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A summary of the Dragan Nikolic Sentencing Judgement (IT-94-2-S, 18 December 2003) is being prepared. Meanwhile, a press release was published on the day of the Judgement's delivery: it reproduces the summary read out in Court by Presiding Judge Schomburg and is available upon request from the Public Information Services or on the Tribunal's website at www.un.org/icty (Judgements page).

In 2003, the Appeals Chamber handed down three judgements and the Trial Chambers eight; in addition the Chambers and the Registry issued 539 interlocutory decisions and 325 orders. We are confident that the *Judicial Supplement* has undoubtedly proven invaluable to those who need or wish to follow the many jurisprudential developments recorded in the course of such an active year. To further assist you, the *Judicial Supplement* has undergone lay-out changes designed to make the contents clearer and the substance of the case-law more easily accessible. The *Judicial Supplement* will as always welcome additional suggestions from its readership.

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PLENARY SESSION

IT/225

“AMENDMENTS TO THE RULES OF PROCEDURE AND EVIDENCE”

17 DECEMBER 2003

By decision of the Judges at the Twenty-ninth plenary session of the International Tribunal held on 11 and 12 December 2003, the following Rules of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) are amended:

Rule 44	French
Rule 65 <i>ter</i> (C)	English and French
Rule 65 <i>ter</i> (F)	French
Rule 67	English and French
Rule 68	English and French
Rule 77	French ¹

The amendments have been highlighted in the text of this document.

Pursuant to Rule 6 (D), these amendments shall enter into force seven days after the date of issue of this official document, i.e., on **24 December 2003**.² Document IT/32/Rev. 29, incorporating these amendments, will be issued in both languages as soon as possible.

The full texts of the amended Rules are set out in the Annex to this document.

Richard May
Judge
Chair of the Rules Committee

Dated this seventeenth day of December 2003
At The Hague
The Netherlands

ANNEX

Rule 44 Appointment, Qualifications and Duties of Counsel

[French text only of Paragraph (A) amended]

Rule 65 *ter* Pre-Trial Judge

- (A) The Presiding Judge of the Trial Chamber shall, no later than seven days after the initial appearance of the accused, designate from among its members a Judge responsible for the pre-trial proceedings (hereinafter “pre-trial Judge”).
- (B) The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seised of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.
- (C) The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, **Rule 67**, Rule 73 *bis* and Rule 73 *ter*, and with all or part of the functions set forth in Rule 73.
- (D) (i) The pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.
(ii) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled.
(iii) Acting under the supervision of the pre-trial Judge, the Senior Legal Officer shall oversee the implementation of the work plan and shall keep the pre-trial Judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.
(iv) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case, in particular, so that the Prosecutor can meet his or her obligations pursuant to paragraphs (E) (i) to (iii) of this Rule and for the defence to meet its obligations pursuant to paragraph (G) of this Rule and of Rule 73 *ter*.
(v) Such meetings are held *inter partes* or, at his or her request, with the Senior Legal Officer and one or more of the parties. The Senior Legal Officer ensures that the obligations set out in paragraphs (E) (i) to (iii) of this Rule and, at the appropriate time, that the obligations in paragraph (G) and Rule 73 *ter*, are satisfied in accordance with the work plan set by the pre-trial Judge.
(vi) The presence of the accused is not necessary for meetings convened by the Senior Legal Officer.
(vii) The Senior Legal Officer may be assisted by a representative of the Registry in the performance of his

¹ IT/255/Corr.1, 19 December 2003.

² IT/255/Corr.2, 29 January 2004.

- or her duties pursuant to this Rule and may require a transcript to be made.
- (E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 *bis*, to file the following:
- (i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;
 - (ii) the list of witnesses the Prosecutor intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
 - (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;
 - (e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
 - (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.
 - (iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.
- (F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:
- (i) in general terms, the nature of the accused's defence;
 - (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and
 - (iii) in the case of each such matter, the reason why the accused takes issue with it.
- (e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
- (f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case; and
- (ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed.
- (H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.
- (I) In order to perform his or her functions, the pre-trial Judge may *proprio motu*, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.
- (J) The pre-trial Judge shall keep the Trial Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Trial Chamber.
- (K) The pre-trial Judge may set a time for the making of pre-trial motions and, if required, any hearing thereon. A motion made before trial shall be determined before trial unless the Judge, for good cause, orders that it be deferred for determination at trial. Failure by a party to raise objections or to make requests which can be made prior to trial at the time set by the Judge shall constitute waiver thereof, but the Judge for cause may grant relief from the waiver.
- (L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.
- (ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G).
- (M) The Trial Chamber may *proprio motu* exercise any of the functions of the pre-trial Judge.
- (N) Upon a report of the pre-trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence.

[French text only of Paragraph (F) amended]

(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:

- (i) a list of witnesses the defence intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify;
 - (d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;

**Rule 67
Additional Disclosure**

- (A) **Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:**
- (i) the defence shall notify the Prosecutor of its intent to offer:
 - (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
 - (b) any special defence, including that of diminished or lack of mental responsibility; in which case the



notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and

- (ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above;
- (B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.
- (C) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

Rule 68

Disclosure of Exculpatory and Other Relevant Material

- (A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.
- (B) Without prejudice to paragraph (A), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.
- (C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70(B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
- (D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.
- (E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

Rule 77

Contempt of the Tribunal

[French text only of Paragraphs (A) and (D) amended]

APPEALS CHAMBER
The Prosecutor v. Vidoje Blagojevic

Case No. IT-02-60-AR73.4

Judges Shahabuddeen [Presiding], Pocar, Hunt, Güney and Weinberg de Roca

“PUBLIC AND REDACTED VERSION FOR DECISION ON APPEAL BY VIDOJE BLAGOJEVIC TO REPLACE HIS DEFENCE TEAM”

7 NOVEMBER 2003

Review of Registrar's decision on withdrawal of counsel

Review of Registrar's decision on withdrawal of counsel: the only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar. It is only by adopting this approach that a Trial Chamber properly respects the power specifically conferred upon the Registrar and the President by the Directive to determine whether an accused's request for the withdrawal of Counsel should be granted in the interests of justice.

Procedural Background

● At the 27 November 2002 Status Conference, Vidoje Blagojevic (“Accused”) informed the pre-trial Judge of some problems with his Defence. At the *ex parte* and closed-session hearing held the same day, he explained that his complaint concerned the assignment of co-counsel (Ms. Tomanovic) who, he argued, had not been appointed pursuant to his suggestion and with his consent.

● On 9 December 2002, Trial Chamber II denied the Accused's motion to have his co-counsel replaced since no good cause had been shown requiring it to intervene in the Registrar's decision.¹ No appeal or motion for certification to appeal from the Trial Chamber Decision was lodged by the Accused.

● At the 27 March 2003 Status Conference, the Accused again raised the issue. After the Status Conference, an *ex parte* hearing was held. The pre-trial Judge stated that, were the Registrar to issue a disputed decision, it would be for the Trial Chamber, based on its inherent powers to intervene in exceptional cases, to decide whether or not it had to make a ruling.

● On 8 April 2003, the Registrar issued a decision (“Registrar's Decision”) in which he refused to replace co-counsel or lead counsel (Mr. Karnavas). He found that the Accused “ha[d] not shown any substantive grounds relating to the performance or professional ethics of Ms. Tomanovic justifying a replacement; that no change in circumstances had taken place since the Trial Chamber's Decision of 9 December 2002; and that to replace co-counsel at this point in the proceedings may cause prejudice to the Accused by having the potential to cause, *inter alia*, a delay in the proceedings and thereby adversely affect his right to be tried expeditiously”. No appeal of the Registrar's Decision was lodged by the Accused.

● At the Pre-Trial Conference held on 5 May 2003, the Accused contended that he did not have a lawyer present, as he had dismissed Mr. Karnavas. The Trial Chamber informed him that it had, to date, found no reason to change his Defence team and that it would ask the Registrar to assign to him an independent counsel to consult on the matter and assist him in drafting a motion should he wish to do so. The Trial Chamber also notified him that his present Defence team would continue working with him.

● On 23 May 2003, in keeping with an Order of the Trial Chamber of 9 May 2003,² the Registrar appointed Mr. Jan Sjöcrona independent legal counsel (“Independent Counsel”) for the Accused. That same day, the Trial Chamber ordered that an *ex parte* and closed session hearing be held on 29 May 2003 in

order to discuss the matter, with the Accused represented by Independent Counsel.

● At the 29 May 2003 hearing (“May Hearing”), through Independent Counsel, the Accused asked for assigned counsel to be withdrawn and a new legal team appointed. He alleged *inter alia* a lack of trust in his Defence and a subsequent breakdown in communication.

● On 5 June 2003, Independent Counsel filed an *ex parte* and confidential Motion for the Registrar to appoint a new lead counsel and co-counsel.³ On 11 June 2003, the Registrar filed a confidential and *ex parte* response to the May Hearing and the Motion.⁴ On 12 June 2003, the Prosecution filed its response on a confidential and *ex parte* basis.⁵ On 16 June 2003, Counsel⁶ filed their Response to the Motion on a confidential and *ex parte* basis (“Counsel's Response”).⁷ Following the filing of Counsel's Response, the Trial Chamber ordered Independent Counsel to file any reply by 27 June 2003.⁸ It denied Independent Counsel's request to file a reply on 18 August 2003.

● On 3 July 2003, Trial Chamber I denied the Accused's Motion and ordered that the Registrar appoint the Accused a legal representative to assist him and his defence team in the preparation of his defence (“Impugned Decision”).⁹

● On 25 July 2003, following an application by the Accused, the Trial Chamber granted him certification to appeal the Impugned Decision.¹⁰ On 1 August 2003, Vidoje Blagojevic (“Appellant”) filed his Appeal Brief.¹¹

³ Independent Counsel for Vidoje Blagojevic's Motion to Instruct Registrar to Appoint New Lead and Co-counsel (“Motion”). On 6 June 2003, the Trial Chamber lifted the confidentiality of the Motion.

⁴ Motion of the Registrar (“Registrar's Response”). The Trial Chamber lifted the *ex parte* nature of the Registrar's Response on 12 June 2003.

⁵ Prosecution's Response to Independent Counsel for Vidoje Blagojevic's Motion to Instruct Registrar to Appoint New Lead and Co-Counsel (“Prosecution's Response”). The Trial Chamber lifted the *ex parte* nature of the Prosecution's Response in relation to the Accused, Independent Counsel, and Counsel on 13 June 2003.

⁶ The Trial Chamber referred to Michael Karnavas as “lead counsel”, to Suzana Tomanovic as “co-counsel” and to both of them together as “Counsel”.

⁷ Counsel's and Co-Counsel's Response to the Motion by Independent Counsel, 16 June 2003.

⁸ In the same Order, the Trial Chamber lifted the *ex parte* nature of Counsel's Response.

⁹ *Blagojevic & Jokic*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead Counsel and Co-Counsel, 3 July 2003. For a summary of this Decision and a detailed account of the role and the terms of the assignment of the legal representative, see *Judicial Supplement* No. 43.

¹⁰ Decision on Vidoje Blagojevic's Request for Certification, 25 July 2003.

¹¹ Appeal Brief After Certification by the Trial Chamber Ex Rule 73 to Lodge an Appeal Against its Decision of 3 July 2003 in which it was Denied the Motion to Instruct the Registrar to Appoint new Lead and Co-counsel for Vidoje Blagojevic, 1 August 2003 (“Appeal Brief”).

¹ Decision on Oral Motion to Replace Co-Counsel, 9 December 2002 (“Trial Chamber Decision”).

² Order on the Appointment of Independent Legal Counsel, 9 May 2003.



Decision

The Appeals Chamber dismissed the Appeal on 15 September 2003. Reasons for the Decision were given on 7 November 2003. The following is a summary of the public and redacted version of the decision which was filed on 15 December 2003.

Reasoning

Applicable law

Article 19 of the Directive of Assignment on Defence Counsel (IT/73, Rev. 9) governs requests for withdrawal of assigned counsel. It reads in relevant parts:

Article 19 (“Suspension and Withdrawal of Counsel”)

(A) In the interests of justice, the Registrar may:

- (i) at the request of the accused, or his counsel, withdraw the assignment of counsel;
- (ii) at the request of lead counsel withdraw the assignment of co-counsel.

[...]

(F) Where a request for withdrawal, made pursuant to paragraph A, has been denied the person making the request may seek the President’s review of the decision of the Registrar within two weeks from the notification of the decision to him.

Article 19(F) therefore provides that it is for the President to review a refusal to withdraw a counsel or assigned counsel. As noted by the Appeals Chamber, the Directive “does not provide for review of a refusal to be made by a Trial Chamber”.¹²

Impugned Decision

The Trial Chamber recognised that the Registrar has primary responsibility in the matter of assignment of counsel but based itself on previous decisions in which it had been held that a Trial Chamber, pursuant to its inherent power and its duty to guarantee a fair trial and the proper administration of justice as set forth in the Statute, may review decisions of the Registrar on assignment of counsel.¹³ It determined that the Appellant’s request did not involve merely a consideration of “the appointment of counsel from an administrative perspective, but extend[ed] to the substantive nature of the representation by Counsel, and the proper fulfilment of obligations of legal representation towards the Accused by Counsel”.¹⁴ It viewed the Motion as “one implicating a substantive right of the Accused, namely, the right to a fair and expeditious trial”¹⁵ and therefore ruled that it had the power to review the Registrar’s Decision of 8 April 2003.

Review of Registrar’s Decision on Withdrawal of Counsel

The Appeals Chamber stated in clear terms that the only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair and that a Trial Chamber cannot appropriate for itself a power which is conferred elsewhere. It held:

“[...] the only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar”.¹⁶

The Appeals Chamber considered that “it is only by adopting this approach that the Trial Chamber properly respects the power specifically conferred upon the Registrar and the President by the Directive to determine whether an accused’s request for the withdrawal of Counsel should be granted in the interests of justice”.¹⁷

¹² Para. 6.

¹³ See *Blagojević*, IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002, *Judicial Supplement* No. 38. See also *Hadzihasanović et al.*, IT-01-47-PT, Decision on the Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, *Judicial Supplement* No. 31 *bis*.

¹⁴ Impugned Decision, para. 27.

¹⁵ *Ibid.*

¹⁶ Para. 7.

¹⁷ *Ibid.*

TRIAL CHAMBERS
The Prosecutor v. Stanislav Galic

Case No. IT-98-29-T

Trial Chamber I (Judges Orié [Presiding], El Mahdi and Nieto-Navia)

“JUDGEMENT AND OPINION”

5 DECEMBER 2003

Attacks on civilians and military necessity - Protection of civilians - Elements of attacks on civilians - Attacks on civilians and the principle of proportionality - Terror in international humanitarian law - Terror as a serious violation of international humanitarian law - Terror and threats of violence - Elements of the crime of terror

Attacks on civilians and military necessity: Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity.

Elements of attacks on civilians: the crime of attacks on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
 - The notion of "wilfully" incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully".
 - In order to prove the *mens rea* for a charge of attacks on civilians the Prosecution must show that the perpetrator was aware of the civilian status of the persons attacked. In cases of doubt as to the status of those persons, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

Attacks on civilians and the principle of proportionality: certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.

The rule of proportionality does not refer to the actual damage caused or to the military advantage achieved by an attack, but instead uses the words "expected" and "anticipated".

Terror in international humanitarian law: it could be said that the specific prohibition against terror shares the peremptory character of the general prohibition of attack on civilians, for it protects the same value. According with the general norm, the rule against terror neither conflicts with nor derogates from peremptory norms of international law.

Terror as a serious violation of international humanitarian law: there is no doubt that making the civilian population or individual civilians the object of attack, with resulting death and injury to civilians, is a very serious violation of a basic rule of international humanitarian law which would even qualify as a grave breach of Additional Protocol I under its Article 85(3). Doing the same with the primary purpose of spreading terror among the civilian population can be no less serious, nor can it make the consequences for the victims any less grave.

Terror and threats of violence: certain threats of violence would undoubtedly involve grave consequences. For example, a credible and well publicized threat to bombard a civilian settlement indiscriminately, or to attack with massively destructive weapons, will most probably spread extreme fear among civilians and result in other serious consequences, such as the displacement of sections of the civilian population.

Terror and individual criminal responsibility: serious violations of the second part of Article 51(2), and specifically the violations causing death or injury, entailed criminal responsibility in 1992.

Elements of the crime of terror: the crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.
 - The actual infliction of terror is not a constitutive element of the crime of terror. As a result there is no requirement to prove a causal connection between the unlawful acts of violence and the production of terror.
 - "Acts of violence" do not include legitimate attacks against combatants but only unlawful attacks against civilians.
 - "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts - or, in other words, that he was aware of the possibility that terror would result - but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.
 - "Terror" can be defined as "extreme fear".

Background

Stanislav Galic was born on 12 March 1943 in Goles village in Banja Luka Municipality. He held the rank of Major General in the Bosnian Serb army ("VRS") and assumed command of the Sarajevo Romanija Corps ("SRK") on or about 10 September 1992, remaining in that position until about 10 August 1994. An indictment against him was filed on 26 March 1999 and remained sealed until his detention by troops of the Multinational Stabilisation Force ("SFOR") on 20 December 1999. He was charged for the events surrounding the military encirclement of the city of Sarajevo, the capital of Bosnia-Herzegovina, in 1992.

According to the Indictment, Stanislav Galic ("Accused") conducted during this period a protracted campaign of shelling and sniping¹ to kill, maim, wound and terrorise the inhabitants of Sarajevo, thereby killing and wounding thousands of civilians. He was charged on the basis of his individual criminal responsibility

¹ On the definition of sniping see *Galic*, IT-98-29-T, Decision on the Motion for Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, *Judicial Supplement No. 37*. See also paras. 182-184 of the Judgement. In para. 184, the Trial Chamber found that "in the present case, sniping must be understood as direct targeting of individuals at a distance using any type of small calibre weapon".



under Articles 7(1) and 7(3) of the Statute for his acts and omissions in relation to infliction of terror as a violation of the laws or customs of war as set forth in Article 51 of Additional Protocol I² and Article 13 of Additional Protocol II³ to the Geneva Conventions of 1949⁴ (Count 1), attacks on civilians as violations of the laws or customs of war (Counts 4 and 7), murder as a crime against humanity (Counts 2 and 5), and inhumane acts as crimes against humanity (Counts 3 and 6).

On 21 December 1999, Stanislav Galic was transferred to the Tribunal. At his initial appearance, on 29 December 1999, he pleaded not guilty to all counts. The trial commenced on 3 December 2001 and closing arguments were presented on 6, 7 and 8 May 2003. A total of 171 witnesses were heard. The total number of exhibits, including written reports, films, photographs, maps and sound-recordings, amounted to 1,268 items, in addition to which there were 15 expert reports.

Judgement

The Trial Chamber found Stanislav Galic guilty on the following counts, pursuant to Article 7(1) of the Statute of the Tribunal:

- Count 1: Violations of the Laws or Customs of War (acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.
- Count 2: Crimes against Humanity (murder) under Article 5(a) of the Statute of the Tribunal.
- Count 3: Crimes against Humanity (inhumane acts – other than murder) under Article 5(i) of the Statute of the Tribunal.
- Count 5: Crimes against Humanity (murder) under Article 5(a) of the Statute of the Tribunal.
- Count 6: Crimes against Humanity (inhumane acts – other than murder) under Article 5(i) of the Statute of the Tribunal.

As a consequence of the finding of guilt on Count 1, the Trial Chamber dismissed the following counts:⁵

- Count 4: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

² Article 51 (Protection of the Civilian Population) reads: "1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

³ Article 13 (Protection of the Civilian Population) reads: "1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities".

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977 ("Additional Protocol I"). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977 ("Additional Protocol II").

⁵ According to the Appeals Chamber, it is permissible to enter cumulative convictions under different statutory provisions to punish the same criminal acts if "each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not contained in the other". See *Delalic et al.*, IT-96-21-A, 20 February 2001, paras. 412, *Judicial Supplement No. 23*. As the Trial Chamber found that the crime of terror as charged under Count 1 involved the same acts as those charged in Counts 4 and 7 and as it held that the crime of terror is a specific-intent crime (see below under "Elements of the crime of terror"), it could only enter a conviction under Count 1 (see paras. 157-162 of the Judgement).

Count 7: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

The Trial Chamber, by Majority, sentenced Stanislav Galic to a single sentence of twenty years of imprisonment.⁶

Reasoning⁷

Attacks on civilians as a violation of the laws or customs of war

It was alleged in Count 4 that Stanislav Galic, as commander of the SRK, conducted a "coordinated and protracted campaign of sniper attacks upon the civilian population of Sarajevo, killing and wounding a large number of civilians of all ages and both sexes, such attacks by their nature involving the deliberate targeting of civilians with direct fire weapons". Count 7 of the Indictment alleged that the Accused conducted a "coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population. The campaign of shelling resulted in thousands of civilians being killed or injured". After satisfying itself that the conditions of application of Article 3 of the Statute had been met,⁸ the Trial Chamber addressed *inter alia* the following legal issues:

Attacks on civilians and military necessity

The Trial Chamber noted that the constitutive elements of this offence have not yet been the subject of a definitive statement by the Appeals Chamber. Only two cases before the Tribunal have dealt with persons charged with and tried for attacks on civilians under Article 3 of the Statute pursuant to Article 51(2) of Additional Protocol I. In the *Blaskic* case, the Trial Chamber observed in relation to the *actus reus* that "the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property.[...] Targeting civilians or civilian property is an offence when not justified by military necessity".⁹ As to the *mens rea* it found that "such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity".¹⁰ The Trial Chamber in the *Kordic and Cerkez* case held that "prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects".¹¹

⁶ On 18 December 2003, the Prosecution filed its sentencing appeal and Counsel for Stanislav Galic filed a request for an extension of the time in which he must file a Notice of Appeal. The Defence requested 30 days from the date on which the official French translation of the Judgement and Opinion becomes available. The Defence's request was granted on 22 December 2003 (*Galic*, IT-98-29-A, Decision on Request for Extension of Time to File Notice of Appeal, 22 December 2003).

⁷ This summary will discuss only those contributions essential to the Tribunal's case-law and international criminal and humanitarian law. The full text and the summary Judgement may be obtained from the Tribunal's Public Information Services and/or its Internet site at the following address: www.un.org/icty ("Judgements" page).

⁸ See *Tadic*, IT-94-I-AR72, Decision on the Defence Interlocutory Appeal on Jurisdiction ("Tadic Jurisdiction Decision"), 2 October 1995. In paragraph 94, the Appeals Chamber held that the following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: "(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule".

⁹ *Blaskic*, IT-95-14-T, Judgement ("Blaskic Trial Judgement"), 3 March 2000, para. 180, *Judicial Supplement No. 13*.

¹⁰ *Ibid.*

¹¹ *Kordic and Cerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 328, *Judicial Supplement No. 23*.

The Trial Chamber followed this jurisprudence insofar as it states that an attack which causes death or serious bodily injury within the civilian population constitutes an offence. It however did not subscribe to the view that the prohibited conduct of attacking a civilian population set out in the first part of Article 51(2) could adequately be described as targeting civilians “when not justified by military necessity”.¹² In its view, this provision “states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity”.¹³

Protection of civilians

The Trial Chamber recalled that Article 51(2) confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities and pointed out that the prohibition against attacking civilians stems from a fundamental principle of international humanitarian law: the principle of distinction. This principle is set out, among other places, in Article 48 of Additional Protocol I which states that the warring parties must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.¹⁴

The Trial Chamber addressed in detail the question of who can be considered a civilian. It is well established in international humanitarian law that a civilian is a person who does not take an active part in hostilities. In other words the protection granted to civilians ceases when those civilians take up arms and engage in fighting.¹⁵ As it is sometimes difficult to assert the status of a person, factors such as the clothing, activity, age or sex of the person may be considered, and in any case if there is a doubt as to the civilian character of an individual, that individual shall be presumed to be a civilian.¹⁶ In the understanding of the Trial Chamber, “a person shall not be made the object of an attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant”.¹⁷

Elements of attacks on civilians

In sum, the Trial Chamber found that the crime of attacks on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

¹² In its broad sense, military necessity means “doing what is necessary to achieve a war aim” (Dictionary of International Law of Armed Conflict, ed. ICRC, 1992). The principle of military necessity acknowledges the potential for unavoidable civilian death and injury ancillary to the conduct of legitimate military operations. However, this principle requires that destroying a particular military objective will provide some type of advantage in weakening the enemy military forces. Under no circumstance are civilians to be considered legitimate military targets. Consequently, attacking civilians or the civilian population as such cannot be justified by invoking military necessity (footnote 76 of the Judgement, reproduced in part).

¹³ Judgement, para. 44. The Trial Chamber further referred to Article 51(6) of Additional Protocol I which explicitly prohibits “attacks against the civilian population or civilians by way of reprisals” and noted that the language of this Article “implies that the prohibition against reprisals cannot be waived on the grounds of military necessity” (see footnote 77 of the Judgement).

¹⁴ In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice described the principle of distinction and the principle of protection of the civilian population as the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and ruled that “States must never make civilians the object of attack” (ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Report 1996, para. 78).

¹⁵ Kupreskic et al., IT-95-16-T, Judgement, 14 January 2000, paras. 522-523, Judicial Supplement No. 11.

¹⁶ See Article 50(1) of Additional Protocol I.

¹⁷ Judgement, para. 50. The Trial Chamber conducted a similar analysis with regard to military objects. It held in para. 51: “such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action”.

2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.¹⁸

As regards the mental element of the offence of attacks on civilians, the Trial Chamber referred to Article 85 of Additional Protocol I which qualifies as a grave breach the act of “wilfully [...] making the civilian population or individual civilians the object of attack” when that act results in death or serious injury to body or health. It then referred to the Commentary to Article 85 of Additional Protocol I which sets out that the word “wilfully” means that the accused “must have acted consciously and with intent” and encompasses the concept of “recklessness”.¹⁹ It held: “the notion of ‘wilfully’ incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts ‘wilfully’”.²⁰ The Trial Chamber further held that, in order to prove the *mens rea* for a charge of attacks on civilians, the Prosecution must show that the perpetrator was aware of the civilian status of the persons attacked. The Trial Chamber held that, in cases of doubt as to the status of those persons, “the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant”.²¹

Attacks on civilians and proportionality

With regard to the first element of the above definition of attacks on civilians, it is well established that indiscriminate attacks, i.e. attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks on civilians.²² Further, indiscriminate attacks are expressly prohibited in Article 51 of Additional Protocol I²³ which considers as indiscriminate such attacks as “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.²⁴ In other words, attacks that are disproportionate may *per se* qualify as indiscriminate attacks.

In order to obey the principle of proportionality, “precautions in attack” must be taken by those who plan or decide to target an objective (Article 57 of Additional Protocol I²⁵). Those persons must do “everything feasible” to assess whether the intended target is not civilian (or a protected military objective), choose the proper

¹⁸ Judgement, para. 56.

¹⁹ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman (ed.), International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987 (“ICRC Commentary”).

²⁰ Judgement, para. 54.

²¹ *Ibid.*, para. 55.

²² The discriminatory nature of an attack may be inferred from the type of weapons used. See *inter alia* *Blaskic* Trial Judgement, paras. 501, 512. The International Court of Justice stated, with regard to the obligation of States not to make civilians the object of attacks, that States must never “never use weapons that are incapable of distinguishing between civilian and military targets” (ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, para. 78). On the customary nature of the prohibition of indiscriminate attacks, see *Tadic* Jurisdiction Decision, para. 127.

²³ Article 51(4) of Additional Protocol I reads: “Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction”.

²⁴ Article 51(5) of Additional Protocol I.

²⁵ Article 57 (Precautions in Attack) reads in relevant part: “2. With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; [...]”.



means to attack in order to minimize the incidental loss, and then assess whether striking the target would still be feasible without causing "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". In the words of the Trial Chamber, determining whether an attack is proportionate requires a determination as to "whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack".²⁶ It thereby determined that "to establish the *mens rea* of a disproportionate attack the Prosecution must prove [...] that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties".²⁷

With regard to the application of this principle, the Trial Chamber noted that "the rule of proportionality does not refer to the actual damage caused or to the military advantage achieved by an attack, but instead uses the words 'expected' and 'anticipated'".²⁸ It further noted that, when ratifying Additional Protocol I, Germany stated that "the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight".²⁹ In consequence, when it assessed scheduled shelling incident 1, the Trial Chamber noted that, although half of the victims were soldiers, the attack, when planned, had clearly been expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.³⁰

Terror against the civilian population as a violation of the laws or customs of war

The introductory paragraph of Count 1, headed "Infliction of Terror", alleged that General Galic, as commander of the SRK, "conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population". The crime of terror as such had never been considered as a separate offence in any Judgement issued by the Tribunal, although the terrorisation of civilians had been taken into account as part of the commission of other crimes.³¹ This was

²⁶ Judgement, para. 58.

²⁷ *Ibid.*, para. 59. See Article 85(3)(b) of Additional Protocol I which characterises such an attack as a grave breach of the Protocol.

²⁸ Judgement, footnote 109.

²⁹ *Ibid.* See Statements of Understanding made by Germany (14 February 1991)). Similar declarations were also made by Switzerland (17 February 1982), Italy (27 February 1986), Belgium (20 May 1986), The Netherlands (26 June 1987), New Zealand (8 February 1988), Spain (21 April 1989), Canada (20 November 1990), and Australia (21 June 1991). No other party to Additional Protocol I raised objections to these declarations.

³⁰ For more details on scheduled shelling incident 1 (Dobrinja III soccer match), see paras. 372-387.

³¹ Judgement, footnote 114. In the *Celebici* case, acts of intimidation creating an "atmosphere of terror" in prison camps were punished as grave breaches of the Geneva Conventions (torture or inhuman treatment) and as violations of Article 3 common to the Geneva Conventions (torture or cruel treatment): *Delalic et al.*, IT-96-21-T, Judgement ("Celebici Trial Judgement"), 16 November 1998, paras. 976, 1056, 1086-91 and 1119, *Judicial Supplement No. 1*. In the *Blaskic* case, the Trial Chamber took into account "the atmosphere of terror reigning in the detention facilities" as part of the factual basis leading to the Accused's conviction for the crimes of inhuman treatment (a grave breach) and cruel treatment (a violation of the laws or customs of law): *Blaskic* Trial Judgement, paras. 695, 700 and 732-3. *Blaskic's* additional conviction for "unlawful attack" on civilians was based in part upon the finding that his soldiers "terrorised the civilians by intensive shelling, murders and sheer violence" (see para. 630). In the *Krstic* case, General Krstic was accused of persecutions, a crime against humanity, on the basis of his alleged participation in "the terrorising of Bosnian Muslim civilians": *Krstic*, IT-98-33-T, Judgement, 2 August 2001, para. 533, *Judicial Supplement No. 27*. The Trial Chamber found that a "terror campaign" had been conducted: "Numerous witnesses gave evidence that, during Operation Krivaja 95, the VRS shelled the Srebrenica enclave intensively with the apparent intent to terrify the populace" (para. 122). Moreover: "On 12 and 13 July 1995, upon the arrival of Serb forces in Potocari, the Bosnian Muslim refugees taking shelter in and around the compound were subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes, and murders" (para. 150). The *Krstic* Trial Chamber characterised "the crimes of terror" and the forcible transfer of the women, children, and elderly at Potocari as persecution and inhumane acts (para. 607; see also paras. 1, 41, 44, 46, 147, 153, 292, 364, 517, 527, 537, 653, 668, 671, 677). See also *Martić*, IT-95-11-R61, Decision ("Martić Rule 61 Decision"), 8 March 1996, paras. 23-31 (rockets

the first time an international tribunal had addressed the matter. The Trial Chamber was not required to assess its jurisdiction over the crime of inflicting terror on the civilian population in a general sense but was concerned only with the question as to whether the specific offence of killing and wounding civilians in time of armed conflict with the intention of inflicting terror on the civilian population, as alleged in the Indictment, was an offence over which the Tribunal had jurisdiction. It did so with regard to the four *Tadic* conditions which must be met in order for an offence to fall within the scope of Article 3 of the Statute³² and then turned to the elements of the crime of terror.

Terror in international humanitarian law

The crime of terror was charged in the Indictment in accordance with both Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. As it had already found that Article 51 applied to the armed conflict in Sarajevo for the events charged in the Indictment as a matter of conventional law,³³ the Trial Chamber decided to rely on the second part of Article 51(2) of Additional Protocol I ("second part of Article 51(2)") which states that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". Therefore the first *Tadic* condition that the prohibition be based on a rule of international humanitarian law was met.

As to the second condition, the Trial Chamber did not have to prove that the prohibition was part of customary international law. It decided to base itself on treaty law and proceeded with "additional caution [...] to avoid any possible misunderstanding [...] on this important question".³⁴ In the *Tadic* Jurisdiction Decision, the Appeals Chamber had ruled that the International Tribunal was "authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law".³⁵

In relation to the first point, the Trial Chamber had already found, as mentioned above, that Additional Protocol I applied as a matter of conventional law in the present case. As for the Appeals Chamber's second point that the treaty in question must not conflict with or derogate from peremptory norms of international law, the Trial Chamber stated that the second paragraph of Article 51, read as a whole, meant that the prohibition against terror is a specific prohibition within the general prohibition of attacks on civilians.³⁶ The general prohibition being a peremptory norm of customary international law, the Trial Chamber stated that it could be said that the specific prohibition also shares this peremptory character, for it protects the same value. It therefore held that "according with the general norm, the rule against terror neither conflicts with nor derogates from peremptory norms of international law".³⁷

were used not to strike a military target but to terrorize the civilian population of Zagreb contrary to the rules of international law); and *Momir Nikolic*, IT-02-60/1-S, Sentencing Judgement, 2 December 2003, para. 38, present issue of the *Judicial Supplement*.

³² See *supra* footnote 8.

³³ On 22 May 1992, representatives from the Republic of Bosnia and Herzegovina, the Serbian Democratic Party and the Croatian Democratic Community had concluded, under the auspices of the International Committee of the Red Cross, an agreement whereby they agreed to abide by *inter alia* the relevant provisions of Additional Protocol I. In para. 25, the Trial Chamber had found that "Article 51, along with Articles 35 to 42 and 48 to 58 of Additional Protocol I, undoubtedly applied as conventional law between the parties to the conflict". The 22 May 1992 Agreement not only incorporated Article 51(2) by reference but also repeated the very prohibition against the crime of terror.

³⁴ Judgement, para. 97.

³⁵ *Tadic* Jurisdiction Decision, para. 143.

³⁶ The Trial Chamber referred to the ICRC Commentary, para. 4785: "Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population" (emphasis added by the Trial Chamber).

³⁷ Judgement, para. 98.

Terror as a serious violation of international humanitarian law

In accordance with the third *Tadic* condition, the violation in question must be “serious”, i.e. must constitute a breach of a rule protecting important values where the breach involves grave consequences for the victim. The Trial Chamber noted that acts of violence of a serious nature were charged in the Indictment and found that there was “no doubt that making the civilian population or individual civilians the object of attack, with resulting death and injury to civilians, is a very serious violation of a basic rule of international humanitarian law” which would even qualify as a grave breach of Additional Protocol I under its Article 85(3).³⁸ It then held that “doing the same with the primary purpose of spreading terror among the civilian population can be no less serious, nor can it make the consequences for the victims any less grave”.³⁹

Terror and threats of violence

Threats of violence were not at issue in the present case and the Trial Chamber was not therefore required to address the question of whether threats of violence, as opposed to acts of violence, could also involve grave consequences for the victims. Nevertheless it did not neglect the issue and found that “certain threats of violence would undoubtedly involve grave consequences”.⁴⁰ As an example it stated that “a credible and well publicized threat to bombard a civilian settlement indiscriminately, or to attack with massively destructive weapons, will most probably spread extreme fear⁴¹ among civilians and result in other serious consequences, such as displacement of sections of the civilian population”.⁴²

Terror and individual criminal responsibility in 1992

Before turning to the elements of the crime of terror, the Trial Chamber examined the fourth *Tadic* condition that the violation in question had to entail the criminal responsibility of the Accused at the time relevant to the Indictment. Stated otherwise, the Trial Chamber had to be satisfied that the intent to spread terror had already been criminalised in 1992. It surveyed statutory and conventional law prior to the introduction of Article 51(2)⁴³ and then reviewed the legislative developments in the region relevant to the Indictment, starting with Article 125 (“War Crime Against the Civilian Population”) in Chapter XI (“Criminal Offences Against Humanity and International Law”) of the 1960 Criminal Code of the Federal Republic of Yugoslavia which stated that “[w]hoever, in violation of the rules of international law in times of war, armed conflict or occupation issues orders for or performs [...] the application of intimidating measures and terror [...] shall be punished with severe imprisonment of at least five years or with the penalty of death”. Among the other relevant provisions, the Trial Chamber referred to the 1976 Criminal Code, Article 142 of which read: “Whosoever, in violation of the rules of international law, during a war, an armed conflict or an occupation, orders [the] imposition of measures [against the civilian population] aimed at inducing fear and terror [...] or whosoever commits any of the said acts, shall be punished by imprisonment of not less than five years or by death”. It further noted that after Yugoslavia ratified Additional Protocol I on 11 March 1997, the new treaty was incorporated into its “[Armed Forces] Regulations on the Application of International Laws of War”. Those regulations stated that “[a]ttacking civilians for the purpose of terrorising them is especially prohibited”. The Trial Chamber found that “because the alleged violations would have been subject to penal sanction in 1992, both internationally⁴⁴ and in the region of the former

Yugoslavia including Bosnia Herzegovina,⁴⁵ the fourth *Tadic* condition was met. It held: “serious violations of the second part of Article 51(2), and specifically the violations alleged in this case causing death or injury, entailed criminal responsibility in 1992”.⁴⁶

Elements of the crime of terror

The Trial Chamber relied on the wording of Article 51(2) of Additional Protocol I in concluding:

“[...] the crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population”.⁴⁷

The Trial Chamber expanded on the following elements of the crime of terror and found that:

- The actual infliction of terror is not a constitutive element of the crime of terror. As a result there is no requirement to prove a causal connection between the unlawful acts of violence and the production of terror.⁴⁸
- “Acts of violence” do not include legitimate attacks against combatants but only unlawful attacks against civilians.⁴⁹
- “Primary purpose” signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.⁵⁰
- “Terror” can be defined as “extreme fear”.⁵¹

Separate and partially dissenting opinion of Judge Nieto-Navia

Judge Nieto-Navia appended a separate and partially dissenting opinion in which he reviewed facts of importance for understanding the context of the conflict in Sarajevo during the period relevant to the Indictment. He explained why he disagreed with the conclusions of the majority as regards certain incidents involving civilians and why in his view the evidence did not establish that the SRK had waged a campaign “purposefully targeting civilians”⁵² throughout the period relevant to the Indictment. He discussed *inter alia* the following legal issues:

⁴⁵ See para. 126 of the Judgement. The Trial Chamber found one conviction for terrorism of the civilian population in the course of the Yugoslav conflict by a municipal court in the territory of the former Yugoslavia for events that occurred between September 1991 and 1993 (Prosecutor v. R. Radulovic et al., Split County Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997, cited in M. Sassoli and A. Bouvier (eds.), *How Does Law Protect in War?* (Geneva: ICRC, 1999)).

⁴⁶ Judgement, para. 130. The Trial Chamber emphasised that it was not expressing a view as to whether the Tribunal had jurisdiction over the other forms of violation of the rule, such as the form consisting only of threats of violence, or the form comprising acts of violence not causing death or injury.

⁴⁷ Judgement, para. 133.

⁴⁸ *Ibid.*, para. 134. The Trial Chamber relied on the plain wording of Article 51(2) as well as on the *travaux préparatoires* of the Diplomatic Conference which, in its view, exclude this from the definition of the offence.

⁴⁹ *Ibid.*, para. 135.

⁵⁰ *Ibid.*, para. 136.

⁵¹ *Ibid.*, para. 137.

⁵² Separate and Partially Dissenting Opinion of Judge Nieto-Navia (“Dissenting Opinion”), para. 2.

³⁸ *Ibid.*, para. 108.

³⁹ *Ibid.*, para. 109.

⁴⁰ *Ibid.*, footnote 179.

⁴¹ The Trial Chamber accepted the Prosecution’s definition of terror as “extreme fear”. See below under “Elements of the crime of terror”.

⁴² Judgement, footnote 179.

⁴³ *Ibid.*, paras. 114-119.

⁴⁴ See paras. 114-119 of the Judgement. The Trial Chamber referred *inter alia* to the *Motomura et al.* case (Trial of Shigeaki Motomura and 15 others, 13 Law R. Trials War Crim. 138, 1947) in which 13 Accused were convicted of “systematic terrorism practiced against civilians” for acts including unlawful mass arrests during a court-martial hearing in Makassar in the Netherlands East-Indies.



Terror against the civilian population as a violation of the laws or customs of war

In Judge Nieto-Navia's view, an offence can only fall within the Tribunal's jurisdiction if it existed as a form of liability under international customary law.⁵³ He referred to the Report submitted to the Security Council regarding the establishment of the Tribunal in which the Secretary-General explained that "the application of the [criminal law] principle of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law".⁵⁴ He further referred to the finding of the Appeals Chamber in the *Ojdanic* Interlocutory Appeal Decision in which it was held that the *ratione materiae* jurisdiction of the Tribunal may be said to be determined "both by the Statute [...] and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed".⁵⁵ Judge Nieto-Navia stated that, in finding that an offence may fall under the jurisdiction of the Tribunal under treaty law, the Majority had interpreted the *Tadic* Jurisdiction Decision in such a way as to depart from the "established jurisprudence of the Tribunal".⁵⁶ He concluded that the offence of inflicting terror on a civilian population did not fall within the jurisdiction of the Trial Chamber.

Authority as an aggravating factor

The Trial Chamber found that the fact that General Galic occupied the position of VRS Corps commander, and repeatedly breached his public duty in this senior capacity, was an aggravating factor with respect to his sentencing.⁵⁷ Judge Nieto-Navia expressed his view that since the Trial Chamber had found the Accused responsible under Article 7(1) of the Statute for having ordered the crimes proved at trial, "considering his position as a military commander as an aggravating circumstance is analogous to concluding that being a husband is an aggravating circumstance with respect to the crime of uxoricide".⁵⁸ ■

⁵³ Dissenting Opinion, paras. 108-113.

⁵⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1193), para. 34 (emphasis added by Judge Nieto-Navia).

⁵⁵ *Milutinovic et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 9, *Judicial Supplement No. 41*.

⁵⁶ Judge Nieto-Navia explained that previous Trial Chambers and the Appeals Chamber have consistently sought confirmation that a particular offence existed as a form of liability under international customary law before concluding that it fell within the jurisdiction of the Tribunal. He referred to the following Judgements: *Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002, para. 193 et seq., *Judicial Supplement No. 38*; *Krnjelac*, IT-95-25-T, Judgement, 15 March 2002, para. 177 et seq. and para. 350 et seq., *Judicial Supplement No. 31 bis*; *Kunarac et al.*, IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001, para. 518 et seq., *Judicial Supplement No. 23*; *Celibici* Trial Judgement, paras. 414-418; *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 124 and 146-148, *Judicial Supplement No. 34*; *Furundzija*, IT-95-17/1-A, Judgement, 10 December 1998, para. 111, *Judicial Supplement No. 1*.

⁵⁷ Judgement, para. 765.

⁵⁸ Dissenting Opinion, para. 121. Uxoricide: "the killing of one's wife / a man who kills his wife" (Concise Oxford Dictionary, 10th Edition, 1999).

TRIAL CHAMBERS
The Prosecutor v. Slobodan Milosevic
Case No. IT-02-54-T

Trial Chamber III (Judges May [Presiding], Robinson and Kwon)

“FINAL DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS”

16 DECEMBER 2003

Admissibility of adjudicated facts under Rule 94(B)

Admissibility of adjudicated facts under Rule 94(B): the admission on a wholesale basis of adjudicated facts would not only raise the possibility of placing a heavy burden upon the Accused in the preparation and the conduct of his case, but attempts by an Accused to rebut these facts may absorb considerable time and resources during the course of the proceedings, thereby not promoting the judicial economy or expeditiousness.

Procedural Background

● On 28 October 2003, the Appeals Chamber issued its “Decision on the Prosecutor’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts” by which it “returned the matter to the Trial Chamber for it to review the taking of judicial notice of the adjudicated facts in accordance with the present decision”.¹

● On 6 November 2003, the Trial Chamber issued a “Further Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts” in which it required the parties and *amici curiae* to make submissions on the effect of the Appeals Chamber ruling.

● On 18 November 2003, the *amici curiae* filed their response² in which they submitted that the Prosecution should be put to the task of persuading the Trial Chamber that a revised and less extensive list of facts could be admitted without compromising the right of the Accused to a fair trial. On 26 November 2003, the Prosecution filed its response in which it adhered to its initial application.³

Decision

The Trial Chamber admitted some of the facts set out by the Prosecution⁴ and decided that those could be challenged by the Accused.

Reasoning

The Trial Chamber reviewed the taking of judicial notice in accordance with the Appeals Chamber’s Decision in which it had been held that “by taking notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial” (thereby creating a “rebuttable presumption”).⁵

The Trial Chamber found force in the arguments submitted by the *amici curiae*, in particular in their proposition that the wholesale nature of the application to admit the 332 remaining facts was capable of offending the principle of a fair trial by

creating too onerous a burden of rebuttal upon the Accused.⁶

The Trial Chamber used its discretion under Rule 94(B)⁷ to determine the admissibility of the facts. In the exercise of its discretion, it found that it may consider the tendentiousness of the facts sought to be admitted and recalled that there have been areas of evidence, i.e. the role of the JNA and the Serb paramilitaries in the takeover of municipalities and villages in Croatia and Bosnia and Herzegovina, where the Trial Chamber has consistently allowed the Accused to cross-examine.⁸

In its Decision, the Appeals Chamber had previously acknowledged that the principle of judicial economy lies behind the exercise of the discretion to admit facts pursuant to Rule 94(B). In applying this principle to the case, the Trial Chamber found that the admission on a wholesale basis of adjudicated facts would not only “raise the possibility of placing a heavy burden upon the Accused in the preparation and the conduct of his case, but attempts by an Accused to rebut these facts may absorb considerable time and resources during the course of the proceedings, thereby not promoting the judicial economy or expeditiousness”.⁹

The Trial Chamber dealt with the remaining adjudicated facts for which the Prosecution sought admission by subject category. The Chamber concentrated on the salient facts and excluded those which, when taken together, would result in such a large number as to compromise the principle of a fair and expeditious trial. The specific reasons for not admitting certain facts were that they were either too broad, too tendentious, not sufficiently significant, too detailed, too numerous, repetitive of other evidence already admitted by the Chamber, or not sufficiently relevant to the case. ■

¹ *Milosevic*, IT-02-54-AR73.5, Decision on the Prosecutor’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (“Appeals Chamber Decision”), 28 October 2003, p. 4, *Judicial Supplement* No. 44.

² *Milosevic*, IT-02-54, *Amici Curiae* Submissions in Response to Trial Chamber Further Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts dated 6 November 2003, 19 November 2003.

³ *Milosevic*, IT-02-54, Prosecution’s Submissions on the Effect of the Appeals Chamber’s Decision of 28 October 2003 Concerning Judicial Notice of Adjudicated Facts, 26 November 2003.

⁴ The Trial Chamber admitted facts 175-178, 182-188, 190-201, 205-209, 213, 220-223, 243 and 260-367, as set out by the Prosecution in its Initial Motion.

⁵ Appeals Chamber Decision, pp. 3-4.

⁶ Trial Chamber Decision, paras. 7 and 8.

⁷ *Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003, p. 4: “the wholesale admission of facts taken from a judgment based upon the assessment by another Trial Chamber of the evidence before it is not an appropriate exercise of a Trial Chamber’s discretion under Rule 94 (B), and is in conflict with the accused’s right to a fair trial”.

⁸ *Milosevic*, IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (D) – Foca Transcripts, 30 June 2003, para. 28.

⁹ Trial Chamber Decision, para. 11. In this paragraph, the Chamber also referred to the Dissenting Opinion of Judge Hunt with respect to the Appeals Chamber Decision. In paragraph 9 of his Dissenting Opinion, Judge Hunt argued that in order for the adjudicated facts to be admissible, they should not be the subject of reasonable dispute between the parties, for both legal and practical reasons.



TRIAL CHAMBERS
The Prosecutor v. Momir Nikolic

Case No. IT-02-60/1-S

Trial Chamber I, Section A (Judges Liu [Presiding], Vassilenko and Argibay)

“SENTENCING JUDGEMENT”

2 DECEMBER 2003

Guilty pleas as a basis for conviction - Plea agreement procedure - Appropriateness of guilty pleas - Impact on the mandate of the Tribunal - Judicial economy and quality of justice - Advantages of guilty pleas

Guilty pleas as a basis for conviction: while the parties have the autonomy to enter into plea agreements the Trial Chambers retain the ultimate authority over both the process and the proceedings.

Impact on the mandate of the Tribunal: if convictions result from a guilty plea certain aims of criminal proceedings are not fully realised. If certain charges or factual allegations are withdrawn the public record established might be incomplete or at least open to question, as the public will not know whether the allegations were removed because of insufficient evidence or because they were simply a “bargaining chip” in the negotiation process. If the Prosecutor makes a plea agreement such that the totality of an individuals criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done.

Judicial economy and quality of justice: while the saving of Tribunal resources is appreciated, in cases of this magnitude, it cannot be given undue consideration or importance. The Trial Chamber does not want to compromise the *quality* of the justice and the fulfilment of the mandate of the Tribunal. While savings of time and resources may be a *result* of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements.

Advantages of guilty pleas: in relation to the Tribunal's mission to assist in restoring peace and bring reconciliation to the territory of the former Yugoslavia, guilty pleas can certainly contribute significantly. Through the acknowledgment of the crimes committed and the recognition of ones own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a Trial Chamber to the victims and survivors. When an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created. As perpetrators are brought to justice, a guilty plea leads directly to the fulfilment of a fundamental purpose of the Tribunal. Guilty pleas can assist investigations and provide evidence at trials.

Procedural Background

● According to the Initial Indictment,¹ Momir Nikolic was charged as a member of a joint criminal enterprise, the common purpose of which was “to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995; and to capture, detain, summarily execute by firing squad, bury, and rebury thousands of Bosnian Muslim men and boys aged 16 to 60 from the Srebrenica enclave from 12 July 1995 until and about 19 July 1995”.² He was charged with six counts: Genocide or, in the alternative, Complicity in Genocide, punishable under Articles 4(3)(a) and 4(3)(e) respectively of the Statute; Extermination, a crime against humanity, punishable under Article 5(b) of the Statute; Murder, a crime against humanity, punishable under Article 5(a) of the Statute; Murder, a violation of the laws or customs of war, punishable under Article 3 of the Statute; Persecutions on political, racial and religious grounds, a crime against humanity, punishable under Article 5(h) of the Statute; and Inhumane Acts (Forcible Transfer), a crime against humanity, punishable under Article 5(i) of the Statute. For all counts Momir Nikolic was charged in his individual capacity under Article 7(1) of the Statute.³

● On 2 April 2002, following his apprehension by the Stabilisation Force in Bosnia Herzegovina (“SFOR”), Momir Nikolic was transferred to the custody of the Tribunal. At his initial appearance, on 3 April 2002, he entered a plea of “not guilty” to all charges in the Initial Indictment.

● On 17 May 2002, Trial Chamber II granted a Prosecution motion seeking to join the case against Momir Nikolic with that of Vidoje Blagojevic, Dragan Obrenovic, and Dragan Jokic.⁴ The Trial Chamber ordered that the four Accused be jointly charged

and tried and that the Prosecution file an amended joinder indictment.⁵

● On 27 May 2002, the Prosecutor filed the Amended Joinder Indictment.⁶ Under the Indictment, Blagojevic, Obrenovic, Jokic and Nikolic were charged as members of a joint criminal enterprise, the common purpose of which was the same as that contained in the Initial Indictment. Under the Indictment the charges and mode of responsibility alleged against Momir Nikolic were identical to those set forth in the Initial Indictment.

● On 6 May 2003, the Prosecution and Momir Nikolic filed a “Joint Motion for Consideration of Plea Agreement between Momir Nikolic and the Office of the Prosecutor”. During a hearing held the same day, the Trial Chamber expressed concern about various provisions of the plea agreement particularly that the Prosecutor did not agree to dismiss the remaining charges until the time of sentencing. The Trial Chamber declined to accept the plea agreement and requested that the parties amend the agreement to take into account the observations of the Trial Chamber.⁷

● On 7 May 2003, the Prosecution and Momir Nikolic filed a “Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolic and the Office of the Prosecutor” (“Amended Plea Agreement”). During a hearing held the same day, after hearing the Parties and Momir Nikolic, the Trial Chamber accepted the Amended Plea Agreement and entered a finding of guilt against Momir Nikolic to Count 5 of the Indictment, namely Persecutions, a crime against humanity, punishable under Article 5(h) of the Statute of the Tribunal, subject to the understanding that the Prosecution would move to dismiss the remaining charges against Momir Nikolic set out in the Indictment.⁸

¹ *Momir Nikolic*, IT-02-56-1, Indictment (“Initial Indictment”), 26 March 2002.

² Initial Indictment, para. 17.

³ Initial Indictment, paras. 21-43.

⁴ *Blagojevic et al.*, IT-02-53-PT.

⁵ *Momir Nikolic*, IT-02-56-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002.

⁶ *Blagojevic et al.*, IT-02-60-PT, Amended Joinder Indictment (“Indictment”), 27 May 2002.

⁷ *Blagojevic, et. al.*, IT-02-60-PT, Plea Hearing (“Plea Hearing”), 6 May 2003, Transcripts (“T.”) 287.

⁸ Plea Hearing, 7 May 2003, T. 294.

● On 8 May 2003, pursuant to the terms of the Amended Plea Agreement, the Prosecution moved to dismiss all remaining counts of the Indictment.⁹ The Trial Chamber granted the motion on 12 May 2003.¹⁰

● On 9 May 2003, the Trial Chamber ordered that the proceedings against Momir Nikolic be separated from those against Vidoje Blagojevic, Dragan Obrenovic and Dragan Jokic.¹¹ On 12 May 2003, the Registrar assigned case number IT-02-60/1 to the proceedings against Momir Nikolic.

● On 14 July 2003, in accordance with an order by the Trial Chamber, the Parties filed their sentencing briefs.

● The Sentencing Hearing for Momir Nikolic was held on 27-29 October 2003.

Sentencing Judgement

The Trial Chamber stated that “the count of persecutions for which Momir Nikolic had pled guilty is based on some of the most horrific events to befall the former Yugoslavia during the war, in which hundreds of thousands of people lost their lives and even more were displaced”.¹² The Trial Chamber found that Nikolic took a “pro-active role”¹³ in these crimes.

The Trial Chamber could not “accept the sentences recommended by either the Defence or Prosecution [as] neither sentence adequately reflected the totality of the criminal conduct for which Momir Nikolic has been convicted”.¹⁴

It sentenced Momir Nikolic to 27 years’ imprisonment.^{15 16}

Plea Agreement

Momir Nikolic agreed to plead guilty to Count 5 of the Indictment (Persecutions as a crime against humanity) and acknowledged his guilt and full responsibility for his actions that are the subject of the Indictment.¹⁷ He confirmed his understanding that if a trial were to be held, the Prosecution would be required to prove the elements of Article 5(h) beyond a reasonable doubt,¹⁸ specifically, (a) the existence of an armed conflict during the time alleged in the Indictment;¹⁹ (b) a widespread or systematic attack directed against a civilian population and, in a manner related to that attack, Momir Nikolic committed acts against the civilian population that violated fundamental human rights;²⁰ (c) Momir Nikolic’s conduct was committed on political, racial or religious grounds and was committed with discriminatory intent;²¹ and (d) Momir Nikolic was aware of the wider context in which his conduct occurred.²²

Momir Nikolic also agreed to “co-operate with and to provide truthful and complete information to the Office of the Prosecutor whenever requested”, including meeting with the Prosecution whenever necessary, testifying truthfully in the trial of his former co-accused under the same indictment, and “in any other trial, hearings, or other proceedings before the Tribunal as requested by the Prosecution”.²³ He confirmed that he would not appeal the sentence imposed by the Trial Chamber unless the sentence is above the range recommended by the Parties.²⁴

Momir Nikolic acknowledged that by entering a plea of guilty he had voluntarily waived certain procedural rights, including: the right to plead not guilty and require the Prosecution to prove the charges in the Indictment beyond a reasonable doubt at a fair and public trial; the right to prepare and put forward a defence to the charges at such a public 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 the witnesses against him; the right not to be compelled to testify against himself or to confess guilt; the right to remain silent; and the right to appeal any finding of guilt or to appeal any pre-trial rulings.²⁵

The Prosecution, in turn, agreed that it would recommend that the Trial Chamber impose a sentence within the range of 15 to 20 years, that Momir Nikolic be given credit for time already spent in the custody of the Tribunal,²⁶ and that at the time of the acceptance of the plea by the Trial Chamber, it would move to dismiss without prejudice to either party the remaining charges against Momir Nikolic set forth in the Indictment.²⁷

In both the Amended Plea Agreement and at the Plea Hearing, Momir Nikolic acknowledged that he understood the details of the Plea Agreement into which he had entered and that the plea was made entirely of his own free will. Further, he affirmed that he understood that the Trial Chamber was not bound to accept the range of sentence suggested by the Parties.²⁸ The Trial Chamber questioned Momir Nikolic at the Plea Hearing on all aspects of his guilty plea.²⁹ Momir Nikolic was then asked to enter a plea to Count 5 and pled guilty.³⁰

At the conclusion of the Plea Hearing, the Trial Chamber, on basis of the Amended Plea Agreement and of the “Statement of Facts and Acceptance of Responsibility”³¹ found that a sufficient factual basis for the crime of persecutions existed to accept the guilty plea. The Trial Chamber was satisfied that the plea of guilty met the requirements of Rule 62 *bis*³² and accordingly, entered a finding of guilt and convicted Momir Nikolic for Count 5 of the Indictment.³³

⁹ *Blagojevic et al.*, IT-02-60-PT, Prosecution’s Motion to Dismiss Charges Against Accused Momir Nikolic, 8 May 2003.

¹⁰ Decision on Motion to Dismiss Charges Against Accused Momir Nikolic, 12 May 2003.

¹¹ *Blagojevic et al.*, IT-02-60-PT, Separation of Proceedings and Scheduling Order, 9 May 2003.

¹² *Momir Nikolic*, IT-02-60/1-S, Sentencing Judgement, (“Sentencing Judgement”), 2 December 2003, para. 174.

¹³ *Ibid.*, para. 176.

¹⁴ *Ibid.*, para. 180.

¹⁵ Momir Nikolic pursuant to Rule 101 (C) is entitled to the credit for the time served since his arrest (610 days).

¹⁶ Momir Nikolic filed his Notice of Appeal, 30 December 2003.

¹⁷ Amended Plea Agreement, para. 3.

¹⁸ *Ibid.*, para. 6.

¹⁹ Momir Nikolic understood and agreed that the armed conflict alleged in paragraph 15 of the Indictment is the armed conflict that began on 6 April 1992 and ended with the Dayton Peace Agreement signed on 14 December 1995.

²⁰ Momir Nikolic understood and agreed that the widespread or systematic attack on the civilian population of Srebrenica, as alleged in paragraph 17 of the Indictment and described in paragraphs 18 to 26 of the Indictment, includes the five modes listed in paragraph 59 of the Indictment.

²¹ Momir Nikolic understood and agreed that one of the reasons he committed the conduct described in the Indictment and in the Amended Plea Agreement was because the victims were Bosnian Muslims.

²² Momir Nikolic understood and agreed that he was aware of the widespread or systematic abuses described in the Indictment and in the Amended Plea Agreement and of their effect on the entire population of Bosnian Muslims from the Srebrenica enclave.

²³ Amended Plea Agreement, para. 9.

²⁴ *Ibid.*, para. 14.

²⁵ *Ibid.*, para. 17.

²⁶ *Ibid.*, para. 4.

²⁷ *Ibid.*, para. 4(b).

²⁸ *Ibid.*, paras. 13, 19 and 21, Plea Hearing, 7 May 2003, T. 292-93.

²⁹ Plea Hearing, 7 May 2003, T. 292-94. The Trial Chamber inquired specifically whether Momir Nikolic understood the consequences of pleading guilty to crimes against humanity (Persecutions) as part of ensuring that the guilty plea was informed. Nikolic responded that the consequences of his pleading guilty were explained to him.

³⁰ *Ibid.*, 7 May 2003, T. 293.

³¹ The “Statement of Facts and Acceptance of Responsibility” is attached to the Judgement as Annex B. The full text and the summary of the Judgement may be obtained from the Tribunal’s Press Information Services and/or its Internet site at the following address: www.un.org/icty (“Judgements” page).

³² 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:

- the guilty plea has been made voluntarily;
- the guilty plea is informed;
- the guilty plea is not equivocal; and
- there is sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent evidence or on lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

³³ Plea Hearing, 7 May 2003, T. 294.



Factual Basis

The Trial Chamber *inter alia* found that between 6-11 July 1995, the enclave of Srebrenica was shelled and attacked by units of the Drina Corps.³⁴ According to the Indictment, “[i]n the several days following this attack on Srebrenica, VRS forces³⁵ captured, detained, summarily executed, and buried over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave, and forcibly transferred the Bosnian Muslim men and children of Srebrenica out of the enclave.”³⁶ These acts form the basis of the crime of persecutions to which Momir Nikolic has pled guilty.

The crime of persecutions, as charged in Count 5 of the Indictment, was carried out by the following means: (a) the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons; (b) the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potocari and in detention facilities in Bratunac and Zvornik; (c) the terrorising of Bosnian Muslim civilians in Srebrenica and Potocari; (d) the destruction of personal property and effects belonging to the Bosnian Muslims; and (e) the forcible transfer of Bosnian Muslims from the Srebrenica enclave.³⁷

Guilty Pleas as Basis for Conviction

The Trial Chamber examined the law of the Tribunal with regard to guilty pleas. Rule 62 *bis* adopted during the Fourteenth Plenary Session of 20 October and 12 November 1997,³⁸ provides the elements which must be established to enter a conviction upon a guilty plea. Rule 62 *ter*³⁹ of the Rules provides the procedure for plea agreements between the Prosecution and the Defence. This provision was adopted during the Twenty-Fifth Plenary Session of 13 December 2001. Prior to the introduction of Rule 62 *ter*, six “plea agreements” had been reached between the Prosecution and Defence teams in relation to guilty pleas.⁴⁰ The Rule was proposed by the Prosecution to establish a formal procedure for a practice which was already in existence.⁴¹ It was

³⁴ Indictment, para. 25.

³⁵ Forces of the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska (footnote added).

³⁶ Indictment, para. 26.

³⁷ *Ibid.*, para. 59.

³⁸ Fourteenth Plenary Session of 20 October and 12 November 1997, IT/32/Rev.12. Rule 62 *bis* has subsequently been amended at four Plenary Sessions, most recently at the Twenty-fifth Plenary Session of 13 December 2001, IT/32/Rev.22

³⁹ 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.

⁴⁰ *Erdemovic*, IT-96-22, first guilty on 31 May 1996, second guilty plea on 14 January 1998, 5 years imprisonment; *Goran Jelisic*, IT-95-10, guilty plea on 29 October 1998, 40 years imprisonment; *Stevan Todorovic*, IT-95-9/1, guilty plea on 13 December 2000, 10 years imprisonment; *Dusko Sikirica*, IT-95-8, guilty plea on 19 September 2001, 15 years imprisonment; *Damir Dosen*, IT-95-8, guilty plea on 19 September 2001, 5 years imprisonment and *Dragan Kolundzija*, IT-95-8, guilty plea on 4 September 2001, 3 years imprisonment. The Trial Chamber noted that the terms of these agreements varied greatly, and that in the case of both *Erdemovic* and *Jelisic*, the first guilty plea appears to have preceded any plea negotiations between the parties. There are 10 other accused who have pleaded guilty: *Milan Simic*, IT-95-9/2, guilty plea on 15 May 2002, 5 years imprisonment; *Biljana Plavsic*, IT-00-39&40, guilty plea on 2 October 2002, 11 years imprisonment; *Momir Nikolic*, IT-02-60/1, guilty plea on 7 May 2003, 27 years imprisonment; *Dragan Obrenovic*, IT-02-60/2, guilty plea on 21 May 2003, 17 years imprisonment; *Predrag Banovic*, IT-02-65, guilty plea on 26 June 2003, 8 years imprisonment; *Darko Mrda*, IT-02-59, guilty plea on 24 July 2003; *Miodrag Jokic*, IT-01-42, guilty plea on 27 August 2003; *Dragan Nikolic*, IT-94-02, guilty plea on 4 September 2003, 23 years imprisonment; *Miroslav Deronjic*, IT-02-61, guilty plea on 30 September 2003 and *Ranko Cesic*, IT-95-10/1, guilty plea on 8 October 2003.

⁴¹ Sentencing Judgement, para. 46.

thought that by having a procedure in the Rules for plea agreements, it would give guidance to all parties and the accused who often come from systems where plea agreements are not common or used at all.⁴²

Plea Agreement Procedure

Negotiations

The Trial Chamber stated that the Plea Agreement is the result of negotiations between the Prosecution and the Accused.⁴³ The issues discussed may include: the charges to which the Accused will plead guilty, the factual allegations contained in the Indictment, the amount of cooperation between the Accused and the Prosecution, agreement on the sentence or sentence range to be recommended, agreement not to appeal the sentence if it is within the ranged recommended in the Plea Agreement, and agreement from the Accused to waive certain procedural rights. The Trial Chamber is not involved in the negotiations stage of the Plea Agreement as it must remain impartial. Moreover, as Judges are the guarantors of an accused's rights, participation in negotiations may prejudice the right to be presumed innocent, in the event that the plea negotiations fail.⁴⁴

Review by the Trial Chamber

Once an agreement has been reached, it is subject to review by the Trial Chamber. A Trial Chamber may inquire into the terms of the agreement to ensure neither party was unfairly treated and particularly that the rights of the accused are respected.⁴⁵ Once the plea agreement has been accepted, a Trial Chamber will continue in its role as guarantor of the fairness of the proceedings and protector of the rights of the accused by inquiring into the nature of the guilty plea, pursuant to Rule 62 *bis* of the Rules.⁴⁶

The guilty plea must have been; (i) made voluntarily, (ii) informed, (iii) not equivocal and (iv) there must be sufficient factual basis for the crime and the accused's criminal conduct. After satisfying itself that the four pre-requisites for accepting a guilty plea have been met, a Trial Chamber may enter a finding of guilt. Thus, a Trial Chamber is not bound by a plea agreement and has discretion whether to accept a guilty plea. A Trial Chamber may not accept a guilty plea if it is not satisfied with the terms of the plea agreement or has concerns that the rights of the accused have not been adequately protected or if the plea agreement is not in the interests of justice.⁴⁷

The Trial Chamber found that “while the parties have the autonomy to enter into plea agreements the Trial Chambers retain the ultimate authority over both the process and the proceedings”.⁴⁸

Appropriateness of Guilty Pleas

In light of the “increased use of plea agreements”,⁴⁹ the Trial Chamber turned to the question of whether plea agreements are appropriate in cases involving serious violations of international humanitarian law. While the Trial Chamber acknowledged that plea agreements are permissible under the Statute of the Tribunal, it enumerated a number of concerns relating to such agreements, arising from both “the nature of the offences over which the Tribunal has jurisdiction and the basis for the establishment of the Tribunal, namely Chapter VII of the United Nations Charter”.⁵⁰

⁴² There is not always a plea agreement with every guilty plea.

⁴³ Sentencing Judgement, para. 48.

⁴⁴ *Ibid.*, footnote 89.

⁴⁵ *Ibid.*, para. 49.

⁴⁶ *Ibid.* See *Erdemovic*, IT-96-22-A, Appeal Judgement, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 7, which reads, in part: “[t]he institution of the guilty plea, though securing administrative efficiency, must not in any way prejudice the [accused's] rights as provided for in Article 20, paragraph 1, of the Statute”.

⁴⁷ *Ibid.*, para. 54.

⁴⁸ *Ibid.*, para. 49.

⁴⁹ *Ibid.*, para. 57.

⁵⁰ *Ibid.*

Mandate of the Tribunal

The Trial Chamber recalled that, when creating the Tribunal, the Security Council wanted to “put an end to such crimes”.⁵¹ The Tribunal was to achieve justice through criminal proceedings in order to realise several purposes: to take effective measures to bring to justice and punish the persons responsible for these crimes; to recognize and acknowledge the suffering of victims; to demonstrate that this type of behaviour will not be tolerated; to deter the commission of further crimes; to contribute to the restoration and maintenance of peace; to hold individuals responsible so that the guilt of the few cannot be shifted to the innocent and to provide an accessible historical record to prevent future acts of aggression.⁵²

Impact on the Mandate

The Trial Chamber stated that if convictions result from a guilty plea “certain aims of criminal proceedings are not fully realised”.⁵³ Most particularly no public trial is held, therefore no or less evidence is presented, and as a consequence the historical record is not complete.⁵⁴ The victims do not have an opportunity to be heard though a few may be called as witnesses during the sentencing hearing.⁵⁵

Most concerning for the Trial Chamber was that as a result of a guilty plea certain charges or factual allegations may be withdrawn. In cases where factual allegations are withdrawn, the “public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence”⁵⁶ or because they were simply a “bargaining chip”⁵⁷ in the negotiation process.⁵⁸ In cases where charges are withdrawn, the Trial Chamber stated that extreme caution must be exercised.⁵⁹ The Prosecutor has a “duty to prosecute serious violations of international humanitarian law”.⁶⁰ Once a charge of genocide has been confirmed, it should not “simply be bargained away”.⁶¹ If the Prosecutor makes a plea agreement “such that the totality of an individuals criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done”.⁶² Further the Trial Chamber stated that “convictions entered by a trial chamber must accurately reflect the actual conduct and crime committed and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter”.⁶³

The Trial Chamber recognised it has a responsibility to ensure that all accused are treated equally before the law.⁶⁴ The Trial Chamber expressed concern that “the Prosecutor may seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in other prosecutions”.⁶⁵ Other accused, whose involvement may have been less, may not be offered a plea agreement.

⁵¹ S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (22 February 1993) and S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (25 May 1993).

⁵² Sentencing Judgement, paras. 59-60.

⁵³ *Ibid.*, para. 61.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, para. 62.

⁵⁶ *Ibid.*, para. 63.

⁵⁷ *Ibid.*

⁵⁸ For a critique of the use of plea bargaining, see, Albert W. Alshuler, “Implementing the Criminal Defendant’s Right to Trial: An Alternative to the Plea Bargaining System,” *University of Chicago Law Review*, Vol. 50 (Summer 1983), pp. 931, 932, “In contested cases, [plea bargaining] substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt”. (Sentencing Judgement, footnote. 111)

⁵⁹ *Ibid.*, para. 65.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Article 21(1) of the Statute of the Tribunal: “All persons shall be equal before the International Tribunal.”

⁶⁵ Sentencing Judgement, para. 66.

Judicial Economy and Quality of Justice

The Trial Chamber noted “that the saving of time and resources due to a guilty plea have often been considered as a valuable and justifiable reason for the promotion of guilty pleas”.⁶⁶ It felt it could not fully endorse this argument. While it appreciated the saving of Tribunal resources, the Trial Chamber found that in cases of this magnitude, where the Tribunal has been entrusted “to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard to the rights of the accused and the interests of victims,”⁶⁷ the saving of resources cannot be given undue consideration or importance”.⁶⁸ The Trial Chamber stated that “it did not want to compromise the *quality* of the justice and the fulfilment of the mandate of the Tribunal” and that “while savings of time and resources may be a *result* of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements”.⁶⁹

Advantages of Guilty Pleas

The Trial Chamber examined the advantages of guilty pleas. It recalled that other Trial Chambers and the Appeals Chamber have considered aspects of guilty pleas including the advantages such as: the accused and the Prosecutor avoid a lengthy trial; it may help an accused to “to save his conscience and atone for his wrongdoing”; to avoid “the indignity of a public trial” and to obtain a more lenient sentence.⁷⁰ The Trial Chamber listed further advantages of guilty pleas:

- in relation to the Tribunal’s mission to assist in restoring peace and bring reconciliation to the territory of the former Yugoslavia, guilty pleas can certainly contribute significantly;
- through the acknowledgment of the crimes committed and the recognition of ones own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a Trial Chamber to the victims and survivors;
- when an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created;
- as perpetrators are brought to justice, a guilty plea leads directly to the fulfilment of a fundamental purpose of the Tribunal;
- guilty pleas can assist investigations and provide evidence at trials.⁷¹

Conclusion

The Trial Chamber concluded that “on balance, guilty pleas pursuant to plea agreements, may further the work and the mandate of the Tribunal” but that “the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice”.⁷²

Determination of the Appropriateness of a Guilty Plea pursuant to a Plea Agreement in this case

The Trial Chamber was concerned about accepting a guilty plea due to the magnitude of the crimes committed following the

⁶⁶ *Ibid.*, para. 67. *Erdemovic*, IT-96-22-A, Appeal Judgement (“*Erdemovic* Appeal Judgement”), 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 2.

⁶⁷ *Ibid.*, footnote. 120. “In relation to the status of victims, the Trial Chamber notes that while certain of those victims who were to have been called to testify may benefit from the guilty plea, other victims may find that the use of plea agreements is not preferable to a full, public trial”.

⁶⁸ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-A73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, 21 October 2003, paras 21-22, *Judicial Supplement* No. 44.

⁶⁹ Sentencing Judgement, para. 67. (emphasis by the Trial Chamber)

⁷⁰ *Ibid.*, para. 57 and footnote 101. *Erdemovic* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, para. 8.

⁷¹ *Ibid.*, para. 72.

⁷² *Ibid.*, para. 73.



fall of Srebrenica and the fact that Momir Nikolic was initially charged with genocide. However, the Trial Chamber noted the importance of having an “insider” willing to testify.⁷³ It considered Momir Nikolic’s acknowledgment of the crimes committed following the fall of Srebrenica and his role therein, as well as the role of other Bosnian Serbs members of the joint criminal enterprise, to be significant in verifying that these crimes were in fact committed and in finding who was responsible for their commission. It found that the guilty plea contributed to the process of reconciliation.⁷⁴ It held: “such an acknowledgement may contribute to the establishment of the truth in all areas and communities in the former Yugoslavia. Until such crimes have been recognised, no steps can be taken to apologise for those crimes or seek forgiveness for ones role, however large or small in their commission. Therefore, the Trial Chamber considered this to be an important factor weighing in favour of accepting the guilty plea”.⁷⁵

Penalties and Sentencing

The Trial Chamber examined the purposes of punishment in the context of the Tribunal. According to the Trial Chamber “the punishment must reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes, as well as respond to the call from the international community as a whole to end impunity for massive human rights violations and crimes committed during armed conflicts”.⁷⁶

The Trial Chamber found that the purposes of punishment recognised under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation. It examined the notion of retribution⁷⁷ and found that, in light of the Tribunal’s mandate retribution is better understood as an “expression of condemnation and outrage of the international community”,⁷⁸ and that “impunity will not prevail”.⁷⁹ The Trial Chamber also considered retribution as recognition of the harm and suffering caused to the victims.⁸⁰ Additionally, it considered that the purposes of punishment in the Criminal Code of the Socialist Federal Republic of Yugoslavia were rehabilitation, concepts of public safety and protection, as well as the promotion of the rule of law.⁸¹

The Trial Chamber held that “punishment must strive to attain a further goal: rehabilitation”.⁸² It observed that “the concept of rehabilitation can be thought of broadly and can encompass all stages of criminal proceedings, and not simply the post-conviction stage” and stated that reconciliation and peace can be promoted through the process of rehabilitation.⁸³

Sentencing Factors

Gravity of the offence

In determining the gravity of the offence the Trial Chamber examined the crime of persecutions, the underlying criminal conduct generally, the specific role played by Momir Nikolic in its commission and the status of the victims.

The Trial Chamber considered that “the seriousness of the crime of persecutions cannot be emphasised enough: this is a crime that can be committed in different manners and incorporates manifold acts”.⁸⁴ It noted that it is the “abhorrent

discriminatory intent behind the commission of this crime against humanity that renders it particularly grave”.⁸⁵ It held that Momir Nikolic played an “active role in the commission of the crime”⁸⁶ and found a sentence in the range of 20 years to life imprisonment to be appropriate “based solely on the gravity of the crime he committed, on his role and participation in the commission of that crime, and having taken into consideration the sentencing practices in the former Yugoslavia as well as the sentencing practices of this Tribunal”.⁸⁷

Aggravating circumstances

The position of authority and role of Momir Nikolic

The Trial Chamber held that Momir Nikolic was in a position of authority as Assistant Commander and Chief of Security and Intelligence. While his tasks largely consisted of implementing rather than giving orders, Momir Nikolic directed the military police of the Bratunac Brigade, as well as co-ordinated other units. His role was of significant importance to the overall “murder operation”⁸⁸ that was ongoing. Therefore, the Trial Chamber found his position and role to be aggravating factors.⁸⁹

The vulnerability of the victims and the depravity of the crimes

The Trial Chamber found that “the depravity of the crimes is subsumed in the overall gravity of the offence”.⁹⁰ It took particular note of the vulnerability of the victims as an aggravating factor: “[t]hey were all in a position of helplessness and were subject to cruel treatment at the hands of their captors”.⁹¹

Mitigating circumstances

Guilty plea and acceptance of responsibility

The Trial Chamber found Momir Nikolic’s guilty plea to be “an important factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Momir Nikolic’s acceptance of his individual criminal responsibility for his role in the crime of persecutions”.⁹² In its view it contributed to establishing a historical record of the fall of Srebrenica and will hopefully provide some form of closure for the victims.⁹³

⁷³ *Ibid.*

⁷⁴ *Ibid.*, para. 123.

⁷⁵ *Ibid.*, para. 124 and footnote 195. The Trial Chamber recalled the finding of the Appeals Chamber in para. 96 of the *Jelisić* Appeal Judgement (IT-95-10-A, 5 July 2001, *Judicial Supplement* No. 26): “The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.” The Trial Chamber selected the following examples because of the similarity of offence or gravity: Milomir Stakic was sentenced to life imprisonment for crimes including persecutions; Radislav Krstic was sentenced to 46 years imprisonment, for crimes including that of persecutions (the conviction also included the charge of genocide although the underlying factual basis is similar to that of this case); Tihomir Blaskic was sentenced to 45 years imprisonment, for crimes including that of persecutions; Goran Jelisić was sentenced to 40 years (though the convictions were for offences other than persecutions); Dragoljub Kunarac was sentenced to 28 years (though the convictions were for offences other than persecutions); Dario Kordic was sentenced to 25 years for crimes including persecutions; Zoran Zigic was sentenced to 25 years for crimes including persecutions; Mladjo Radic was sentenced to 20 years for crimes including persecutions; Mitar Vasiljevic was sentenced to 20 years imprisonment, for crimes including that of persecution; and Vladimir Santic was sentenced to 18 years for crimes including persecutions. The Trial Chamber recognised that many of these persons were convicted for crimes in addition to persecutions as a crime against humanity.

⁷⁶ *Ibid.*, para. 135.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para. 136.

⁷⁹ *Ibid.*, para. 137.

⁸⁰ *Ibid.*, para. 149.

⁸¹ See *Plavsić*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras. 75-77, *Judicial Supplement* No. 40. Dr. Alex Boraine, an expert on reconciliation and accountability issues and the former Deputy Chairperson on the Truth and Reconciliation Commission in South Africa, gave testimony on the importance of the acknowledgement and acceptance of responsibility for grave crimes on the process of reconciliation.

⁷³ *Ibid.*, para. 75.

⁷⁴ *Ibid.*, para. 76.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, para. 82.

⁷⁷ *Aleksovski*, IT-95-14/1-A, Appeal Judgement (“*Aleksovski* Appeal Judgement”), 24 March 2000, para. 185, *Judicial Supplement* No. 13.

⁷⁸ Sentencing Judgement, para. 86 and footnote 126. *Aleksovski* Appeal Judgement, para. 185.

⁷⁹ *Ibid.*, para. 87.

⁸⁰ *Ibid.*, para. 86.

⁸¹ *Ibid.*, para. 91.

⁸² *Ibid.*, para. 93.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 105.

The Trial Chamber considered Momir Nikolic's guilty plea as a mitigating factor because it spared witnesses from being required to come and testify about painful and traumatic events.⁹⁴

Finally, the Trial Chamber took note of the fact that other accused have been given credit for pleading guilty before the start of trial or at an early stage of the trial because of the savings of Tribunal resources. However, the Trial Chamber allocated little weight to this aspect of the benefits of a guilty plea.⁹⁵

Cooperation with the Prosecution

The Trial Chamber noted particularly the information given by Nikolic regarding new mass graves and the closure which may now come to the surviving family members and friends. It assessed the value of Momir Nikolic's co-operation, noting his testimony in the *Blagojevic*⁹⁶ case, as well as how forthcoming the information was. It found that his testimony was at times "evasive"⁹⁷ and not as detailed as it could have been. Further, the Trial Chamber took into consideration, in its overall evaluation, Tab "B" to the Amended Plea Agreement, in which Momir Nikolic admitted that he previously made false statements, as "an indicator of the character and a certain lack of candour" on his part.⁹⁸

⁹⁴ Sentencing Judgement, para. 150.

⁹⁵ See above under "Appropriateness of Guilty Pleas".

⁹⁶ *Blagojevic*, IT-02-60-T, Trial

⁹⁷ Sentencing Judgement, para. 156.

⁹⁸ *Ibid.*

Other mitigating circumstances

The Trial Chamber took into account the character of the Accused prior to the war as a mitigating factor.⁹⁹ It decided that the submission that Nikolic would have surrendered voluntarily had he known of his impending arrest was not a factor to be taken into consideration.¹⁰⁰ It did not accord significant weight to Nikolic's comportment in the United Nations Detention Unit¹⁰¹ or his expression of remorse.¹⁰² It recalled the Appeals Chamber finding in the *Kunarac* Appeal Judgement,¹⁰³ noted the family circumstances of Momir Nikolic, and found it could not be given significant weight in a case of this gravity.¹⁰⁴

⁹⁹ *Ibid.*, para. 164.

¹⁰⁰ *Ibid.*, para. 166.

¹⁰¹ *Ibid.*, para. 168.

¹⁰² *Ibid.*, para. 161.

¹⁰³ *Kunarac*, IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 362, *Judicial Supplement No. 34*. The Appeals Chamber held that "family concerns should in principle be a mitigating factor".

¹⁰⁴ *Furundzija*, IT-95-17/1-T, Trial Judgement, 10 December 1998, para. 284, *Judicial Supplement No. 1*.

TRIAL CHAMBERS

The Prosecutor v. Dragan Obrenovic

Case No. IT-02-60/2-S

Trial Chamber I, Section A (Judges Liu [Presiding], Vassylenko and Argibay)

"SENTENCING JUDGEMENT"

10 DECEMBER 2003

Position of leadership as an aggravating factor - Steps towards Rehabilitation

Position of leadership as an aggravating factor: where an accused's criminal responsibility under Article 7(3) of the Statute stems from his position as a commander, it would be inappropriate to use the same conduct to both establish liability and an aggravating factor.

Steps towards Rehabilitation: where an accused has demonstrated that he has already taken affirmative steps on the path toward rehabilitation and that the process of rehabilitation is likely to continue in the future this should be recognised in mitigation of sentence.

Procedural Background

● The Initial Indictment¹ charged Dragan Obrenovic with five counts: Complicity in Genocide punishable under Article 4(3)(e) of the Statute; Extermination as a crime against humanity punishable under Article 5(b) of the Statute; Murder as a crime against humanity punishable under Article 5(a) of the Statute; Murder as a violation of the laws or customs of war punishable under Article 3 of the Statute; and Persecutions on political, racial and religious grounds as a crime against humanity punishable under Article 5(h) of the Statute. For each count, Dragan Obrenovic was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute) and superior criminal responsibility (Article 7(3) of the Statute).²

● On 15 April 2001, Dragan Obrenovic was apprehended by the Stabilisation Force in Bosnia and Herzegovina ("SFOR") and transferred to the Tribunal. At his initial appearance, on 18 April 2001, he entered a plea of not guilty to all charges in the Initial Indictment.³

● On 11 September 2001, the Prosecution filed a motion seeking that Dragan Obrenovic, Vidoje Blagojevic and Dragan Jokic be jointly tried.⁴ The motion was granted.⁵ On 22 January 2002, the Prosecution filed a joint indictment, under case number IT-02-53.⁶ Under the Joint Indictment, the three Accused were charged as members of a joint criminal enterprise, the common purpose of which was "to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995; and to capture, detain, summarily execute by firing squad and bury thousands of Bosnian Muslim men and boys aged 16 to 60 from Srebrenica enclave from 12 July 1995 until and about 19 July 1995".⁷ Under the Joint Indictment, Dragan Obrenovic was charged with the same charges as in the Initial Indictment.

● On 17 May 2002, Trial Chamber II granted the Prosecution's Motion to join Momir Nikolic with the Joint Indictment.⁸ The

⁴ *Dragan Obrenovic*, IT-01-43-PT, *Vidoje Blagojevic*, IT-98-33/1-PT, and *Dragan Jokic*, IT-01-44-PT, Prosecution's Motion for Joinder, 11 September 2001.

⁵ *Dragan Obrenovic*, IT-01-43-PT, *Vidoje Blagojevic*, IT-98-33/1-PT, and *Dragan Jokic*, IT-01-44-PT, Status Conference, 15 January 2002, T.59.

⁶ *Vidoje Blagojevic*, *Dragan Obrenovic* and *Dragan Jokic*, IT-02-53-I, Joinder Indictment ("Joint Indictment"), 22 January 2002.

⁷ *Ibid.*, para. 15.

⁸ *Momir Nikolic*, IT-02-56-I, Decision on Prosecution's Motion for Joinder, 17 May 2002.

¹ *Dragan Obrenovic*, IT-01-43-I, Indictment ("Initial Indictment"), 16 March 2001.

² Initial Indictment, paras. 12-22.

³ *Dragan Obrenovic*, IT-01-43-I, Initial Appearance, 18 April 2001, Transcripts ("T.") 2-3.



Prosecution filed a joint amended indictment under case number IT-02-60 on 27 May 2002.⁹ Under the Indictment, the charges and the modes of responsibility alleged against Dragan Obrenovic were identical to those set forth in the previous Joint Indictment. The trial of the four Accused was scheduled to commence on 6 May 2003.¹⁰ Following the guilty plea of Momir Nikolic, the start of trial was delayed until 14 May 2003.¹¹

● On 20 May 2003, upon completion of the examination-in-chief of the Prosecution's first witness, the Prosecution and Dragan Obrenovic filed a "Joint Motion for Consideration of a Plea Agreement between Dragan Obrenovic and the Office of the Prosecutor". On 21 May 2003, during a public hearing on the Joint Motion, the Trial Chamber accepted the plea agreement and the guilty plea, and entered a finding of guilt against Dragan Obrenovic for Count 5 of the Indictment, namely persecutions as a crime against humanity.¹²

● On 22 May 2003, pursuant to the terms of the Plea Agreement and in accordance with its undertaking to the Trial Chamber at the Plea Hearing,¹³ the Prosecution moved for the Trial Chamber to dismiss all remaining counts of the Indictment. On 23 May 2003, the Trial Chamber granted the motion and further ordered that the proceedings against Dragan Obrenovic be separated from those against Blagojevic and Jokic.¹⁴ The same day the Registrar assigned case number IT-02-60/2 to the proceedings against Dragan Obrenovic.¹⁵

● The Sentencing Hearing for Dragan Obrenovic was held on 30 October 2003.

Sentencing Judgement

The Trial Chamber sentenced Dragan Obrenovic to 17 years imprisonment.¹⁶

Plea Agreement

The Trial Chamber examined Dragan Obrenovic's Plea Agreement. It noted that Dragan Obrenovic agreed to plead guilty to Count 5 of the Indictment (persecutions as a crime against humanity), agreed to co-operate with the Office of the Prosecutor, recognised that by pleading guilty he had waived certain procedural rights, and acknowledged that the plea was made of his own free will. The Trial Chamber noted that the Prosecution agreed to recommend a sentence of 15 to 20 years and would dismiss the remaining charges against Dragan Obrenovic.

At the conclusion of the Plea Hearing, the Trial Chamber found that there was a sufficient factual basis in the Plea Agreement and that the requirements of Rule 62 *bis* for a finding of guilt with respect to Count 5 of the Indictment were met. The Trial Chamber therefore found Dragan Obrenovic guilty of Count 5 of the Indictment and entered a conviction.¹⁷

The Trial Chamber determined that Dragan Obrenovic's guilty plea pursuant to the Plea Agreement was in the interests of justice and therefore accepted it. The Trial Chamber's determination was "based on the following factors, *inter alia*: (a)

the acceptance of responsibility of Dragan Obrenovic for his criminal conduct; (b) the establishment of an undisputed record about the crimes committed following the fall of Srebrenica which may contribute to reconciliation; (c) Dragan Obrenovic's agreement to co-operate with the Prosecution and provide testimony in the cases against other accused indicted for crimes related to Srebrenica, particularly in light of his position as an officer in the VRS;¹⁸ (d) the fact that certain witnesses would not need to come to testify at the Tribunal; and (e) the fact that the Prosecution did not withdraw any factual allegations related to the criminal conduct for which Dragan Obrenovic accepted individual criminal responsibility. The Trial Chamber further considered that an accused has the right to decide what plea to enter to the charges against him".¹⁹

Factual Basis

According to the Indictment, "[i]n the several days following this attack on Srebrenica, VRS forces captured, detained, summarily executed, and buried over 7000 Bosnian Muslim men and boys from the Srebrenica enclave, and forcibly transferred the Bosnian Muslim women and children of Srebrenica out of the enclave".²⁰

The crime of persecutions for which Dragan Obrenovic was charged in Count 5 of the Indictment was carried out through the following means: (a) the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons; (b) the cruel and inhuman treatment of Bosnian Muslim civilians, including beatings of civilians in schools and other detention centres in the Zvornik area on 13 through to 16 July 1995; (c) the terrorisation of Bosnian Muslim civilians from Srebrenica and Potocari from 13 to 16 July 1995; and (d) the destruction of personal property and effects of Bosnian Muslim civilians from Srebrenica who were detained and murdered in the Zvornik area.²¹

Sentencing Factors

Gravity of the offence

Particular circumstances of the commission of persecutions in this case

The Trial Chamber recalled the nature of persecutions as a crime against humanity, the crime to which Dragan Obrenovic pled guilty.²² It found that the crimes committed following the fall of Srebrenica were of "an enormous magnitude and scale" and that their gravity was "unquestionable".²³

Form and degree of participation of Dragan Obrenovic in the crime of persecutions

As the crimes in the Zvornik Brigade area of responsibility started on 13 July 1995, the Trial Chamber found this date to be the appropriate starting point for assessing Dragan Obrenovic's responsibility as the Acting Commander.²⁴ It noted that on the return of his commander Vinko Pandurevic, Dragan Obrenovic was still in a position of responsibility as Deputy Commander and Chief of Staff.²⁵

The Trial Chamber examined a number of actions attributable personally to Dragan Obrenovic and events which he had knowledge of. It found that "Dragan Obrenovic not only knew that members of the Zvornik Brigade took part in the organisation of the killings and the burials of the executed Muslim

⁹ *Vidoje Blagojevic, Dragan Obrenovic, Dragan Jokic and Momir Nikolic*, IT-02-60-PT ("Blagojevic et al."), Amended Joinder Indictment ("Indictment"), 27 May 2002.

¹⁰ *Blagojevic et al.*, Scheduling Order, 6 December 2002.

¹¹ The Sentencing Judgement in the *Momir Nikolic* case was rendered by this same Trial Chamber on 2 December 2003. It gives a detailed account of the procedure for guilty pleas. See *Momir Nikolic*, IT-02-60/1-S, Sentencing Judgement ("Momir Nikolic Sentencing Judgement"), 2 December 2003, present issue of the *Judicial Supplement*.

¹² *Vidoje Blagojevic, Dragan Obrenovic and Dragan Jokic*, IT-02-60-T, 21 May 2003, Plea Hearing ("Plea Hearing"), T. 560.

¹³ Plea Hearing, T. 552.

¹⁴ *Vidoje Blagojevic, Dragan Obrenovic and Dragan Jokic*, IT-02-60-T, Separation of Proceedings and Scheduling Order, 23 May 2003.

¹⁵ *Obrenovic*, IT-02-60/2, Decision, 23 May 2003.

¹⁶ Obrenovic is entitled, pursuant to Rule 101(C), to the credit for the time served since his arrest (969 days).

¹⁷ Plea Hearing, T. 560.

¹⁸ Forces of the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska (footnote added).

¹⁹ Sentencing Judgement, para. 20.

²⁰ Indictment, para. 26.

²¹ Sentencing Judgement, para. 29.

²² *Ibid.*, paras. 64, 65.

²³ *Ibid.*, para. 77.

²⁴ *Ibid.*, para. 81.

²⁵ *Ibid.*

prisoners but also approved the release of members of the Zvornik Brigade to participate in the implementation of this plan".²⁶ It found that even though Dragan Obrenovic did not devise the plan, he participated in the implementation of the plan to kill the Muslim prisoners by releasing his men from their actual duties and ordering them to follow the orders that came from above.²⁷ The Trial Chamber considered this action to be aiding and abetting. It characterised Dragan Obrenovic's participation in the joint criminal enterprise as "co-perpetratorship".²⁸

The Trial Chamber noted Dragan Obrenovic's "particular position and place in the overall chain of command when assessing how these actions reflect[ed] on his individual criminal responsibility".²⁹ The Trial Chamber held that Dragan Obrenovic's "liability stem[med] primarily from his responsibilities as a commander".³⁰ It took into account the fact that he remained "passive when he should have prevented his subordinates from committing the criminal acts or punished them for such crimes afterwards".³¹

Given the gravity of the crime, the Trial Chamber found a sentence in the range of 20 years to 40 years imprisonment to be appropriate.

Aggravating circumstances

Position of leadership and role of Dragan Obrenovic

The Trial Chamber examined the principle of command responsibility. It held that when "commanders, through their own actions or inactions, fail in the duty, which stems from their position, training and leadership skills, to set an example for their troops that would promote the principles underlying the laws and customs of war and thereby – either tacitly or implicitly – promote or encourage the commission of crimes, this may be seen as an aggravating circumstance".³²

The Trial Chamber recalled that a position of leadership may be an aggravating factor.³³ It noted that Dragan Obrenovic was in a position of authority as Acting Commander and Deputy Commander of the Zvornik Brigade. However, as Dragan Obrenovic's criminal responsibility under Article 7(3) of the Statute stemmed from his position as a commander it would be inappropriate to use the same conduct to both establish liability and an aggravating factor.³⁴

Vulnerability of the victims and depravity of the crimes

The Trial Chamber found the depravity of the crimes to be subsumed in the overall gravity of the offence. It considered the vulnerability of the victims as an aggravating factor as "they were in a position of helplessness and were subject to cruel treatment at the hands of their captors".³⁵

Mitigating circumstances

Guilty plea and acceptance of responsibility

The Trial Chamber noted that Dragan Obrenovic "in accepting his responsibility and his guilt ha[d] never sought to offer excuses or shift responsibility for his actions".³⁶ It found Dragan Obrenovic's

guilty plea to be a "significant factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Dragan Obrenovic's unreserved acceptance of his individual criminal responsibility for his role in the crime of persecutions".³⁷ It attached weight to the fact that Dragan Obrenovic's guilty plea will spare witnesses from having to give testimony at trial.³⁸ The parties submitted that Dragan Obrenovic's guilty plea had saved Tribunal resources. The Trial Chamber recalled its finding in the *Momir Nikolic* Sentencing Judgement³⁹ and accordingly attached little weight to this aspect of the guilty plea.⁴⁰

Remorse

The Trial Chamber carefully considered his "expression of remorse and his apologies to the victims for his participation in what he described as the 'horror of Srebrenica'".⁴¹ It held that through his statements and actions he had sought "to atone for his criminal conduct" and found that Dragan Obrenovic had demonstrated genuine remorse.⁴² As a result the Trial Chamber considered Dragan Obrenovic's remorse to be a "substantial mitigating factor".⁴³

Co-operation with the Prosecution

The Trial Chamber noted that Dragan Obrenovic had co-operated with the Prosecution by giving oral evidence at the *Blagojevic and Jokic* Trial⁴⁴ and by providing documents relevant to the this Trial and other investigations and assisting during the investigation phase when he permitted the Prosecution to conduct a search of the Zvornik Brigade's property.⁴⁵ Consequently, it found this substantial co-operation with the Prosecution to be a "significant mitigating factor".⁴⁶

Character of the accused, no opportunity for voluntary surrender, comportment in the United Nations Detention Unit ("UNDU") and personal circumstances

The Trial Chamber found Dragan Obrenovic's character prior to and during the war to be an "important mitigating factor".⁴⁷ It found that Dragan Obrenovic did not discriminate prior to the war and that he provided help to several Muslims during the war.⁴⁸

As the Trial Chamber would have had to speculate in order to determine whether Dragan Obrenovic would have voluntarily surrendered if given the opportunity, it attached little weight to this factor.⁴⁹ Additionally, it did not accord significant weight to his comportment in the UNDU.⁵⁰ The Trial Chamber found that "family circumstances, while recognised as a mitigating circumstance, cannot be given any significant weight in a case of this gravity".⁵¹

Steps towards Rehabilitation⁵²

The Trial Chamber recalled that one of the recognised

²⁶ *Ibid.*, para. 85.

²⁷ *Ibid.*

²⁸ On co-perpetratorship, see *Krnjelac*, IT-97-25-A, Appeal Judgement, 17 September 2003, para. 29, *Judicial Supplement* No. 45.

²⁹ Sentencing Judgement, para. 86.

³⁰ *Ibid.*, para. 88.

³¹ *Ibid.*, para. 121.

³² *Ibid.*

³³ *Ibid.*, para. 122. *Blagojevic and Jokic*, IT-02-60-T.

³⁴ *Ibid.*, para. 128.

³⁵ *Ibid.*, para. 129.

³⁶ *Ibid.*, para. 134.

³⁷ *Ibid.*

³⁸ *Ibid.*, para. 136.

³⁹ *Ibid.*, para. 138.

⁴⁰ *Ibid.*, para. 140 and footnote 249. See *Momir Nikolic* Sentencing Judgement, para. 170.

⁴¹ *Ibid.*, para. 121. See *Dragan Obrenovic* IT-02-60/2-S, Prosecution's Supplemental Submissions Regarding the Sentencing of Dragan Obrenovic, 23 October 2003, para. 3.

⁴² *Ibid.*, para. 121.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. 122. *Blagojevic and Jokic*, IT-02-60-T.

⁴⁵ *Ibid.*, para. 128.

⁴⁶ *Ibid.*, para. 129.

⁴⁷ *Ibid.*, para. 134.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, para. 136.

⁵⁰ *Ibid.*, para. 138.

⁵¹ *Ibid.*, para. 140 and footnote 249. See *Momir Nikolic* Sentencing Judgement, para. 170.

⁵² Trial Chambers in previous judgements have examined personal circumstances while assessing the possibility of rehabilitation. See *Blaskic*, IT-95-14-T, Trial Judgement, 3 March 2000, paras. 779-780, in which the Trial Chamber examined personal mitigating factors and stated that "the character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused" (*Judicial Supplement* No. 13). See also *Kvočka et al.*, IT-98-30/1-T, Trial Judgement, 2 November 2001, para. 704, in which the Trial

²⁶ *Ibid.*, para. 85.

²⁷ *Ibid.*

²⁸ On co-perpetratorship, see *Krnjelac*, IT-97-25-A, Appeal Judgement, 17 September 2003, para. 29, *Judicial Supplement* No. 45.

²⁹ Sentencing Judgement, para. 86.

³⁰ *Ibid.*, para. 88.

³¹ *Ibid.*

³² *Ibid.*, para. 100.

³³ *Kordic*, IT-95-14/2-T, Judgement, 26 February 2001, paras. 853-855, *Judicial Supplement* No. 23.

³⁴ Sentencing Judgement, para. 99. This issue was also discussed in *Galic*, IT-98-29-T, Judgement and Opinion ("Galic Judgement"), 5 December 2003, Separate and Dissenting Opinion of Judge Nieto-Navia, para. 121, present issue of the *Judicial Supplement*.

³⁵ *Ibid.*, para. 102.

³⁶ *Ibid.*, para. 115.

purposes of punishment is rehabilitation.⁵³ It stated that “if an accused has demonstrated that he has already taken affirmative steps on the path towards rehabilitation, and that the process of rehabilitation is likely to continue in the future, this should be recognised in mitigation of sentence”.⁵⁴

The Trial Chamber found that Dragan Obrenovic had begun his process of rehabilitation. In 1998, for example, he permitted the “Office of the Prosecutor to search the premises of the Zvornik Brigade knowing the search was likely to yield information that could incriminate him”.⁵⁵ Additionally, Dragan Obrenovic had “continued the process toward rehabilitation since his arrest by taking full responsibility for the crimes he ha[d] committed and by co-operating fully with the Office of the Prosecutor”.⁵⁶ The Trial Chamber found that by his “expressed words and more importantly his *deeds*” that it was likely that upon his eventual release from his term of imprisonment Dragan Obrenovic will “continue the path that he ha[d] begun by continuing to take positive acts to atone for his responsibility in the crimes at Srebrenica”.⁵⁷ The Trial Chamber therefore found that Dragan Obrenovic’s “affirmative steps toward rehabilitation were a factor in mitigation of sentence”.⁵⁸ ■

Chamber took into account “factors pertaining to the individual circumstances of the convicted person” in order to determine any reasons for the accused’s criminal conduct and in order to assess more accurately the “possibility of rehabilitating those convicted by the Tribunal” (*Judicial Supplement* No. 29). More recently, in the *Galic* Judgement, the Trial Chamber stated that “by taking into consideration factors pertaining to the individual circumstances of the convicted person, the Trial Chamber is able to more accurately assess the possibility of rehabilitation” (para. 759).

⁵³ *Momir Nikolic* Sentencing Judgement, para. 93.

⁵⁴ Sentencing Judgement, para. 143.

⁵⁵ *Ibid.*, para. 144.

⁵⁶ *Ibid.*, para. 145.

⁵⁷ *Ibid.*, para. 146 (emphasis by the Trial Chamber).

⁵⁸ *Ibid.*

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