No. IT-95-9. See *Prosecutor v. Stevan Todorović*, Sentencing Judgement, Case No. IT-95-9/1-S, 31 July 2001 ("*Todorović Sentencing Judgement*").

when contempt allegations against him were dismissed,⁹ Milan Simić filed a second motion for provisional release, which was granted on 29 May 2000.¹⁰ On 26 July 2001, Trial Chamber III ordered the return of Milan Simić from Bosanski Samac, as the trial was set to commence on 10 September 2001.¹¹ Milan Simić was ordered to return to the Detention Unit by 13 August 2001 and he complied with the order.

6. The trial of Milan Simić and his co-accused commenced on 10 September 2001 in Trial Chamber II, before a bench comprised of Judge Florence Mumba, presiding, and Judge Amarjeet Singh and Judge Sharon A. Williams.¹² Judge Per-Johan Lindholm replaced Judge Amarjeet Singh on 11 April 2002, as Judge Amarjeet Singh was unable to continue sitting on this case due to health reasons.¹³

7. Milan Simić, who has been rendered a paraplegic subsequent to the events charged in the Indictment, suffers from medical complications due to this condition.¹⁴ Prior to the commencement of the trial, on 27 June 2001, Milan Simić filed a motion for the reduction of trial hours.¹⁵ On 26 July 2001, in addition to ordering the return of Milan Simić, Trial Chamber III also considered that a second examination by experts would assist the Trial Chamber to reach an informed decision on the motion and ordered as such. A second medical expert report was filed on 31 August 2001.¹⁶ By an oral ruling on 10 September 2001, the Trial Chamber decided that the court sittings would take place in the mornings only, to accommodate Milan Simić's medical situation and ordered the Registry of the Tribunal to look into the possibility of the provision of a suitable bed for his use during breaks.¹⁷ Such a bed was made available for court sittings between 22 October and 9 November 2001, and from 19 November to 30 November 2001. Additionally, a nurse was present to assist Milan Simić. During this period the Trial Chamber was able to sit for an additional one and

⁹ Contempt proceedings were initiated against Milan Simić and his counsel on 7 June 1999 pursuant to Rule 77 of the Rules. In an oral decision delivered on 29 March 2000, the Trial Chamber found that Milan Simić and his counsel were not in contempt of the Tribunal. *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, Judgement in the Matter of Contempt Allegations against an Accused and his Counsel, 30 June 2000.

¹⁰ Decision on Milan Simić's Application for Provisional Release, 29 May 2000.

¹¹ Decision on Return of Milan Simić for Medical Examination and Termination of Provisional Release, 26 July 2001.

¹² Judge Singh and Judge Williams were appointed to serve as *ad litem* judges pursuant to Article 13 *ter* of the Statute, following the "Order of the President Assigning Two *Ad Litem* Judges to a Trial" of 7 September 2001.

¹³ Pursuant to Rule 15 *bis* (C), all accused in the case agreed to the continuation of the trial with the newly-constituted bench. T. 6832-34. Judge Lindholm was appointed to serve as *ad litem* Judge on 8 April 2002.

¹⁴ Milan Simić was wounded by bullets from an automatic weapon in February 1993 resulting in serious permanent disability. "Medical Expertise" report by Dr. Y. De Grave, Dr. J.L. Liessens and Dr. J. Somvile, filed 31 August 2001, Registry Page 9754.

¹⁵ Defendant Milan Simić's Motion for the Reduction of Trial Hours, 27 June 2001, filed together with a "Forensic Expertise" report on the medical condition of Milan Simić.

¹⁶ "Medical Expertise" report by Dr. Y. De Grave, Dr. J.L. Liessens and Dr. J. Somvile, filed 31 August 2001, concluding, *inter alia*, that Milan Simić may be present in court for periods up to three hours, twice a day, and that should there be an interruption in the hearings, the possibility must be provided for him to be put in a supine position during the interruption.

a half hours in the afternoon with a two and a half hours break in between for Milan Simić to rest on the bed.

8. In order to both expedite the proceedings and assist Milan Simić's medical condition, a video-link system was provided and was operational from 11 February 2002 until the time Milan Simić pleaded guilty.¹⁸ A two-way telephone link between Milan Simić in the Detention Unit and his counsel in the courtroom was also installed. This system enabled Milan Simić to follow the proceedings from the Detention Unit and communicate with his counsel. On 1 March 2002, at a status conference, the Trial Chamber inquired as to the functioning of the video-link system and was informed by Defence Counsel for Milan Simić that the system was functioning.¹⁹ Thereafter, the Trial Chamber extended its sitting hours by an additional hour from 4 March 2002. On 26 March 2002, the Trial Chamber, "considering it appropriate to review the state of health of Milan Simić six months after the start of trial," ordered a further medical examination of Milan Simić.²⁰ Pursuant to this order, a third medical expert report was filed on 23 May 2002 ("23 May 2002 Medical Report").²¹ The 23 May 2002 Medical Report concluded amongst other matters that "the court proceedings have had no undue influence on the treatment nor the evolution of the medical condition" of Milan Simić.²²

B. The Plea Agreement

9. Milan Simić and the Office of the Prosecutor ("Prosecution") filed a confidential "Joint Motion for Consideration of Plea Agreement between Milan Simić and the Office of the Prosecutor" on 13 May 2002 ("Joint Motion"). A detailed factual basis of the allegations agreed to by Milan Simić in relation to his participation in the incidents alleged in the Indictment is set out in a document entitled "Annex A" attached to the Joint Motion (collectively, "Plea Agreement"). On 13 May 2002, the parties also jointly requested that any proceedings related to the imposition of a sentence on Milan Simić be conducted in closed session until the conclusion of the Prosecution case in the proceedings against his former co-accused.²³

¹⁷ T. 917.

¹⁸ T. 5585-86. Since 11 February 2002, a total of 25 signed waivers of the right to be present in court during the proceedings have been filed on Milan Simić's behalf.

¹⁹ T. 6644-46.

²⁰ Order for Medical Examination of Milan Simić, 26 March 2002.

²¹ "Medical Expertise" report by Dr. Y. De Grave, Dr. J.L. Liessens and Dr. J. Somville, filed 23 May 2002.

²² *Ibid.* p. 8.

²³ Prosecution and Defence Joint Request for a Closed Session Pursuant to Rule 62 *ter* (C), filed on 13 May 2002, concurrently with the Plea Agreement.

10. In the Plea Agreement, the Prosecution and Milan Simić agreed on certain facts as being true and constituting the factual basis for the guilty plea. Milan Simić agreed to plead guilty to count 4 and count 7 of the Indictment, while the Prosecution agreed to seek leave to withdraw the remaining charges against him, should the guilty plea to the two counts be accepted by the Trial Chamber. Counts 4 and 7 of the Indictment charge Milan Simić with acts of torture, as crimes against humanity under Article 5(f) of the Statute.

11. Milan Simić and the Prosecution agreed that the facts and allegations set out in paragraphs 2, 5, 6-12, 24, 25, in respect of count 4, paragraphs 26 and 27 in respect of count 7, and paragraphs 28-30, 32-34 and 36-37 of the Indictment would be proven beyond reasonable doubt were the Prosecution to proceed with further evidence, and these facts were not disputed by Milan Simić.²⁴ Specifically, Milan Simić acknowledged that: (a) on 30 May 1992 he was appointed President of the Executive Board in the Municipality of Bosanski Šamac; (b) hundreds of Muslim and Croatian men and women were detained within detention centres or prison camps established for civilians in Bosanski Šamac after 16 April 1992; (c) on various occasions during the summer months of 1992, he went, whilst armed and wearing a uniform, accompanied by other armed Serb men, to the primary school in Bosanski Šamac which was serving as a prison camp; (d) on one occasion between 10 June and 3 July 1992, four non-Serb prisoners at the primary school, Hasan Bičić, Muhamed Bičić, Perica Mišić and Ibrahim Salkić, were attacked, brutally beaten and kicked by Milan Simić and the men accompanying him, on various parts of their bodies, and especially in the genitals; during the beating, gunshots were fired above their heads; (e) in an incident in June 1992, Safet Hadžialijagić was severely beaten by Milan Simić and the men accompanying him; it was common knowledge in Bosanski Samac that Safet Hadžialijagić had a heart condition; Safet Hadžialijagić was forced to pull down his pants, and one of the men accompanying Milan Simić brandished a knife and threatened to cut off Safet Hadžialijagić's penis; the other assailants were challenging and exhorting the man wielding the knife to cut off Safet Hadžialijagić's penis; and at one point, the barrel of a handgun was pushed into Safet Hadžialijagić's mouth and Milan Simić fired gunshots over his head, before the victim was released and allowed to return to the gymnasium.²⁵

²⁴ Plea Agreement, para. 8.

²⁵ Plea Agreement, paras 6 and 9. During the sentencing hearing, the Defence indicated that the Prosecution's description of the events related to Safet Hadžialijagić in para. 2 of the Prosecution Sentencing Brief were inaccurate when compared with the Indictment, T/2 at 41. The Trial Chamber notes that there are three versions how Safet Hadžialijagić's pants were pulled down and followed by threats to cut off his penis: (a) "the other Serb men who accompanied Milan Simić repeatedly pulled down the victim's pants and threatened to cut off his penis" (para. 26, Indictment), (ii) "Mr. Hadžialijagić was forced to pull down his pants and one of the perpetrators accompanying the defendant brandished a knife and threatened to cut off his penis" (para. 9(e), Plea Agreement) and (iii) "Milan Simić

12. The Plea Agreement contains provisions reflecting the understanding of Milan Simić as to the legal nature of the charge of torture as a crime against humanity. He accepted that, at the conclusion of trial, the Prosecution would have proven the following elements of Article 5 of the Statute beyond reasonable doubt: (1) an armed conflict existed during the relevant time frame of the Indictment; (2) there was a widespread or systematic attack directed against a civilian population; (3) Milan Simić's conduct was related to the widespread or systematic attack directed against a civilian population; (4) Milan Simić was aware of the wider context in which his conduct occurred; (5) Milan Simić inflicted severe mental or physical pain or suffering on the victims named in paragraphs 24 and 26 of the Indictment; (6) Milan Simić's conduct was committed for the purpose of punishing, intimidating or humiliating the victims with discriminatory intent; and (7) Milan Simić's conduct was committed while holding his position as an official, and in an official capacity.²⁶

13. The Prosecution and the Defence²⁷ agreed that both would recommend to the Trial Chamber a total sentence of not less than three years and not more than five years.²⁸ Both parties agreed that Milan Simić understood that, pursuant to Rule 101 of the Rules, he could face a term of imprisonment up to and including the remainder of his life; that the Trial Chamber was free to sentence him as it saw fit; that the Trial Chamber should consider the gravity of the offence, his individual circumstances, the aggravating and mitigating circumstances, and the general practice regarding prison sentences in the former Yugoslavia in determining his sentence; and that he would be given credit for the time he spent in custody, both before and during the trial.²⁹

14. Milan Simić acknowledged that by entering a plea of guilty he voluntarily waived certain procedural rights guaranteed by the Statute.³⁰

pulled down the victim's pants and threatened to cut off his penis" (para. 2, Prosecution Sentencing Brief). The Trial Chamber also notes the following inconsistencies: Para. 24 of the Indictment alleges that Milan Simić fired a gun shot over the heads of the four victims, whereas para. 9(d) of the Plea Agreement states that gunshots were fired above their heads. Para. 25 of the Indictment alleges that Milan Simić placed the barrel of his gun in Safet Hadžialijagić's mouth. Para. 9(e) of the Plea Agreement states that the barrel of a handgun was pushed into his mouth. The Trial Chamber will rely on the version agreed between the parties in the Plea Agreement for the purposes of sentencing.

²⁶ Plea Agreement, para. 6.

²⁷ The term "Defence" refers to both Defence counsel for Milan Simić and Milan Simić, unless otherwise specified.

²⁸ Plea Agreement, para. 7. If the total sentence imposed by the Trial Chamber does not exceed the range recommended by the parties, both parties agreed not to appeal the sentence. Plea Agreement, para. 10(c).

²⁹ Plea Agreement, para. 10.

³⁰ These include the right to plead not guilty; the right to prepare and put forward a defence to the charges at a public trial; the right to be tried without undue delay; the right to be tried in his presence, and to defend himself in person at trial, or through legal assistance of his own choosing at trial; the right to examine at his trial, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses on his behalf at a trial under the same conditions as witnesses who testified against him; the right not to be compelled to testify against himself or to confess guilt; the right to testify or to remain silent at trial; and all appellate rights including, but not limited to, the right to

15. Milan Simić further acknowledged that he entered into the Plea Agreement freely and voluntarily, that no threats were made, no inducements were offered, to induce or force him to enter into this guilty plea agreement.³¹

16. At the time of the Plea Agreement, the Prosecution was in day 83 of presenting its evidence, with nineteen witnesses having been heard,³² including four of the five proposed witnesses to testify in relation to events concerning Milan Simić, as alleged in counts 4 to 9 of the Indictment.

C. The Guilty Plea

1. Applicable law: guilty plea as a basis for conviction

17. There is no specific provision in the Statute of the Tribunal regarding guilty pleas. Article 20, paragraph 3 of the Statute provides:

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.

18. The relevant provisions under the Rules related to guilty pleas and plea agreements, namely Rule 62 *bis* and Rule 62 *ter*, provide:

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,

appeal a finding of guilt, any pre-trial or trial rulings or any matters relating to sentencing, if the sentence imposed is within the range of sentence agreed upon by the parties. *See* Plea Agreement, para. 11.

³¹ Plea Agreement, para. 13.

³² At the close of the Prosecution case on 3 September 2002 in the case of *Prosecutor v. Blagoje Simić et al.*, 35 witnesses had been heard.

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

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).
- (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.

2. Proceedings related to the guilty plea

19. A hearing pursuant to Rule 62 *bis* was held on 15 May 2002. At the hearing, the Trial Chamber ruled that the proceedings would be conducted in closed session, having satisfied itself that good cause had been shown for such, pursuant to Rule 62 *ter* (C) of the Rules.³³ The purpose of the hearing was for the Trial Chamber to satisfy itself as to the conditions set forth in Rule 62 *bis*, in order to determine whether it could enter findings of guilt against Milan Simić.

20. In accordance with Rule 62 *bis*, the Trial Chamber confirmed that Milan Simić had not been threatened or coerced in any way to enter into the Plea Agreement, and that he was entering his plea voluntarily; that he understood the Indictment against him; that the terms of the Plea Agreement had been explained to him and had been discussed with his counsel; that he understood them and that he understood the consequences of any plea that would be made by him. He also confirmed that he

³³ T. 8009-10.

understood that sentence was ultimately a matter for the Trial Chamber to determine, irrespective of the terms of the Plea Agreement.³⁴

21. Having satisfied itself that the particulars of the facts in the Plea Agreement formed a sufficient factual basis for finding Milan Simić guilty on both counts, and having considered the circumstances surrounding the entering of the plea, the Trial Chamber found that the requirements of Rule 62 *bis* were met. Accordingly, it entered a finding of guilty on counts 4 and 7 of the Indictment.³⁵ Additionally, the Trial Chamber granted the Prosecution leave to withdraw the remaining counts against Milan Simić and ordered it to file a confirmation to this effect.³⁶

22. On 16 May 2002, the Prosecution filed a formal written notice of withdrawal of all remaining counts against Milan Simić.³⁷

23. Pursuant to Rule 82 of the Rules, the Trial Chamber severed Milan Simić from the case *Prosecutor v. Blagoje Simić et al.* on 28 May 2002,³⁸ and the case against Milan Simić was re-designated as Case No. IT-95-9/2.

D. The Sentencing Hearing

24. In preparation for the sentencing hearing, the Defence for Milan Simić filed a motion on 27 June 2002 seeking the admission of two statements of Perica Mišić³⁹ pursuant to Rule 92 *bis* of the Rules, or in the alternative, to compel this witness to testify *viva voce* at the sentencing hearing.⁴⁰

25. The Prosecution opposed both requests on the grounds that (a) the Defence may not call witnesses to testify on any factual aspect of the agreed facts which are the basis of the plea of guilty; and (b) the witness statements cannot be admitted pursuant to the requirements of Rule 92 *bis*.⁴¹ The Prosecution submitted that the “statements of Perica Mišić directly relate to the conduct of Milan Simić and his acts of torture perpetrated on the witness”, and that “the statements also

³⁴ T. 8011-12.

³⁵ T. 8012.

³⁶ T. 8013.

³⁷ Prosecutor’s Formal Notice of Withdrawal of All Counts (Save Counts 4 and 7) Against Milan Simić in the Matter of the *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, and Simo Zarić*, Pursuant to the Order of the Trial Chamber Dated the 15th of May 2002, filed 16 May 2002.

³⁸ T. 8419.

³⁹ Perica Mišić one of the named victims in count 4 appeared on the Prosecution’s original witness list. The Prosecution did not call him.

⁴⁰ Milan Simić’s Motion, Pursuant to Rule 92 *bis*, to Admit Written Statements of Perica Mišić Obtained by the Office of the Prosecutor and Produced Pursuant to Rule 66 and Conditional Motion to Compel Appearance of Perica Mišić to testify *viva voce*, filed confidentially on 27 June 2002.

include evidence of the acts of the men who accompanied Milan Simić in conducting these acts of torture to which the Accused pleaded guilty on 15 May 2002”.⁴²

26. The Trial Chamber denied the motion on 9 July 2002,⁴³ considering that “it would be wrong to allow evidence in the sentencing proceedings which in any way put in issue the agreed facts, and that witness statements or testimony that address agreed facts and an accused person’s responsibility for crimes already pled guilty to should not be allowed.”⁴⁴

27. The Prosecution filed its confidential “Prosecutor’s Brief on the Sentencing of Milan Simić” (“Prosecution’s Sentencing Brief”) on 15 July 2002, as required by the Trial Chamber.⁴⁵ The Defence filed its “Defendant’s Sentencing Brief” (“Defence Sentencing Brief”), also confidentially, on the same day.⁴⁶ In the Defence Sentencing Brief, the Defence indicated that it would call two witnesses *viva voce* at the sentencing hearing. At the sentencing hearing, the Defence informed the Trial Chamber that it would not call witnesses; rather it would submit one proposed witness’ testimony through an affidavit⁴⁷ and agreed to withdraw another witness’ affidavit, as the Prosecution objected to it.⁴⁸

28. The sentencing hearing for Milan Simić was held on 22 July 2002. At the sentencing hearing, the Trial Chamber lifted the confidentiality of all filings related to the hearing, including the transcript of the hearing during which the plea was taken, except that of the Plea Agreement.⁴⁹

29. Milan Simić made a statement at the start of the Defence submissions, in which he expressed his “sincere regret and remorse” for what he had done to his “fellow citizens and friends at the elementary school.”⁵⁰ He took the opportunity to “publicly extend apology to all of them.”⁵¹

⁴¹ Response of the Prosecutor to Defence Motion of 27 June 2002 Concerning Witness Testimony for Purposes of Sentencing Hearing, filed confidentially on 3 July 2002 (“Response”).

⁴² Response, para. 7.

⁴³ Decision on Admission of Witness Testimony, 9 July 2002 (“Decision on Admission”).

⁴⁴ Decision on Admission, p. 3.

⁴⁵ Letter to Parties, 26 June 2002 (scheduling of sentencing briefs and hearing).

⁴⁶ The Defence attached numerous annexes to the Defence Sentencing Brief, including: “Forensic Expert Opinion on the health of the accused, Milan Simić” (Exhibit A); “Report on Milan Simić of UNDU Chief Tim McFadden” (Exhibit B); a report from the Embassy of Bosnia and Herzegovina stating that Milan Simić did not have a “criminal past” (Exhibit C); Certificate from the SDS of Šamac stating that Milan Simić did not become a member of the SDS until 13 February 1993 (Exhibit D); affidavits from eight character witnesses (Exhibits E-L); reports on Milan Simić from the Bosanski Šamac Public Security Station during his provisional release (Exhibits M-W); and documents concerning actions taken by Milan Simić while serving as President of the “Executive Committee”, Serbian Municipality of Bosanski Šamac (Exhibits Y1-11).

⁴⁷ D43/2 and D43/2ter.

⁴⁸ Transcript for Case No. IT-95-9/2 (“T/2.”) at 1.

⁴⁹ T/2. 1.

⁵⁰ T/2. 34.

30. During the sentencing hearing, the parties expanded on the arguments set out in their respective briefs regarding aggravating and mitigating circumstances. The Prosecution requested that the Trial Chamber impose a sentence of five years, while the Defence requested that the Trial Chamber impose a sentence of three years. The Trial Chamber reserved its Judgement to a later date.

II. SENTENCING

A. Applicable Law

31. The provisions of the Statute and the Rules which pertain to sentencing are set forth below:

Article 24

Penalties

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.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 100

⁵¹ T/2. 35.

Sentencing Procedure on a Guilty Plea

- (A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
- (B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-rule 102 (B).

Rule 101

Penalties

- (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 cooperation 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;
 - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
- (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.

B. Sentencing Factors

1. General Considerations

32. The factors to be taken into account in determining the sentence for an individual accused are expressed in Article 24 of the Statute and in Rule 101 (B) of the Rules. These include the gravity of the crime, any aggravating or mitigating circumstances as well as the general practice regarding prison sentences in the courts of the former Yugoslavia.

33. The Trial Chamber is cognisant of the jurisprudence of the Tribunal, which supports deterrence and retribution as the main general sentencing factors.⁵² The Trial Chamber understands this to mean that first, the penalty imposed must be proportionate to the gravity of the crime and the degree of responsibility of the offender, and second, such penalty must have sufficient deterrent value to ensure that those who would consider committing like crimes will be dissuaded from so doing, and consequently contributing to respect of the rule of law and promoting an acknowledgement of the harm done to the victims. Both these general sentencing factors form the backdrop against which Milan Simić's sentence will be determined.

(a) Torture as a Crime against Humanity

34. Milan Simić has been convicted of two counts of torture, as crimes against humanity. The crime of torture is particularly heinous in its nature and violates an internationally recognised human right. This right is fundamental to human dignity and the upholding of the rule of law. Torture has been defined by the Tribunal as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, with the aim of obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, for any reason, against the victim or a third person.⁵³ The right not to be subjected to torture is recognised in customary and conventional international law and as a norm of *jus cogens*. It cannot be tolerated. It is an absolute assault on the personal human dignity, security and mental being of the victims. As noted in *Krnjelac*, torture “constitutes one of the most serious attacks upon a person’s mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment.”⁵⁴ Only acts of substantial gravity which rise to a certain threshold of severity, or cruelty, may be regarded as acts of torture. The objective or absolute degree of pain required for an act to constitute torture, however, has not been determined in the Tribunal’s case-law and must be assessed on a case by case basis, taking account of all the specific circumstances of the case.⁵⁵ Although the act of torture must have been committed for one

⁵² *Todorović* Sentencing Judgement, paras 28-29; *Prosecutor v. Krnjelac*, Case No. IT-97-25-T, Judgement, 12 March 2002 (“*Krnjelac* Judgement”), para. 508; *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac* Trial Judgement”), para. 838; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 806; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”), para. 288; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-Tbis-R117, Sentencing Judgement, 11 November 1999 (*Tadić* Sentencing Judgement (1999)), para. 9.

⁵³ *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002, (“*Kunarac* Appeal Judgement”), para. 142.

⁵⁴ *Krnjelac* Trial Judgement, para. 180.

⁵⁵ *Kunarac* Appeal Judgement, paras 149-50; *Krnjelac* Trial Judgement, para. 182.

of the prohibited purposes mentioned in the definition, the act need not have been committed “exclusively” for one of the prohibited purposes.⁵⁶

35. Further, for torture to qualify as a crime against humanity, proof of the following elements is required: that “objectively the acts of the accused are linked geographically as well as temporally with the armed conflict”;⁵⁷ that the acts of the accused were related to a widespread or systematic attack directed against any civilian population.⁵⁸ In addition, the accused must have known that his acts were part of the attack, or at least have taken the risk that his acts were part of the attack. The Appeals Chamber accepted that this does not entail knowledge of the details of the attack.⁵⁹ When charged as a crime against humanity, the offence of torture committed by an accused is one element of an extensive criminal conduct and the torturer must have acted in the knowledge that his acts formed part of this overall context.

36. In the Plea Agreement, Milan Simic acknowledged that he inflicted severe pain or suffering, whether physical or mental, on the victims named in counts 4 and 7 of the Indictment. The prohibited purpose, as acknowledged in the Plea Agreement, was punishing, intimidating or humiliating the victims with discriminatory intent.⁶⁰ Milan Simic further accepted the other legal elements of torture as a crime against humanity.

(b) The gravity of the crime

37. Article 24(2) of the Statute requires that in determining an appropriate sentence, a Trial Chamber should consider the gravity of the offence. Trial Chambers have consistently viewed the gravity of the offence as the most important factor to consider in determining sentence.⁶¹ The Appeals Chamber reiterated this position in the *Čelebici* case when it held that “the gravity of the

⁵⁶ *Kunarac* Appeal Judgement, para. 153; *Krnojelac* Trial Judgement, para. 184.

⁵⁷ *Kunarac* Appeal Judgement, para. 83

⁵⁸ See *Kunarac* Appeal Judgement, paras 85-100.

⁵⁹ *Kunarac* Appeal Judgement, para. 102.

⁶⁰ The Trial Chamber notes that, although there is no clear jurisprudence as to whether the purpose of “humiliating” should be recognised as one of the prohibited purposes of torture, it is not the only purpose acknowledged by Milan Simić. See *Krnojelac* Judgement, paras 185-86; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (“*Kvočka* Judgement”), paras 141, 152, 157; *Furundžija* Trial Judgement, para. 162. In accordance with the Appeals Chamber’s holding in *Kunarac*, the Trial Chamber considers that if one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose is immaterial. See *Kunarac* Appeal Judgement, para. 155.

⁶¹ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebici* Trial Judgement”), para. 1225; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 (“*Kupreškić* Trial Judgement”), para. 852.

offence is the primary consideration in imposing sentence.”⁶² The Appeals Chamber endorsed the following statement by the Trial Chamber in *Kupreskić*:

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.⁶³

38. In order to determine the gravity of Milan Simić’s offence, and in light of the fact that his conviction rests upon a plea of guilty, the Trial Chamber must consider the details of the criminal conduct forming the basis of the conviction and any aggravating circumstances. This is done below.

39. In relation to any aggravating circumstances, the Appeals Chamber in *Celebici* held that “only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.”⁶⁴

(c) Mitigating circumstances

40. Rule 101(B)(ii) of the Rules provides that the Trial Chamber, in determining the sentence, shall take into account “any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction.” Mitigating circumstances need only be proven on the balance of probabilities and not beyond a reasonable doubt.⁶⁵

41. A Trial Chamber has the discretion to consider any factors that it considers to be of a mitigating nature.⁶⁶ Mitigating factors will vary with the circumstances of each case. In previous cases, Chambers of the Tribunal have found the following factors to be mitigating: voluntary surrender, guilty plea, co-operation with the Prosecution, youth, expression of remorse, good character with no prior criminal conviction, family circumstances, acts of assistance to victims, diminished mental capacity, and duress.⁶⁷

⁶² *Čelebići* Appeal Judgement, para. 731.

⁶³ *Ibid.*, (citing *Kupreskić* Trial Judgement, para. 852).

⁶⁴ *Ibid.*, para. 763.

⁶⁵ *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 (“*Sikirica* Sentencing Judgement”), para. 110 (referring to *Kunarac* Trial Judgement, para. 847).

⁶⁶ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement (“*Krstić* Judgement”), para. 713.

⁶⁷ Voluntary surrender: *Kupreskić* Trial Judgement, paras 853, 860, 863. *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreskić* Appeal Judgement”), para. 430. *Kunarac* Trial Judgement, para. 868. Admission of guilt: *Kupreskić* Appeal Judgement, para. 464; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement (“*Jelisić* Appeal Judgement”), para. 122; *Sikirica* Sentencing Judgement, paras 148-151, 192-93, 228. *Todorović* Sentencing Judgement, paras 75-82. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998 (“*Erdemović* Sentencing Judgement (1998)”), para. 16(ii). Cooperation with OTP: *Kunarac* Judgement, para. 868; *Kupreskić* Appeal Judgement, para. 463. *Todorović* Sentencing Judgement, paras. 83-88. *Tadić* Sentencing Judgement (1999), paras 21-22. *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25

42. A circumstance that the Trial Chamber is specifically required to consider in mitigation of the sentence pursuant to Rule 101 (B)(ii) is the “substantial co-operation with the Prosecution by the convicted person before or after conviction”. In the *Blaskic* case, the Trial Chamber laid down the conditions under which an accused’s co-operation with the Prosecution may qualify as a mitigating factor:

Co-operation with the Prosecutor is the only circumstance explicitly provided for within the terms of the Rules. By this simple fact, it takes on a special importance. The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused’s co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Providing that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a “significant mitigating factor”.⁶⁸

43. The Trial Chamber in the *Todorovic* case adopted this position and held that the determination as to whether an accused’s co-operation has been substantial “depends on the extent and quality of the information he provides.”⁶⁹

(d) The general practice regarding prison sentences in the courts of the former Yugoslavia

44. Article 24(1) of the Statute and Rule 101 (B)(iii) of the Rules require the Trial Chamber, in determining a sentence, to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia. The Appeals Chamber interpreted these provisions as follow:

It is now settled practice that, although a Trial Chamber should “have recourse to” and should “take into account” this general practice regarding prison sentences in the courts of the former Yugoslavia, this “does not oblige the Trial Chambers to conform to the practice; it only obliges the Trial Chambers to take account of that practice.” ... Trial Chambers are not *bound* by the practice of courts in the former

June 1999 (“*Aleksovski* Trial Judgement”), para. 238; *Erdemović* Sentencing Judgement (1998), para. 16(iv). Young age: *Jelisić* Appeal Judgement, paras 129, 131; *Furundžija* Trial Judgement, para. 284; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić* Judgement”), para. 778; *Erdemović* Sentencing Judgement (1998), para. 16(i). Remorse: *Sikirica* Sentencing Judgement, paras 152, 194, 230. *Todorović* Sentencing Judgement, paras. 89-92; *Erdemović* Sentencing Judgement (1998), para. 16(iii). Character: *Krnjelac* Judgement, para. 519; *Kupreškić* Trial Judgement, para. 478. *Kupreškić* Appeal Judgement, para. 459. *Aleksovski* Trial Judgement, para. 236; *Erdemović* Sentencing Judgement (1998), para. 16(i). Family circumstances: *Kunarac* Appeal Judgement, paras 362 and 408; *Tadić* Sentencing Judgement (1999), para. 26; *Erdemović* Sentencing Judgement (1998), para. 16(i). Acts of assistance to victims: *Krnjelac* Judgement, para. 518; *Sikirica* Sentencing Judgement, paras 195 and 229. *Kupreškić* Trial Judgement, para. 860. Diminished mental capacity: *Čelebići* Appeal Judgement, paras 590, 841. Duress: *Erdemović* Sentencing Judgement (1998), para. 17.

⁶⁸ *Blaškić* Judgement, para. 785.

⁶⁹ *Todorović* Sentencing Judgement, para. 86.

Yugoslavia in reaching their determination of the appropriate sentence for a convicted person.⁷⁰

45. Article 34 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (“SFRY Criminal Code”), which was in force when the offences were committed, provides for imprisonment, among other forms of punishment.⁷¹

46. Although there is no provision in the SFRY Criminal Code relating to crimes against humanity specifically,⁷² Article 142 (“War Crimes against the Civilian Population”) prohibits criminal conduct which corresponds to the offence of which Milan Simić stands convicted, namely, torture. This Article provides that “whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to ... torture, inhuman treatment... causing great suffering or serious injury to body and health...” shall be punished by imprisonment for not less than five years, and up to the death penalty.

47. Article 38 sets out the terms of imprisonment that may be imposed under the SFRY Criminal Code. It provides that for criminal acts for which a fifteen year sentence can be imposed, when the offence was perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of twenty years can be imposed. Additionally, where criminal acts are eligible for the death penalty, the court may impose a maximum sentence of 20 years’ imprisonment in lieu thereof.

48. Thus, under the criminal provisions in effect in the former Yugoslavia at the time the offences for which Milan Simić stands convicted were committed, the crime of torture would have attracted a sentence of between 5 and 20 years’ imprisonment.

49. Article 41 of the SFRY Criminal Code lays down the “general rules for determining sentence”, and states, in part, that:

A court shall determine sentence for the perpetrator of a crime within the boundaries prescribed by the code for this crime, bearing in mind the purpose of punishment and taking into account all circumstances influencing the degree of severity (mitigating and aggravating circumstances, and, in particular: the level of criminal responsibility, the motive for the crime, the level of threat to or violation of protected assets, the circumstances under which the crime was committed, the previous character of the perpetrator, his/her personal circumstances and conduct

⁷⁰ *Čelebići* Appeal Judgement, paras 813 and 816 (internal citations omitted).

⁷¹ Article 34 (Types of Punishment): The following punishments may be imposed on the perpetrators of criminal acts: (1) capital punishment; (2) imprisonment; (3) fine; (4) confiscation of property.

⁷² Chapter 16 of the SFRY Criminal Code, in which Article 142 is found, is entitled “Crimes against Humanity and International Law”.

after the commission of the crime, and other circumstances relating to the personality of the perpetrator.

50. Additionally, the Defence brought Article 42 (“Reduction of Sentence”) to the Trial Chamber’s attention during the sentencing hearing.⁷³

51. The Trial Chamber takes note of the arguments of the parties related to the relevance and substance of the general practice regarding prison sentences in the former Yugoslavia, as presented in their briefs and at the sentencing hearing. In accordance with the jurisprudence of the Tribunal, the Trial Chamber will consider the sentencing practice of the courts of the former Yugoslavia, although it is not bound by such practice, in the determination of a sentence.⁷⁴

2. Factors relating to Milan Simic

52. Milan Simic has pleaded guilty to two counts of torture, a crime against humanity under Article 5(f) of the Statute. The Trial Chamber observes that the Plea Agreement contains references to the evidence presented at trial in the case against Milan Simic and his former co-accused, up until the time Milan Simic entered into the Plea Agreement. Similarly, both the Prosecution and the Defence referred to the evidence led at trial in their respective sentencing briefs. The Trial Chamber has accordingly taken into consideration such relevant evidence where necessary.

(a) Criminal conduct forming basis for conviction

53. Milan Simic was a member of the Serb Crisis Staff and serving in the position of President of the Executive Board of the Municipal Assembly of Bosanski Samac when he committed the offences with which he is charged. Milan Simic has admitted that, one night between about 10 June and 3 July 1992, he, along with several other men, beat Hasan Bicic, Muhamed Bicic, Perica Misic and Ibrahim Salkic with a variety of weapons. Milan Simic kicked the victims in their genitals and gunshots were fired over their heads.⁷⁵

54. Milan Simic also admitted that he, along with several other men, repeatedly beat Safet Hadzialijagic with a variety of weapons one night in or about June 1992. The barrel of a handgun

⁷³ T/2. 37-38. Article 42 states: A court may impose a sentence on an accused below the limit prescribed by the Code, or apply a reduced type of sentence: (1) if the Code prescribes that the perpetrator may receive a reduced sentence; (2) if it establishes that there are particular mitigating circumstances that indicate that the purpose of punishment will be served by a reduced sentence. Article 43 reads, in part: If the conditions for reduction of a sentence described under Article 42 herein exist that court shall reduce its sentence: (1) if the minimum sentence prescribed for a crime is a custodial sentence of three or more years, it may be reduced to a sentence of one year of imprisonment.

⁷⁴ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997, para. 20; *Čelebići* Appeal Judgement, paras 813 and 820; *Kupreškić* Appeal Judgement, para. 418 and *Kunarac* Appeal Judgement, para. 349.

⁷⁵ *See supra* para. 11.

was placed in Safet Hadzialijagic's mouth. During the beating, Safet Hadzialijagic was forced to pull down his pants and one of the other Serb men who accompanied Milan Simic threatened to cut off his penis while brandishing a knife. During the course of the beating, Milan Simic fired gun shots over the victim's head.⁷⁶

55. The Trial Chamber finds that the direct and intentional participation of Milan Simić in the perpetration of the offences, as well as his presence when others joined in the attack on these victims are factors that must be considered in determining his sentence.

56. In the Plea Agreement, Milan Simić agreed to plead guilty to counts 4 and 7 of the Indictment alleging torture, a crime against humanity, punishable under Article 5(f) of the Statute of the Tribunal. The Appeals Chamber in the *Tadic* case addressed the issue whether a crime against humanity should in principle attract a higher sentence than a grave breach of the Geneva Conventions of 1949 or than a violation of the laws or customs of war, due to the fact that a crime against humanity is always committed in relation to a widespread or systematic attack directed against a civilian population. The Appeals Chamber held that crimes against humanity should not, in principle, attract a higher sentence than war crimes:

The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgements of the Trial Chambers and the Appeals Chamber of the Tribunal. After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorised penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference (...)⁷⁷

⁷⁶ *Ibid.*

⁷⁷ *Prosecutor v. Tadić*, Judgement in Sentencing Appeal, Case No. IT-94-1-*Abis*, 26 January 2000 (“*Tadić* Appeal Sentencing Judgement”), para. 69. See also, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997 (“*Erdemović* Appeal Judgement”); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), paras 243 and 247; *Krnjelac* Judgement, paras 511-512. In the *Rutaganda* case, Trial Chamber I of the International Criminal Tribunal for Rwanda (“ICTR”) adhered to this position in holding that: “Whereas in most national systems, the scale of penalties is determined in accordance with the gravity of the offence, the Chamber notes that the Statute does not rank the various crimes falling under the jurisdiction of the Tribunal and, thereby, the sentence to be handed down. In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.” *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 (“*Rutaganda* Trial Judgement”), para. 472.

(b) Aggravating circumstances

57. As required by Rule 101(B)(i) of the Rules, the Trial Chamber now turns to an examination of any aggravating circumstances in relation to the crimes for which Milan Simić stands convicted.

58. The Prosecution submits that the Trial Chamber should consider the following factors in aggravation of the offence: (a) gravity of offence; (b) position of Milan Simić as President of the Executive Board and as a member of the Crisis Staff; (c) manner in which the crime was committed; (d) effect of the crime on the victims; (e) repeated and separate offences; (f) premeditation; and (g) discriminatory intent.

59. The Defence submits that there are no aggravating factors in this case.

(i) Gravity of the offence and manner in which the crimes were committed

60. The Prosecution submits that the crime of torture carries a “special stigmatisation” due to the deliberate form of inhuman treatment it represents and the severity of the pain and suffering inflicted.⁷⁸ At the sentencing hearing, the Defence described the acts of torture committed by Milan Simić upon the five victims to be “at the lower end of the punishment scale”, as there were no other crimes such as rape or murder reflected in the acts that resulted in Milan Simić’s torture convictions.⁷⁹

61. The Prosecution cites the “personal participation” of Milan Simić, the “significant duration” of the incidents and the fact that the torture “included direct infliction of pain, blows and threats to the victim’s genitals” as aggravating factors.⁸⁰ The Defence submits that Milan Simić’s torture victims had received much longer beatings at other times, “ritualistically”, and that the comparatively shorter time for Milan Simić’s acts of torture should be considered by the Trial Chamber.⁸¹

62. In terms of the direct infliction of pain, the Trial Chamber finds that “severe pain or suffering” is an element of torture, and thus is already sufficiently considered when assessing the gravity of the offence.⁸² The Trial Chamber in the *Todorović* Sentencing Judgement found that an element of an offence, in that case discriminatory intent, an element of persecution, could not be

⁷⁸ Prosecution Sentencing Brief, para. 34.

⁷⁹ T/2. 40.

⁸⁰ Prosecution Sentencing Brief, para. 44.

⁸¹ Defence Sentencing Brief, para. 22.

⁸² “Since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of *Todorović*’s criminal conduct is already encompassed in a consideration of the offence. Therefore, it should not be treated separately as an aggravating factor”, *Todorović* Sentencing Judgement, para. 57.

found to be an aggravating factor in determining the sentence for a count of persecution. This Trial Chamber follows that reasoning and therefore does not consider the direct infliction of pain to the victims as an additional aggravating factor. The Trial Chamber further finds that incidents involving Milan Simić are the only ones that form the subject of this Sentencing Judgement and that these were extremely serious, regardless of their exact duration.

63. In relation to count 4, the Plea Agreement details the “instruments” used to beat the victims: the victims were beaten with fists, the leg of a chair, a rod or bar, the butt of a rifle, and were kicked, on various parts of their bodies and especially in the genitals. It further provides that the victims were forced to stand with their arms outstretched, and were ordered to stand with their legs apart in order to receive forceful kicks to their genitals.⁸³ Safet Hadzialagic, the victim of torture charged in count 7, in addition to being severely beaten, had to face threats that his penis would be cut off. He had the barrel of a gun pushed into his mouth. The victims of both counts also had to endure gunshots fired over their heads. There can be no doubt that the acts that comprised the particular torture acts for which Milan Simić stands convicted are barbaric and shocking. Although the mistreatment inflicted by Milan Simic upon his victims did not happen over a prolonged period of time, the manner and methods used render them despicable. The sexual, violent, and humiliating, nature of the acts are therefore considered in aggravation, as it would certainly have increased the mental suffering and feeling of degradation experienced by the victims. Moreover, the crimes in which Milan Simic took part should be viewed in the context of the horrific conditions which existed at the primary school at the time, and of the inhumane treatment meted out to the detainees in this detention camp. Milan Simic’s willing participation in the mistreatment of some of the detainees exacerbated these conditions.⁸⁴ The events in the primary school present a horrifying picture of anti-Muslim and anti-Croat behaviour culminating in acts that destroy the soul in their recounting. The personal participation of Milan Simić, as an aggravating factor, is also addressed vis-à-vis the discussion below on his official position.

(ii) Position of Milan Simić as president of the Executive Board and as a member of the Crisis Staff

64. The Prosecution submits that the role of Milan Simić as President of the Executive Board and as a member of the Crisis Staff in Bosanski Samac, “one of the highest civilian positions in the

⁸³ Plea Agreement, para. 9(d).

⁸⁴ See Plea Agreement, paras 6 (II) and (III), in which Milan Simić accepts that his conduct was part of the overall conduct of beatings and other widespread or systematic abuses perpetrated against the Muslim and Croat population of Bosanski Šamac at the time.

new Serb administration”,⁸⁵ is an aggravating factor. His participation in the events “provided additional encouragement to his subordinates to commit similar acts.”⁸⁶

65. The Defence addresses the position of Milan Simić in its Sentencing Brief, under the subject of mitigating factors. The Defence submits that Milan Simić carried out his duties for “the well-being of all of the citizens of Bosanski Šamac, regardless of their nationality,” and included documentary evidence of the non-discriminatory actions he undertook in this position.⁸⁷ The Trial Chamber addresses the issue of non-discriminatory actions or intentions of Milan Simić below, and finds that the Defence submissions on Milan Simić’s position do not directly address the arguments put forth by the Prosecution.

66. Trial Chambers and the Appeals Chamber of this Tribunal and of the ICTR have both considered the high-ranking position of an accused to be an aggravating factor.⁸⁸ The Appeals Chamber in *Aleksovski* held that the accused’s “superior responsibility as a warden seriously aggravated” the offences. The Appeals Chamber further found that due to that accused’s position as a superior, his role was to prevent or punish criminal conduct, and certainly not to participate in it himself. The Appeals Chamber also found that the participation of a commander in the commission of crimes “provided additional encouragement to his subordinates to commit similar acts” and that these factors should have resulted in a longer sentence.⁸⁹ More recently, the Appeals Chamber in *Kupreskić* confirmed that “a Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator’s position of authority.”⁹⁰

67. While such persons have often been charged under the doctrine of command responsibility pursuant to Article 7(3) of the Statute, Milan Simić, due to his direct participation, was charged under Article 7(1) of the Statute. This Trial Chamber finds that while he was not charged as a superior *per se*, his position of authority is nonetheless relevant, as an aggravating factor, as Milan Simić clearly went to the primary school using his official capacity. Hasan Bicic testified that Milan Simić’s escorts called him “President” during the events, while Ibrahim Salkic testified that Milan Simić introduced himself as “the Serb minister”.⁹¹ Considering his position, Milan Simić’s participation in the torture of the detainees referred to in counts 4 and 7 must have left the

⁸⁵ Prosecution Sentencing Brief, para. 42.

⁸⁶ Prosecution Sentencing Brief, para. 43.

⁸⁷ Defence Sentencing Brief, para. 44.

⁸⁸ See, e.g. *Krstić* Judgement, paras 708-709; *Kupreskić* Trial Judgement, para. 862; *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement, 4 September 1998, para. 44; *Rutaganda* Trial Judgement, para. 470.

⁸⁹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 183.

⁹⁰ *Kupreskić* Appeal Judgement, para. 451. See also *Čelebići* Appeal Judgement, para. 745, referring to *Aleksovski*.

impression on those present with him in the primary school at the time that this type of conduct was permissible, or even, encouraged.

(iii) Status of the Victims and Effect of the Offences on Victims

68. The Prosecution submits that the status of the victims at the time the offences were committed should be considered when the Trial Chamber assesses the gravity of the crime. Specifically, the Prosecution cites as relevant: the status of the victims as civilians; the fact that the victims had been in detention for two months; the fact that the victims were specifically selected by Milan Simić; the fact that the victims had already been subjected to various beatings, ill-treatment and inhumane acts, including watching other detainees being beaten and, in at least one case, killed; the conditions under which the victims were detained, including lack of medical care and insufficient food; and the lack of legal representation or legal remedy available to the victims at the time of their detention.⁹²

69. The Prosecution submits the “episode of torture must have contributed” to the physical pain and difficulty in sleeping due to nightmares that one victim suffered for two years after he was released from detention.⁹³ Although the Prosecution acknowledges that the victims of the two counts of torture also suffered “at the hands of various torturers” during their detention, it submits that the acts of Milan Simić “contributed to that legacy” of physical and mental symptoms and suffering following release from detention.⁹⁴

70. The Trial Chamber rejects the Prosecution’s submission that the status of the victims as civilians should be considered as an aggravating factor. The civilian character of the victims is one of the basic elements of a crime against humanity and is already encompassed in the consideration of the offence.⁹⁵ The Trial Chamber finds that there can be no doubt that Milan Simić’s victims were in a position of inferiority and of acute vulnerability, being in the custody and control of the Bosanski Samac authorities:⁹⁶ they all had been in detention for several months,⁹⁷ during which

⁹¹ T. 2729-33 and 3356.

⁹² Prosecution Sentencing Brief, para. 38.

⁹³ Prosecution Sentencing Brief, para. 66.

⁹⁴ Prosecution Sentencing Brief, para. 67.

⁹⁵ *Todorović* Sentencing Judgement, para. 57.

⁹⁶ *Kunarac* Appeal Judgement, para. 352. The Appeals Chamber held in the context of rape that vulnerability could be considered both as an element of the crime and as evidence of its gravity, and as such could be taken into account in the course of sentencing.

⁹⁷ Plea Agreement, para. 9(a).

they had already suffered extensive and brutal beatings at the hands of others;⁹⁸ they were defenceless and had no possibility to protect themselves. In addition, Milan Simic knew the victims personally and selected them. As agreed upon in the Plea Agreement, it was common knowledge in Bosanski Samac that Safet Hadzialijagic, the victim named in count 7, suffered from a heart condition.⁹⁹ The Trial Chamber is satisfied that this heart condition qualifies as vulnerability and that in beating the victim, Milan Simić intentionally exploited this by the intentional infliction or threatened infliction of severe physical pain or suffering.

(iv) Repeated and Separate Offences

71. The Prosecution submits that counts 4 and 7 represent two separate offences of torture and that, pursuant to Rule 87 (C) of the Rules, the Trial Chamber must impose a sentence for each count.¹⁰⁰

72. The Prosecution further submits that the fact that there were two separate episodes demonstrates that the episodes were premeditated and planned, and that the “clear selection of specified victims” is further evidence of this fact. The Prosecution submits that Milan Simić went to the primary school with no other purpose than to commit the offences.¹⁰¹

73. The Defence addressed this issue in its Sentencing Brief, arguing that the two incidents are part of one criminal episode in that both incidents occurred on the same night, although the Defence does not contest that Milan Simić was responsible for, and pleaded guilty to, two separate crimes.¹⁰² In relation to Milan Simic’s mental state at the time the crimes were committed, the Defence submits that he was intoxicated and in an emotional state due to the death of his best friend, and that these circumstances negate the argument that these crimes were premeditated.¹⁰³ The Prosecution argued at the sentencing hearing that such circumstances cannot serve in mitigation.¹⁰⁴

74. The Trial Chamber finds that voluntary intoxication is not a mitigating factor to the crimes committed by Milan Simić. Additionally, while the Trial Chamber appreciates the grief suffered by Milan Simić at the death of his friend, it must be stressed that the death was not connected to the victims of his torture. The Trial Chamber condemns in the strongest terms acts of revenge or vengeance in this instance based solely on reasons of ethnicity. The fact that the killing of his friend

⁹⁸ Evidence has been led that, due to the effect of previous beatings, he had to be carried out of the primary school gymnasium to the hallway when called out by Milan Simić. T. 6130-31.

⁹⁹ Plea Agreement, para. 9(d).

¹⁰⁰ Prosecution Sentencing Brief, para. 45, and T/2. 13-22.

¹⁰¹ Prosecution Sentencing Brief, para. 47.

¹⁰² Defence Sentencing Brief, para. 21. See also, T/2. 43-44.

¹⁰³ T/2. 45-46.

may have served as part of the motive for Milan Simić to commit these offences is certainly not a mitigating factor, and may be considered as an aggravating factor. The Trial Chamber finds that the crimes were premeditated in that Milan Simić had no other reason for being at the primary school and that he specifically selected his victims who were known to him.

75. The Trial Chamber finds that there is no basis to support the Defence submission that the incidents charged in counts 4 and 7 happened on the same night. The Indictment, as agreed upon in the Plea Agreement, alleges, as to count 4 that the events happened between 10 June and 3 July 1992, while in relation to count 7 the events are alleged to have occurred in June 1992.¹⁰⁵ The Trial Chamber finds that there were two separate incidents of torture for which Milan Simić was indicted and pleaded guilty, as reflected in counts 4 and 7 of the Indictment. It must be emphasised that the fundamental consideration is that Milan Simic was involved in two distinct and separate events. The Trial Chamber will impose a sentence for each offence, accordingly.

(v) Discriminatory intent

76. The Prosecution submits that to “appropriately reflect the elements of retribution and deterrence”, the fact that Milan Simić, as a senior official, selected victims because they were non-Serbs must be considered.¹⁰⁶

77. Milan Simic admitted committing the offences of which he stands convicted with a discriminatory intent, in so far that he intentionally chose to beat the victims because they were either Muslims or Croats, and he wished to punish, intimidate and humiliate them.¹⁰⁷ In the *Kunarac* case, the Appeals Chamber reiterated the position it had held in the *Tadic* Appeal Judgement, namely that a discriminatory intent “is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution.”¹⁰⁸ In *Kunarac*, the Appeals Chamber found that the Trial Chamber did not err in regarding the discriminatory intent as an aggravating factor for other Article 5 offences.¹⁰⁹ A discriminatory intent in the commission of the particular offences to which Milan Simic pleaded guilty is therefore considered by the Trial Chamber to be an aggravating circumstance in determining Milan Simic’s sentence.

¹⁰⁴ T/2. 25-28.

¹⁰⁵ Plea Agreement, paras 9(d) and (e).

¹⁰⁶ Prosecution Sentencing Brief, paras 48-49.

¹⁰⁷ Plea Agreement, para. 6.

(c) Mitigating circumstances

78. As required under Rule 101 (B)(ii) of the Rules the Trial Chamber now turns to an examination of “any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction.”

79. The Defence submits that the Trial Chamber should consider the following factors in mitigation of the offence: (a) guilty plea; (b) remorse; (c) Milan Simić’s medical situation; (d) personal circumstances, including age, character and family circumstances; (e) voluntary surrender to the Tribunal; (f) no prior criminal convictions; and (g) comportment in the Detention Unit and general attitude towards proceedings.

80. While the Prosecution does not submit that there are mitigating factors that must be considered, it does argue that certain mitigating factors that have previously been recognised before the Tribunal are absent in this case. This will be discussed below at the conclusion of the mitigating factors.

(i) Plea of guilty

81. The Defence submits that Milan Simić’s guilty plea, which it characterises as having come “in the middle of the Prosecution’s case”, should be considered as a mitigating factor. The Defence submits that negotiations on the plea agreement commenced in May 2001, thus before the start of trial.¹¹⁰ Additionally, the Defence argues that the guilty plea contributes to the vindication and retribution for the victims of Milan Simić’s crimes.¹¹¹ Finally, the Defence submits that the guilty plea has resulted in saved resources of the Tribunal, which should also be taken into account when determining the sentence.¹¹²

82. The Prosecution argues that the fact that Milan Simić pleaded guilty at “this stage of the proceedings and in the circumstances under which they occurred”, means that the guilty plea can be given “virtually no weight, if any at all”.¹¹³ The Prosecution submits that Milan Simić entered into

¹⁰⁸ *Kunarac* Appeal Judgement, para. 357 (citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), para. 305).

¹⁰⁹ *Ibid.*

¹¹⁰ T/2. 56.

¹¹¹ T/2. 48.

¹¹² Defence Sentencing Brief, paras 47-48.

¹¹³ Prosecution Sentencing Brief, para. 52.

the Plea Agreement only “following the production of all available evidence.”¹¹⁴ The Prosecution submits that the guilty plea was already taken into account when the Prosecution agreed to the sentencing range of 3 to 5 years for two counts of torture as crimes against humanity.¹¹⁵

83. The principle that a guilty plea should be considered as a mitigating circumstance has been acknowledged in several cases before the Tribunal. In the *Erdemovic* case, the Trial Chamber considered the accused’s decision to enter a guilty plea as a mitigating factor in sentencing and held that “an admission of guilt demonstrates honesty and it is important for the Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators.”¹¹⁶ Moreover, a guilty plea contributes directly to the fundamental mission of the Tribunal to establish the truth in relation to the crimes subjected to its jurisdiction. This Trial Chamber is of the view that an accused’s admission of guilt and acceptance of the facts as related by victim-witnesses provides a unique and unquestionable fact-finding tool that greatly contributes to peace-building and reconciliation among the affected communities.¹¹⁷

84. The jurisprudence of the Tribunal reflects that a guilty plea should, in principle, give rise to a reduction in the sentence a convicted person would otherwise have received. A guilty plea is recognised as greatly contributing to the work of the Tribunal in so far that it avoids a possible lengthy trial.¹¹⁸ Generally, a plea of guilt will only contribute to public advantage if it is pleaded before the commencement of the trial.¹¹⁹ Such public advantage includes the saving of resources for investigation, counsel fees and the general cost of trial. Although not always the case, it may in certain circumstances, and in the case of some victims and witnesses, relieve the stress of giving evidence.¹²⁰ The Trial Chamber in *Todorovic* decreased the weight it accorded to the guilty plea since it had been entered into by the accused 26 months after his initial appearance before the Tribunal. It nevertheless took into account “the considerable contribution of this guilty plea to the efficiency of the work of the International Tribunal and to its search for the truth”.¹²¹

85. Milan Simic is the seventh accused before the Tribunal to have been convicted on the basis of a guilty plea. He pleaded guilty more than four years after his initial appearance and, his trial had

¹¹⁴ Prosecution Sentencing Brief, para. 57. At the sentencing hearing, the Prosecution further asserted that there could be “no public advantage” from the guilty plea since all of the available evidence to prove counts 4 and 7 had been produced by the time Milan Simić pleaded guilty. T/2. 30.

¹¹⁵ T/2. 29-30.

¹¹⁶ *Erdemović* Sentencing Judgement (1998), para. 16(ii).

¹¹⁷ See *Sikirica* Sentencing Judgement, para. 149; *Todorović* Sentencing Judgement, para. 81.

¹¹⁸ *Todorović* Sentencing Judgement, para. 80, citing the Separate and Dissenting Opinion of Judge Cassese to *Erdemović* Appeal Judgement, para. 8.

¹¹⁹ *Todorović* Sentencing Judgement, para. 81.

¹²⁰ *Ibid*

¹²¹ *Ibid*, para. 8.

already commenced at the time he entered the Plea Agreement. The Trial Chamber notes, however, that one named victim in count 4 who was scheduled to testify for the Prosecution had not yet testified before the Tribunal. In light of these factors, Milan Simić's plea of guilty is bound to weigh less in the sentencing process than if it had been made earlier or before the commencement of the trial.

86. The Trial Chamber notes the extensive preparations and modifications that were undertaken at both the Detention Unit and the Tribunal to accommodate the special needs of Milan Simić due to his medical condition, including the daily video-link between the two locations, as discussed above. The Trial Chamber is aware of the expense for such facilities and takes note of the fact that certain of these expenses have ceased to be incurred by the Tribunal, and by extension the international community, due to the plea of guilty by Milan Simić.

87. The Trial Chamber thus finds that, despite the lateness of Milan Simić's plea, he should receive some credit for entering a plea of guilty.

88. An issue which arises in relation to the entering of a guilty plea is that of co-operation with the Prosecution. The Prosecution argues that while "substantial co-operation with the Prosecution" is a mitigating factor that must be considered by the Trial Chamber pursuant to Rule 101 (B)(ii), in this case, there has been no such co-operation.¹²² The Prosecution refers to the fact that Milan Simić sought and obtained a guarantee from the Prosecution that it would not produce the Plea Agreement into evidence against his former co-accused as evidence of his lack of co-operation.¹²³

89. The Trial Chamber finds that while it cannot give credit to Milan Simić for co-operation with the Prosecution in their case against his former co-accused, it cannot accept that the fact that he did not permit the Plea Agreement to be used against his former co-accused, should be taken into consideration as an aggravating factor. While Milan Simić had been jointly charged with other accused in the case *Prosecutor v. Blagoje Simić et al.* (Case No. IT-95-T), an option envisioned by Rule 48 of the Rules, the Trial Chamber remains highly sensitive to the fact that the Tribunal was established to prosecute individuals for their individual criminal responsibility, and that the burden of establishing each accused's criminal responsibility lies solely with the Prosecution. The Trial Chamber further notes that the Prosecution agreed to this term when it negotiated the terms of the Plea Agreement and cannot use that term against Milan Simić at this stage.

(ii) Remorse

90. The Defence submits that Milan Simić regrets his actions, and expressed his remorse soon after the crimes were committed in 1992, and expresses that remorse before the Tribunal through his guilty plea. The Defence cites the fact that he returned to the primary school after committing the crimes and apologised to two of his victims, taking them temporarily out of the detention centre to receive food and clean clothes,¹²⁴ he explained to them that he committed the crimes due to the loss of his best friend,¹²⁵ and asked them to convey his apologies to other victims of the attack.¹²⁶

91. The Prosecution submits that Milan Simić “demonstrated no remorse whatsoever”.¹²⁷ While it acknowledges that he extended “decent treatment” to two of the victims after the first episode of torture, it focuses on the fact that he did not extend an apology or “decent treatment” to the other victims.¹²⁸ The Prosecution cites both Milan Simić’s denial of wrongdoing during an interview with the Prosecution in March 1998 and the fact that his defence counsel conducted an “extensive, detailed, lengthy and searching” cross-examination of the victims during their testimony as evidence of his lack of remorse.¹²⁹

92. Remorse has been considered as a mitigating factor in a number of cases before the Tribunal. In order to accept remorse as a mitigating factor, a Trial Chamber must be satisfied that the expressed remorse is sincere.¹³⁰

93. The Trial Chamber rejects the submissions of the Prosecution that the “extensive, detailed, lengthy and searching” cross-examination of the victim-witnesses by Milan Simić’s defence counsel can be used as evidence to counter his expression of remorse. Up until the time that an accused enters a plea of guilty, there is a presumption of innocence, as recognised by Article 21 of the Statute and international human rights law. An accused enjoys certain other rights and privileges under the Statute, including the right to defend himself through legal assistance and to examine the witnesses against him. Additionally, under the “Code of Professional Conduct for

¹²² Prosecution Sentencing Brief, para. 50.

¹²³ Prosecution Sentencing Brief, para. 51.

¹²⁴ The Trial Chamber notes that the evidence presented at trial provides a different account. Hasan Bičić testified that Milan Simić when taking him to his office in the building of the municipal assembly, about a week after the beating, allowed him to briefly stop by his house. Hasan Bičić found his house ransacked and only changed his shoes. T. 2738-42. Once in Milan Simić’s office, a man escorting them was told by Milan Simić to bring something to eat and drink. T. 2742-43.

¹²⁵ Defence Sentencing Brief, para. 25, citing T. 2742-43.

¹²⁶ T. 3141.

¹²⁷ Prosecution Sentencing Brief, para. 54.

¹²⁸ Prosecution Sentencing Brief, para. 55.

¹²⁹ Prosecution Sentencing Brief, paras 56 and 58.

¹³⁰ *Todorović* Sentencing Judgement, para. 89; *Erdemović* Sentencing Judgement (1998), para. 16(iii); *Blaškić* Judgement, para. 775; *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999, paras 40-41; *Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000, paras 69-72.

Defence Counsel Appearing Before the International Tribunal”, Defence Counsel “have an overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice.” Thus, the Trial Chamber finds that defence counsel was carrying out his duty when he conducted cross-examination.¹³¹ A vigorous defence is fundamental to the criminal process and the rights of the accused.

94. The Trial Chamber takes note of the statement made by Milan Simić at the sentencing hearing in which he expressed his “sincere regret and remorse” for what he had done to his “fellow citizens and friends at the elementary school”,¹³² and that he took the opportunity to “publicly extend apology to all of them.”¹³³ The Trial Chamber finds this expression of remorse to be sincere. The Trial Chamber also takes note of the fact that Milan Simić returned to the primary school and apologised to two of his victims.

(iii) Personal Circumstances: Milan Simić’s Medical Condition

95. The Defence refers to the medical report attached as Exhibit A to the Defence Sentencing Brief which noted, *inter alia*, that Milan Simić’s injuries significantly shorten his life-expectancy regardless of the treatment he receives and that the “additional exhaustion of ‘life-coping mechanisms’ as a consequence of [Milan Simić]’s confinement further reduce (sic) his life expectancy.”¹³⁴ The Defence submits that Milan Simić will require full time medical attention for the remainder of his life; that he will also require daily assistance for personal hygiene, food preparation, moving his wheelchair and transferring him from the bed to his wheelchair; and that Milan Simić’s physical and mental status has greatly declined during his trial and detention.¹³⁵

96. The Prosecution submits that there is no assessment in the medical report (Exhibit A) as to the degree to which Milan Simić’s life expectancy may be affected by incarceration and that the report also fails to take into account the actual conditions in the prison where Milan Simić will eventually serve his sentence.¹³⁶

97. On the issue of ill health, the Trial Chamber in the *Kordić* case stated that:

¹³¹ The Trial Chamber further notes that the cross-examination did not violate Rule 75 (C) of the Rules: “A Chamber shall, wherever necessary, control the manner of questioning to avoid any harassment or intimidation.”

¹³² T/2. 34.

¹³³ T/2. 35.

¹³⁴ Defence Sentencing Brief, para. 45. The Trial Chamber notes that the injuries suffered by Milan Simić and which resulted in his present medical condition are not related to, or connected in any way with, the counts to which he pled guilty.

¹³⁵ *Ibid.*

¹³⁶ T/2. 8.

The following have been considered as mitigation in certain cases: a good personal character with no previous criminal record, *poor health* and youth. Although it will be rare for such factors to play a significant part in mitigating international crimes, there may be occasions when they do; and the categories of mitigating circumstance cannot be considered as closed. Such factors will vary with the circumstances of each case, as must be contemplated by the reference to “individual circumstances” in Article 24 of the Statute.¹³⁷

98. This Trial Chamber adopts a similar position. In addition, the Trial Chamber is of the view that issues concerning the ill health of a convicted person should normally be a matter for consideration in the execution of the sentence to be meted out. Hence, it is only in exceptional circumstances or “rare” cases where ill health should be considered in mitigation.

99. The Trial Chamber has considered the medical report (Exhibit A), the representations of Milan Simić’s defence counsel during the sentencing hearing and Milan Simić’s physical appearance. Mindful of the particular circumstances presented by his physical condition, the Trial Chamber, however, observes that there is no indication in the medical report (Exhibit A) regarding the extent to which Milan Simić’s life expectancy would be effected by virtue of being incarcerated. A medical condition that may at some future date effect life expectancy does not, in the opinion of this Trial Chamber, automatically give rise to a reduction in sentence.

100. With regard to the matter of prison facilities that would be able to adequately accommodate his medical needs, the Trial Chamber notes the “Report on Milan Simić” submitted by Tim McFadden, the Chief of the Detention Unit, on 19 June 2002 (“Detention Unit Report on Milan Simić”) (Exhibit B to the Defence Sentencing Brief) stating that, “it would prove extremely difficult to find a custodial institution suitable to hold him for further incarceration”. The Trial Chamber cannot accept that the consideration of finding a prison authority with the ability to house a prisoner satisfactorily should, as matter of course, impact the sentence. The Trial Chamber, however, takes note of the Detention Unit Report on Milan Simić in which the Chief of the Detention Unit recounted that due to Milan Simić’s physical disability, “the preparations required to make his cell and environment wheelchair friendly and special equipment such as bed and furniture had to be installed to enable him to survive.” Milan Simić also required complete nursing care on a daily basis. Consequently, the Trial Chamber finds it necessary to state that the prison facility to which Milan Simić will eventually be assigned should, as far as possible, be in a position to accommodate his medical needs.

¹³⁷ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT 95-14/2-T, Judgement, 26 February 2001, para. 848 (internal citations omitted). In *Krstić*, the Trial Chamber accepted that the bad health of a convicted person may be a mitigating circumstance. It however concluded: “Although sympathetic to General Krstić’s discomfort throughout the

101. Although sympathetic with the medical complications that Milan Simić has suffered and his current medical condition, the Trial Chamber is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence. Milan Simić's medical condition is not to be taken into account as a mitigating factor in the determination of sentence.

(iv) Personal circumstances, including age, character and family circumstances

102. The Defence submits that under the jurisprudence of the Tribunal, the age and family circumstances of Milan Simić should be considered in sentencing.¹³⁸ While the Defence states that Milan Simić was 32 years old at the time that the crimes were committed, it does not comment on the proposed significance of this factor for the Trial Chamber. The Trial Chamber takes note of the fact that Milan Simić is married and that his parents live in Bosanski Šamac.

103. The Trial Chamber finds that at the time he committed the offences, Milan Simić's age and educational background, were such that he was sufficiently mature to know that his actions were not only wrong, but were criminal, and that he knowingly took advantage of a war-time situation to commit horrific violent acts against defenceless persons whom he knew.

104. The Defence submits that Milan Simić is a man of "good character."¹³⁹ The Defence cites Milan Simić's intelligence, education, employment and "good family" as evidence of his good character, and supports these assertions through affidavits. These include persons from all three ethnic communities, namely Muslim, Croatian and Serbian, attesting to the fact Milan Simić was friendly with all communities¹⁴⁰ and non-discriminatory in his behaviour and treatment of persons. Additionally, the Defence cites excerpts from the evidence of Milan Simić's victims when they testified before the Tribunal to show that he socialised with persons from other ethnic communities before the outbreak of armed conflict. The Defence submits that the Trial Chamber should look not just at Milan Simić's behaviour at the time the offences were committed, but rather at "the totality of the character" of Milan Simić.¹⁴¹

105. The Trial Chamber does not challenge the truthfulness of the affidavits and any of the Defence's characterisations of Milan Simić as they relate to his character and behaviour before the

trial because of medical complications he suffered, the Trial Chamber considers that this circumstance is not related to the objectives of sentence." *Krstić* Judgement, para. 723 (internal citations omitted).

¹³⁸ Defence Sentencing Brief, para. 30.

¹³⁹ Defence Sentencing Brief, para. 31. Exhibits E-L.

¹⁴⁰ Six of the eight affidavits are provided by Bosnian Serb persons, while one is provided by a Bosnian Muslim, and one by a Bosnian Croat.

¹⁴¹ T/2. 47.

armed conflict. It does not, however, find that such statements are sufficient to counter the fact that at the time the offences for which Milan Simić stands convicted, he exercised discriminatory intent. Moreover, the Trial Chamber finds that the possession of these traits and personal circumstances, if anything, could be considered aggravating elements rather than mitigating factors. The possession of such character traits is not regarded by the Trial Chamber as a mitigating factor to the commission of the crime of torture.

(v) Voluntary surrender to the Tribunal

106. The Defence submits that the fact that Milan Simić voluntarily surrender to the Tribunal constitutes a mitigating factor.¹⁴² The Defence further submits that Milan Simić was the first person to voluntarily surrender to the Tribunal, and that at the time the Republika Srpska “his native country”, did not enjoy the same level of co-operation with the Tribunal that it currently does. The Defence argues that the voluntary surrender of Milan Simić created a precedent for future surrenders and greater co-operation.¹⁴³

107. The Trial Chamber finds that the voluntary surrender of Milan Simić constitutes a mitigating factor. In particular, the Trial Chamber recognises that Milan Simić’s surrender may have had an impact on the manner in which the Tribunal was viewed by officials and ordinary citizens in the Republika Srpska, at a time when relations between the Tribunal and the Republika Srpska were beginning to move from non-cooperation to limited co-operation.¹⁴⁴ Additionally, in cases of voluntary surrender, there is no need to resort to the Stabilisation Force (SFOR) or other government bodies to carry out potentially dangerous arrest operations to secure an indictee’s presence before the Tribunal. Finally, voluntary surrender of an accused indicates a general spirit of co-operation of the accused with the Tribunal, which the Trial Chamber found to exist throughout this case. Accordingly, the Trial Chamber finds that Milan Simić’s voluntary surrender to the Tribunal is a mitigating factor.

(vi) No prior Criminal Convictions

¹⁴² Defence Sentencing Brief, para. 52, citing *Blaskić* Judgement, para. 773.

¹⁴³ Defence Sentencing Brief, para. 52.

¹⁴⁴ See, e.g., Fourth Annual Report of the Tribunal, A/52/375 - S/1997/729, 18 September 1997, paras 183-189 on co-operation of Republika Srpska with the Tribunal. “[T]here are the two entities of Bosnia and Herzegovina - the Federation of Bosnia and Herzegovina and Republika Srpska - and the Federal Republic of Yugoslavia that have done little or nothing to cooperate with the Tribunal - they have neither enacted legislation nor arrested any indictees. Indeed Republika Srpska and the Federal Republic of Yugoslavia do not admit their duty to arrest and deliver accused persons to The Hague. They flatly deny all cooperation in delivering indictees.” para. 183. See, Fifth Annual Report of the Tribunal, A/53/219 - S/1998/737, 10 August 1998, paras 215 and 222 on improved co-operation from Republika Srpska with the Tribunal. The Trial Chamber also notes that the Prosecutor referred to Milan Simić’s surrender as “significant”, Press Release dated 14 February 1998, CC/PIO/290-E.

108. The Defence submits that the lack of criminal convictions against Milan Simić should count as a mitigating factor.¹⁴⁵ The Trial Chamber accepts Exhibit C (report from the Embassy of Bosnia and Herzegovina), which confirms that Milan Simić does not have prior criminal convictions in Bosnia and Herzegovina, as true. The Trial Chamber treats Milan Simić's lack of prior criminal record as a mitigating factor, albeit not a significant one.

(vii) Comportment in the Detention Unit and general attitude towards proceedings

109. The Defence submits that Milan Simić has demonstrated "excellent behaviour" while in the custody of the Detention Unit, citing the Detention Unit Report on Milan Simić (Exhibit B) to support this assertion.¹⁴⁶

110. The Trial Chamber takes note of Mr. McFadden's Report which states that "Mr. Simić behaved very well at all times and despite his handicap he was cooperative with the staff and did not complain". The Trial Chamber finds that Milan Simić was co-operative throughout the proceedings, and notes specifically his agreement to follow the proceedings via video-link from the Detention Unit, resulting in greater efficiency in the trial.

111. The Trial Chamber finds such co-operation to constitute co-operation with both the Trial Chamber and the Prosecution. While the Prosecution argues that there has been no co-operation from Milan Simić because he refused to testify against former co-accused, the Trial Chamber finds that co-operation should not be construed narrowly and singularly. Rather, co-operation with the Prosecution can be found to exist where a defendant, through his or her actions, facilitated the timely presentation of the Prosecution's case, as was the case when Milan Simić agreed to the use of video-link, thereby waiving his right to be present for his trial, as enshrined in Article 21(4)(d) of the Statute.¹⁴⁷

112. The Trial Chamber finds Milan Simić's comportment in the Detention Unit and his general co-operation with the Trial Chamber and the Prosecution during the proceedings against him to be a mitigating factor.

¹⁴⁵ Defence Sentencing Brief, para. 53.

¹⁴⁶ Defence Sentencing Brief, para. 54.

¹⁴⁷ In *Krstić*, the Trial Chamber held, in the context of a discussion of mitigating circumstances posterior to the commission of the crimes, that the "behaviour of the accused in the proceedings against him is of particular importance." The fact that the accused is co-operating with the court may therefore constitute a mitigating circumstance "provided the accused is acting knowingly and sincerely." *Krstić* Judgement, para. 715. See also, *Krnjelac* Judgement, para. 520.

III. TRIAL CHAMBER'S DETERMINATION OF SENTENCE

113. The Trial Chamber has taken into account and weighed the totality of Milan Simić's culpability and all the particular circumstances of the case. Having considered the written and oral submissions of the Prosecution and the Defence, the Trial Chamber finds that the following circumstances have been proven beyond reasonable doubt to be aggravating: the circumstances in which the offences were committed, Milan Simić's official position, the vulnerability of the victims, and Milan Simić's discriminatory intent. The Trial Chamber is satisfied that Milan Simić's admission of guilt and expression of remorse, his voluntary surrender, lack of prior criminal record, and his comportment in the Detention Unit and attitude towards the proceedings are circumstances proven to be mitigating on the balance of probabilities. In the determination of Milan Simić's sentence, the Trial Chamber has considered the general practice regarding prison sentences in the former Yugoslavia. The Trial Chamber has also considered the need for the sentence to reflect the relative significance of Milan Simić's role in the broader context of the conflict in the former Yugoslavia.¹⁴⁸

114. The Trial Chamber is mindful of the importance of consistency in the sentences imposed by the Tribunal in cases where the circumstances are substantially similar. The Appeals Chamber in *Kupreskić* held that a Trial Chamber is "under no obligation to expressly compare the case of one accused to that of another."¹⁴⁹ The Appeals Chamber previously agreed that while "it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results."¹⁵⁰ The Trial Chamber notes that at the present time a range or pattern of sentences in relation to persons with generally similar circumstances as that of Milan Simić and having committed acts of torture as a crime against humanity in substantially similar circumstances does not exist.

¹⁴⁸ *Krnojelac* Judgement, para. 509; *Čelebići* Appeal Judgement, para. 847; *Tadić* Appeal Sentencing Judgement, para. 55.

¹⁴⁹ *Kupreškić* Appeal Judgement, para. 443.

¹⁵⁰ *Čelebići* Appeal Judgement, para. 719. See also *Furundžija* Appeal Judgement, para. 250, and *Jelisić* Appeal Judgement, para. 101.

115. Milan Simic was a senior public official in Bosanski Samac and he committed acts of torture in the primary school while serving as President of the Executive Board of the municipality. Although Milan Simic held a senior position in Bosanski Samac, the Trial Chamber is not satisfied that he played any particularly significant role in the broader context of the conflict in the former Yugoslavia. However, Milan Simic is responsible for particularly serious offences against vulnerable persons. His behaviour and consequent infliction of severe pain and suffering through violent beatings and other barbaric acts can only be condemned in the highest degree. Under ordinary circumstances a long custodial sentence, even up to the remainder of his life, would have been appropriate.

116. Rule 101 of the Rules sets out the factors which a Trial Chamber is mandated to take into consideration when determining a sentence. The list of factors enumerated in this provision, however, is not exhaustive as evidenced by the use of the phrase “as well as such factors as”. The Trial Chamber discussed above the medical condition of Milan Simic and noted that, as a paraplegic, Milan Simić, who is wheelchair bound, requires full time medical attention including daily assistance with the most basic activities crucial for day to day subsistence. Although the Trial Chamber found that such condition does not qualify as a factor in mitigation of Milan Simic’s sentence, Milan Simic’s physical circumstances cannot be ignored. The Trial Chamber notes that in the history of the Tribunal there has not been an accused in similar medical circumstances. Such a condition poses an exceptional circumstance that obliges this Trial Chamber, for reasons of humanity, to accept that Milan Simic’s medical condition ought to be a consideration in sentencing, as a special circumstance. Accordingly a lesser sentence than Milan Simic would have otherwise received will be imposed. This is not to say that a long custodial sentence cannot be imposed on any accused in a similar state. Rather, each case must be treated according to its own circumstances.

117. Under the Plea Agreement, the Parties jointly recommended a sentence of “not less than three (3) years and not more than five (5) years,”¹⁵¹ pursuant to Rule 62 *ter* (A)(ii) of the Rules. The Parties rightly acknowledged that under Rule 62 *ter* (B), the Trial Chamber “shall not be bound” by any agreement between the parties on the sentence, and can issue any sentence, including a life sentence, that it determines to be appropriate. Additionally, Milan Simić explicitly waived his right to appeal a finding of guilt or any matters relating to sentencing “if the sentence imposed is within the range of sentence agreed upon by the parties.”¹⁵²

¹⁵¹ Plea Agreement, para. 7.

¹⁵² Plea Agreement, para. 11(h).

118. The Defence submits that the “strict conditions” imposed on Milan Simić during his time of provisional release,¹⁵³ his physical disabilities and the lengthy time that he was provisionally released “significantly limited his personal liberty” and amounted to “detention in custody.”¹⁵⁴ At the sentencing hearing, the Prosecution challenged this submission, arguing that the terms of Milan Simić’s provisional release did not amount to “house arrest”, as he was able to leave his house, and that time spent provisionally released is not envisioned under Rule 101(C) as time for which an accused should be given credit towards his or her sentence.¹⁵⁵

119. The Trial Chamber does not find that the conditions of Milan Simić’s provisional release amounted to “house arrest” but rather, allowed him to return to his family and his community, pending the start of his trial. Milan Simić was allowed to leave his house, albeit with certain limitations. Provisional release in these conditions cannot be considered as amounting to “detention in custody”. Therefore, no credit will be given to Milan Simić for the time he spent provisionally released from the Detention Unit, pending the start of his trial.

120. Pursuant to Rule 87(C) of the Rules, a Trial Chamber has the discretion to impose separate sentences in respect of multiple convictions, and to indicate, whether they should be served concurrently or consecutively. The fundamental principle underlying this provision seeks to ensure that the sentence to be imposed on an accused must reflect the totality of his criminal conduct.¹⁵⁶ In the instant case, the Trial Chamber considers that it is appropriate to impose a sentence in respect of each conviction entered.

121. Milan Simić has been detained in the Detention Unit since he voluntarily surrendered to the Tribunal on 14 February 1998, with the exception of the time he has been provisionally released to Bosanski Šamac, namely 26 March 1998 to 7 June 1999 and 7 June 2000 to 13 August 2001. Pursuant to Rule 101(C), he is entitled to credit for the time which he has spent in detention, which amounts to 835 days. In accordance with Rule 102(A), the sentence shall begin to run as of today.

¹⁵³ The terms of Milan Simić’s provisional release included, *inter alia*, that he remain within the confines of the municipality of Bosanski Šamac; that he meet once a day with the local police; and that he not have any contact or interfere with anyone who may testify at his trial.

¹⁵⁴ Defence Sentencing Brief, para. 56.

¹⁵⁵ T/2. 5-6.

¹⁵⁶ *Čelebići* Appeal Judgement, para. 771.

IV. DISPOSITION

122. For the foregoing reasons, having considered the arguments of the parties, the evidence presented at the sentencing hearing, and the Statute and the Rules, having weighed the aggravating and mitigating circumstances, and taken note of the general practice regarding prison sentences in the former Yugoslavia, the **TRIAL CHAMBER SENTENCES** Milan Simić to **5 years** imprisonment for count 4 and **5 years** imprisonment for count 7, and **ORDERS** that the sentences shall be served concurrently. The Trial Chamber **FINDS** that he is entitled to credit for 835 days in relation to the sentence imposed by the Trial Chamber, as of the date of this Sentencing Judgement.

123. Pursuant to Rule 103(C) of the Rules, Milan Simić shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

124. Pursuant to Rule 104, the Trial Chamber requests that the Registry of the Tribunal ensures, as far as possible, that the custodial institution where Milan Simić is to serve his sentence should adequately accommodate his medical needs.

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

Florence Ndepele Mwachande Mumba
Presiding

Sharon A. Williams

Per-Johan Lindholm