



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

Case No. IT-02-60/1-S
Date: 2 December 2003
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IN TRIAL CHAMBER I, SECTION A

Before: Judge Liu Daqun, Presiding
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Judgement Of: 2 December 2003

PROSECUTOR

v.

MOMIR NIKOLIĆ

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Stefan Waespi
Ms. Antoinette Issa
Ms. Anne Davis

Counsel for the Accused:

Mr. Veselin Londrović
Mr. Stefan Kirsch

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I. INTRODUCTION

A. The Accused: Momir Nikolić

1. Momir Nikolić was born on 20 February 1955 in the village of Hrancin, Bratunac, in then-Republic of Bosnia and Herzegovina in the former Yugoslavia. He is married and has two sons. Momir Nikolić is a Serb by ethnicity. At the time of his arrest, he was living in Bratunac, in the Republika Srpska, Bosnia and Herzegovina.¹

2. Momir Nikolić attended the Faculty of Political Sciences in Sarajevo, where he studied defence and protection. He worked as a secondary school teacher in Bratunac from 1981 to 1986. He then began working with the Territorial Defence in Bratunac as the assistant commander for intelligence. He was mobilised into the Territorial Defence on 18 April 1992, and briefly acted as commander of the Territorial Defence staff in Bratunac. During this period, he was a member of the War Presidency and Crisis Staff in Bratunac.² After spending some months in Serbia, Momir Nikolić was appointed as the Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the VRS in November 1992, a post he remained in until the end of the war.³ In July 1995, Momir Nikolić was a Captain First Class in the VRS.⁴ Momir Nikolić was demobilised in April 1996 and was appointed as chief of the department of the Ministry for Refugees and Displaced Persons in Bratunac and as coordinator of that Ministry for the municipality of Srebrenica. He remained in that position for fifteen months. Between 1998 and 2002, Momir Nikolić held various positions in two companies in Bratunac.⁵

B. Procedural History

3. The Office of the Prosecutor of the Tribunal brought an indictment against Momir Nikolić, which was confirmed by Judge Wolfgang Schomburg on 26 March 2002.⁶ An arrest warrant was issued the same day. It was further ordered that the Initial Indictment and supporting material be sealed until such time as the arrest warrant was served.⁷

4. The Initial Indictment charged Momir Nikolić as a member of a joint criminal enterprise, the common purpose of which was “to forcibly transfer the women and children from the Srebrenica

¹ *Blagojević* Trial, Trial Proceedings, 19 September 2003, BT. 1596.

² *Blagojević* Trial, Trial Proceedings, 25 September 2003, BT. 1860.

³ *Blagojević* Trial, Trial Proceedings, 19 September 2003, BT. 1597.

⁴ *Blagojević* Trial, Trial Proceedings, 25 September 2003, BT. 1871-72.

⁵ *Blagojević* Trial, Trial Proceedings, 19 September 2003, BT. 1598.

⁶ *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-I, Indictment, dated 26 March 2002 and filed on 28 March 2002.

⁷ *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-I, Order on Review of Indictment Pursuant to Article 19 of the Statute and Order for Non-Disclosure, filed *ex parte* and under seal on 28 March 2002; *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-I, Warrant of Arrest Order for Surrender, filed under seal on 28 March 2002.

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.”⁸ The Initial Indictment charged Momir Nikolić 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 Nikolić was charged in his individual capacity under Article 7(1) of the Statute.⁹

5. SFOR arrested and detained Momir Nikolić on 1 April 2002, and transferred him to the custody of the Tribunal the following day. At his initial appearance, held on 3 April 2002, Momir Nikolić heard the Initial Indictment read out in full, pursuant to Rule 62 of the Rules of Procedure and Evidence of the Tribunal. Momir Nikolić entered a plea of “not guilty” to all charges in the Initial Indictment.¹⁰ Momir Nikolić never sought provisional release and has remained in detention at the United Nations Detention Unit.

6. The Registrar assigned Veselin Londrović as lead counsel for Mr. Nikolić on 10 April 2002,¹¹ and Stefan Kirsch as co-counsel on 16 May 2002.¹²

7. On 17 May 2002, Trial Chamber II granted a Prosecution motion seeking to join the case against Momir Nikolić with that of Vidoje Blagojević, Dragan Obrenović, and Dragan Jokić.¹³ The Trial Chamber ordered that the four accused be jointly charged and tried and that the Prosecution file an amended joinder indictment.¹⁴

8. On 27 May 2002, the Prosecutor filed the Amended Joinder Indictment.¹⁵ Under the Indictment, Blagojević, Obrenović, Jokić and Nikolić were charged as members of a joint criminal

⁸ Initial Indictment, para. 17.

⁹ Initial Indictment, paras 21-43.

¹⁰ *Prosecutor v. Momir Nikolic*, Case No. IT-02-56-I, Initial Appearance Hearing, T. 47-48.

¹¹ *Prosecutor v. Momir Nikolic*, Case No. IT-02-56-PT, Decision by the Registrar Assigning Counsel as of 10 April 2002, dated 17 April 2002.

¹² *Prosecutor v. Momir Nikolic*, Case No. IT-02-56-PT, Decision by the Registrar Assigning Co-Counsel as of 16 May 2002, dated 28 May 2002. Both lead counsel and co-counsel were permanently assigned to Mr. Nikolić on 1 August 2002 (*Prosecutor v. Momir Nikolic*, Case No. IT-02-56-PT, Decision by the Registrar Assigning Counsel and Co-Counsel, dated 1 August 2002).

¹³ *Prosecutor v. Vidoje Blagojević, Dragan Obrenović and Dragan Jokić*, Case No. IT-02-53-PT.

¹⁴ *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002.

¹⁵ *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić and Momir Nikolić*, Case No. IT-02-60-PT, (“*Prosecutor v. Blagojević et al.*”), Amended Joinder Indictment, 27 May 2002.

enterprise, the common purpose of which was the same as that contained in the Initial Indictment.¹⁶ Under the Indictment the charges and mode of responsibility alleged against Momir Nikolić were identical to those set forth in the Initial Indictment.

9. On 1 April 2003, pursuant to an order by the President of the Tribunal, the case was transferred from Trial Chamber II to Trial Chamber I, composed as follows: Judge Liu Daqun, Presiding (China), Judge Volodymyr Vassylenko (Ukraine), and Judge Carmen Maria Argibay (Argentina).¹⁷

10. The trial for the four accused was scheduled to commence on 6 May 2003.¹⁸

11. On 6 May 2003, the Prosecution and Momir Nikolić filed a “Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor”. During a hearing on the First Joint Motion held the same day, the Trial Chamber raised multiple questions and concerns 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.¹⁹

12. On 7 May 2003, the Prosecution and Momir Nikolić filed a “Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor”, the details of which are discussed below. During a hearing on the Second Joint Motion held the same day, after hearing the Parties and Momir Nikolić, the Trial Chamber accepted an amended plea agreement²⁰ and entered a finding of “guilt” against Momir Nikolić 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 without prejudice to either party the remaining charges against Momir Nikolić set out in the Indictment.²¹

13. On 8 May 2003, pursuant to the terms of the Amended Plea Agreement, the Prosecution moved to dismiss all remaining counts of the Indictment, which included genocide, or in the

¹⁶ See, *supra* para. 4.

¹⁷ *Prosecutor v. Blagojević, et al.*, Case No. IT-02-60-PT, Order Assigning Judges to a Case before a Trial Chamber, 1 April 2003. The two *ad litem* judges, Judge Volodymyr Vassylenko and Judge Carmen Maria Argibay, were appointed to this case by letter from the Secretary General of the United Nations dated 21 January 2003, in accordance with Article 13 *ter* of the Statute.

¹⁸ *Prosecutor v. Blagojević, et al.*, Case No. IT-02-60-PT, Scheduling Order, 6 December 2002. With two subsequent scheduling orders of 5 and 6 May 2003, the Trial Chamber ordered that the start of trial be delayed, respectively, to 8 and 14 May 2003, having determined “that it [was] in the interest of justice that additional time be given for the preparation of the commencement of the trial”.

¹⁹ *Prosecutor v. Blagojević, et al.*, Case No. IT-02-60-PT, Plea Hearing (“Plea Hearing”), 6 May 2003, T. 287.

²⁰ See, Second Joint Motion, 7 May 2003, Annex A.

²¹ Plea Hearing, 7 May 2003, T. 294.

alternative, complicity to commit genocide; extermination, a crime against humanity; murder, a crime against humanity; murder, a violation of the laws or customs of war; and inhumane acts (forcible transfer), a crime against humanity.²² The Trial Chamber granted the motion on 12 May 2003.²³

14. On 9 May 2003, the Trial Chamber ordered that the proceedings against Momir Nikolić be separated from those against Vidoje Blagojević, Dragan Obrenović and Dragan Jokić.²⁴ On 12 May 2003, the Registrar assigned the Case Number “02-60/1” to the proceedings against Momir Nikolić.²⁵

15. On 14 July 2003, in accordance with an order by the Trial Chamber, the Parties filed their sentencing briefs. Upon the request of the Parties, the Trial Chamber permitted the Prosecution and Defence to file additional submissions on the issue of Momir Nikolić’s co-operation with the Prosecution following his testimony at the *Blagojević* Trial.²⁶ Additional submissions were filed by the Defence on 10 October 2003²⁷ and by the Prosecution on 15 October 2003.²⁸

C. The Plea Agreement, Guilty Plea and Conviction

16. According to the Amended Plea Agreement, Momir Nikolić agrees to plead guilty to Count 5 of the Indictment, namely persecutions, a crime against humanity. Momir Nikolić agrees that he is pleading guilty to Count 5 because he is in fact guilty and acknowledges full responsibility for his actions that are the subject of the Indictment.²⁹ Momir Nikolić confirms 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,³⁰ specifically, (a) the existence of an armed conflict during the time alleged in the Indictment;³¹ (b) a widespread or systematic attack directed against a civilian population and, in a manner related to that attack, Momir Nikolić committed acts against the

²² *Prosecutor v. Blagojević et. al.*, Case No. IT-02-60-PT, Prosecution’s Motion to Dismiss Charges Against Accused Momir Nikolić, 8 May 2003.

²³ Decision on Motion to Dismiss Charges Against Accused Momir Nikolić, 12 May 2003.

²⁴ *Prosecutor v. Blagojević et. al.*, Case No. IT-02-60-PT, Separation of Proceedings and Scheduling Order, 9 May 2003.

²⁵ Corrigendum Decision, 14 May 2003.

²⁶ Momir Nikolić testified in the *Blagojević* Trial, as a Prosecution witness from 19 September 2003-1 October 2003. The Trial Chamber notes for the record that the judges assigned to this case are the same judges assigned to the *Blagojević* Trial.

²⁷ Addendum to Defendant’s Sentencing Brief, 10 October 2003.

²⁸ Prosecution’s Supplemental Submissions Regarding the Sentencing of Momir Nikolić, 15 October 2003.

²⁹ Amended Plea Agreement, para. 3.

³⁰ Amended Plea Agreement, para. 6.

³¹ Amended Plea Agreement, Momir Nikolić 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.

civilian population that violated fundamental human rights;³² (c) Momir Nikolic's conduct was committed on political, racial or religious grounds and was committed with discriminatory intent;³³ and (d) Momir Nikolić was aware of the wider context in which his conduct occurred.³⁴

17. Pursuant to the Amended Plea Agreement, Momir Nikolić also agrees 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.”³⁵ Momir Nikolić further agrees that he will not appeal the sentence imposed by the Trial Chamber unless the sentence is above the range recommended by the Parties.³⁶

18. Momir Nikolić acknowledges that by entering a plea of guilty he has 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.³⁷

19. In “exchange” for Momir Nikolić's plea of guilty to Count 5 and the fulfilment of all his obligations under the Amended Plea Agreement, the Prosecution agrees that it will recommend that the Trial Chamber impose a sentence within the range of 15 to 20 years, and that Momir Nikolić be given credit for time already spent in the custody of the Tribunal.³⁸ Furthermore, the Prosecution agrees 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 Nikolić set forth in the Indictment.³⁹

³² Amended Plea Agreement, Momir Nikolić 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. *See, infra* para. 31.

³³ Amended Plea Agreement, Momir Nikolić 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.

³⁴ Amended Plea Agreement, Momir Nikolić 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.

³⁵ Amended Plea Agreement, para. 9.

³⁶ Amended Plea Agreement, para. 14.

³⁷ Amended Plea Agreement, para. 17.

³⁸ Amended Plea Agreement, para. 4.

³⁹ Amended Plea Agreement, para. 4(b).

20. In both the Amended Plea Agreement and at the Plea Hearing, Momir Nikolić 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 without threats or coercion. Further, he affirmed that he understood that the Trial Chamber was not bound to accept the range of sentence suggested by the Parties.⁴⁰ The Trial Chamber questioned Momir Nikolić at the Plea Hearing on all aspects of his guilty plea.⁴¹ Momir Nikolić was then asked to enter a plea to Count 5; he pled guilty.⁴²

21. At the conclusion of the Plea Hearing, the Trial Chamber found that there was a sufficient factual basis provided in the facts of the Amended Plea Agreement and the attached Statement of Facts for a finding of guilt with respect to Count 5 of the Indictment.⁴³ The Trial Chamber was satisfied that the plea of guilty met the requirements of Rule 62 *bis* and accordingly, entered a finding of guilt and convicted Momir Nikolić for Count 5 of the Indictment.⁴⁴

D. The Sentencing Hearing

22. The Sentencing Hearing for Momir Nikolić was held on 27-29 October 2003. The Prosecution did not call any witnesses to testify. However, pursuant to Rule 92 *bis* (D), the Trial Chamber admitted the former testimony from the case *Prosecutor v. Radislav Krstić*⁴⁵ of four witnesses as Prosecution evidence.⁴⁶ The Trial Chamber heard four *viva voce* witnesses on behalf of the Defence, two of whom were granted protective measures, including face distortion and the use of a pseudonym.⁴⁷

23. During the Sentencing Hearing, the Prosecution moved that the testimony of Momir Nikolić in the *Blagojević* Trial be entered into evidence in order for the Trial Chamber to assess the extent of the co-operation of Mr. Nikolić with the Prosecution, recalling that the additional submissions of

⁴⁰ Amended Plea Agreement, paras 13, 19 and 21; Plea Hearing, 7 May 2003, T. 292-93.

⁴¹ Plea Hearing, 7 May 2003, T. 292-94. The Trial Chamber inquired specifically whether Momir Nikolić understood the *consequences* of pleading guilty to crimes against humanity, persecutions, as part of ensuring that the guilty plea was informed; Mr. Nikolić responded that the consequences of his pleading guilty were explained to him. Additionally, the Trial Chamber further questioned whether Mr. Nikolić understood that the Trial Chamber was not bound by the sentence recommended by the Prosecution, pursuant to Article 62 *ter*(B), to which he responded that he was quite clear about this provision.

⁴² Plea Hearing, 7 May 2003, T. 293.

⁴³ See Section II.

⁴⁴ Plea Hearing, 7 May 2003, T. 294.

⁴⁵ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T.

⁴⁶ Lieutenant Leenert Van Duijn (“Prosecution Ex. PS-4”), Witness I (“Prosecution Ex. PS-1”), Witness DD (“Prosecution Ex. PS-3”) and Teufka Ibrahimfendić (“Prosecution Ex. PS-2”) testified at the *Krstić* Trial, and their testimony from the trial was admitted into evidence, pursuant to Rule 92 *bis* (D). See, Status Conference, 8 September 2003, T.1471; and Sentencing Hearing, 29 October 2003, T. 1486

⁴⁷ Status Conference, 8 September 2003, T. 1470.

both the Prosecution and the Defence were based on this testimony. The Trial Chamber granted the motion.⁴⁸

24. The Defence tendered numerous exhibits, which included the annexes attached to the Nikolić Sentencing Brief and the Addendum to Nikolić Sentencing Brief, as well an “Open Letter from the Mayor of Srebrenica Municipality”⁴⁹ and two newspaper articles related to Momir Nikolić’s guilty plea and testimony in the *Blagojević* Trial.⁵⁰ The Trial Chamber admitted all of these exhibits.

25. As the Trial Chamber has to evaluate the extent of Momir Nikolić’s co-operation with the Prosecution as a possible mitigating factor, and as the truthfulness of Mr. Nikolić’s testimony is an integral factor in assessing his full co-operation with the Prosecution, the Trial Chamber found it necessary to call three witnesses *proprio motu* to testify at the Sentencing Hearing on certain points upon which Mr. Nikolić had given testimony in the *Blagojević* Trial,⁵¹ in order to assist the Trial Chamber in assessing Mr. Nikolić’s credibility.⁵² The three witnesses all appeared, were questioned first by the Trial Chamber and subsequently were cross-examined by the Defence and the Prosecution. As one of the witnesses, Miroslav Deronjić, is a convicted person awaiting sentence before this Tribunal,⁵³ the Trial Chamber permitted that his counsel be present at the Sentencing Hearing during his testimony.⁵⁴ One Trial Chamber witness was granted protective measures pursuant to Rule 75 such that this witness’s testimony was heard in closed session.⁵⁵

26. Upon conclusion of the submissions of the Prosecution and Defence, the Defence requested that Momir Nikolić be permitted to make a final statement. The Trial Chamber granted this request and Momir Nikolić addressed the Trial Chamber.

II. FACTUAL BASIS UNDERLYING THE CONVICTION

27. In the Amended Plea Agreement, the Parties specified those paragraphs of the Indictment upon which the guilty plea is based. Furthermore, Momir Nikolić specified, *inter alia*, his acts and

⁴⁸ Sentencing Hearing, 29 October 2003, T. 1645-46. Momir Nikolić’s former testimony is Prosecution Ex. PS-5.

⁴⁹ Defence Ex. DS-17.

⁵⁰ “Truth at The Hague”, Emir Suljagić, *New York Times*, 1 June 2003, Defence Ex. DS-18; and “Revisiting Srebrenica,” Editorial, *The Wall Street Journal Europe*, 14 October 2003, Defence Ex. DS-19.

⁵¹ See, Order Summoning Mile Petrović to Appear as a Witness of the Trial Chamber pursuant to Rule 98, filed confidentially 7 October 2003 (as the witness did not request protective measures and testified in open session, the confidentiality of this order is lifted); Order Summoning [REDACTED] to Appear as a Witness of the Trial Chamber pursuant to Rule 98, filed confidentially on 10 October 2003; Order Summoning Miroslav Deronjić to Appear as a Witness of the Trial Chamber pursuant to Rule 98, filed 10 October 2003.

⁵² Sentencing Hearing, 27 October 2003, T. 1531.

⁵³ *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61.

⁵⁴ Sentencing Hearing, 28 October 2003, T. 1535.

⁵⁵ Sentencing Hearing, 28 October 2003, T. 1613.

conduct in the joint criminal enterprise for which he was charged, as part of the Amended Plea Agreement. The “Statement of Facts and Acceptance of Responsibility” is attached to the Judgement as Annex B. It was based upon the factual allegations in the Indictment, which Momir Nikolić acknowledged as true and correct in the Amended Plea Agreement, and the Statement of Facts that the Trial Chamber found that a sufficient factual basis for the crime of persecutions existed to accept the guilty plea. A detailed account of the facts upon which the conviction is based can be found in these two documents; below is a summary of the factual basis.

28. In April 1993, the United Nations Security Council adopted Resolution 819 in which it expressed its alarm at the information “on the rapid deterioration of the situation in Srebrenica and its surrounding areas, as a result of the continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units,” and its awareness “that a tragic humanitarian emergency has already developed in Srebrenica and its surrounding areas as a direct consequence of the brutal actions of Bosnian Serb paramilitary units, forcing the large-scale displacement of civilians, in particular women, children and the elderly.”⁵⁶ Condemning the “deliberate interdiction by Bosnian Serb paramilitary units of humanitarian assistance convoys,” the Security Council demanded, *inter alia*, that “all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act” and “the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica”, and further requested that “the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end.”⁵⁷

29. In July 1994, the commander of the Bratunac Brigade, Lieutenant Colonel Slavko Ognjenović, issued a report which stated, in part:

We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task – the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy’s life has to be made unbearable and their temporary stay in the enclave impossible so that they leave the enclave *en masse* as soon as possible, realising that they cannot survive there.⁵⁸

⁵⁶ Resolution 819 (1993) adopted by the Security Council at its 3199th meeting, on 16 April 1993 (“Security Council Resolution 819 (1993)”, S/RES/819 (1993).

⁵⁷ Finally, the Security Council demanded the “unimpeded delivery of humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina, in particular to the civilian population of Srebrenica and its surrounding areas,” recalling that any impediment to the delivery of humanitarian assistance “constitute a serious violation of international humanitarian law.” Security Council Resolution 819 (1993).

⁵⁸ Indictment, para. 22.

In March 1995, political and military leaders in the Republika Srpska issued orders calling for, *inter alia*, the creation of “an unbearable situation of total insecurity, with no hope of further survival or life” for the inhabitants of Srebrenica.⁵⁹

30. Between 6-11 July 1995, the enclave of Srebrenica was shelled and attacked by units of the Drina Corps.⁶⁰ 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.”⁶¹ These acts form the basis of the crime of persecutions to which Momir Nikolić has pled guilty.

31. 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 Potočari and in detention facilities in Bratunac and Zvornik; (c) the terrorising of Bosnian Muslim civilians in Srebrenica and Potočari; (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.⁶²

A. Murder of Thousands of Bosnian Muslim Civilians

32. Beginning on 12 and 13 July 1995 in Potočari, a number of Bosnian Muslim men and women were shot and killed in and around the area of the United Nations compound, where they had gathered after fleeing Srebrenica; one group of approximately 80-100 men were summarily executed by decapitation. Within a five-day period, approximately 6,000 Bosnian Muslim men who were escaping in “the column” from Srebrenica were captured, detained and executed in various locations in the Bratunac and Zvornik municipalities. In the town of Bratunac on 13 July 1995, some of the Bosnian Muslim men who were detained there were taken from their places of detention, including schools, hangars and buses, and summarily executed. Along the route between Bratunac and Zvornik, the names previously used to mark settlements and communities or places of learning, culture and work or geographic features are now used to identify mass execution sites: Jadar River, Čerska Valley, Kravica Warehouse, Petkovci School, Pilica Cultural Centre, and the villages of Tišća and Orahovac.⁶³ At one location, Branjevo Military Farm, approximately 1,200

⁵⁹ Indictment, para. 23, citing Radovan Karadžić’s instructions in “Operation Directive 07” issued by the Supreme Command of the Armed Forces of the Republika Srpska, on 8 March 1995.

⁶⁰ Indictment, para. 25.

⁶¹ Indictment, para. 26.

⁶² Indictment, para. 59.

⁶³ Indictment, para. 43-46.

Bosnian Muslim men who had been captured from the column were executed by automatic weapon fire.⁶⁴

33. In his Statement of Facts, Momir Nikolić describes his role in the initial stages of planning the murder operation, including the detention of able-bodied men and the selection of execution sites:

In the morning of 12 July, prior to the above-mentioned meeting, I met with Lt. Colonel Vujadin Popović, Chief of Security, Drina Corps, and Lt. Colonel Kosorić, Chief of Intelligence, Drina Corps, outside the Hotel Fontana. At that time Lt. Colonel Popović told me that the thousands of Muslim women and children in Potočari would be transported out of Potočari toward Muslim-held territory near Kladanj and that the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd, detained temporarily in Bratunac, and killed shortly thereafter. I was told that it was my responsibility to help coordinate and organise this operation. Lt. Colonel Kosorić reiterated this information and we discussed the appropriate locations to detain the Muslim men prior to their execution. I identified several specific areas: the Old Elementary School "Vuk Karadžić" (including the gym), the old building of the secondary School "Duro Pucar Stari", and the Hangar (which is 50 meters away from the old secondary School). Lt. Colonel Popović and Kosorić talked with me about sites of executions of temporarily detained Muslim men in Bratunac and we discussed two locations which were outside Bratunac town. These were: State company "Ciglane" and a mine called "Sase" in Sase.⁶⁵

34. Momir Nikolić further describes seeing long columns of hundreds of captured Bosnian Muslim men being marched in the directions of Konjević Polje and Sandići on 13 July 1995.⁶⁶ Later on the day of 13 July 1995, as he travelled along the Konjević Polje-Bratunac road, Momir Nikolić saw "many prisoners being marched in both directions. I also saw dead bodies lying on the side of the road near Pervani and Lolići. I saw groups of three or so bodies at a time. At Sandići, I saw about 10 to 15 corpses and a large mass of prisoners in a meadow."⁶⁷ Momir Nikolić learned of the execution of the detainees held at the Kravica Warehouse the day after the executions were carried out.⁶⁸ Momir Nikolić is aware of murders that were carried out in Bratunac, including the murder of approximately 80-100 men near the Vuk Karadžić school on the evening of 13 July 1995.⁶⁹

35. Momir Nikolić states that on the night of 13 July 1995, he was ordered to travel to the Zvornik Brigade and inform Drago Nikolić, the Zvornik Brigade Security Officer that "thousands of Muslim prisoners were being held in Bratunac and would be sent to Zvornik that evening. Colonel Beara [Chief of Security of the VRS Main Staff] also told me that Muslim prisoners should be detained in the Zvornik area and executed."⁷⁰ Momir Nikolić indicates that on the night of 13

⁶⁴ Indictment, para. 46.10.

⁶⁵ Statement of Facts, p. 2, para. 4.

⁶⁶ Statement of Facts, p. 4, para. 9.

⁶⁷ Statement of Facts, p. 5, para. 9.

⁶⁸ Statement of Facts, p. 5, para. 9.

⁶⁹ Statement of Facts, p. 7, para. 11.

⁷⁰ Statement of Facts, p. 6, para. 10.

July 1995, discussions were held in Bratunac at the SDS office during which the “killing operation was openly discussed.”⁷¹

B. Cruel and Inhumane Treatment of Bosnian Muslim Civilians

36. Following the fall of the Srebrenica enclave, Bosnian Muslim civilians were subjected to acts of violence, including severe beatings at Potočari. In Potočari, men were separated from women and children and detained.⁷² Furthermore, Bosnian Muslim men who were detained in Bratunac and Zvornik were subjected to cruel and inhumane treatment.

37. In his Statement of Facts, Momir Nikolić confirms that during the time that Bosnian Muslims were detained in Potočari and around Bratunac, they were not given any food or medical aid, and were only given enough water to sustain them until they were transported to Zvornik.⁷³

C. Terrorising of Bosnian Muslim civilians in Srebrenica and Potočari

38. During the time-period that the Bosnian Muslim refugee population from Srebrenica was in and around Potočari, members of the VRS terrorised the population.⁷⁴ According to Momir Nikolić’s Statement of Facts, this took the form of intimidation and abuse, with the purpose of compelling the Muslim population to get on the buses and trucks to Kladanj.⁷⁵

D. Destruction of Personal Property

39. Beginning around 12 July 1995 and continuing throughout the period of executions, the personal property of Bosnian Muslim men was confiscated and destroyed by members of the VRS and MUP. This included identification documents and valuables. As the Bosnian Muslim refugees travelled along the Bratunac-Milići road, personal property was taken and destroyed.⁷⁶ Additionally, at various execution sites, Bosnian Muslim men had any property still in their possession confiscated, and subsequently destroyed.⁷⁷

⁷¹ Statement of Facts, p. 6, para. 10.

⁷² Indictment, para. 41.

⁷³ Statement of Facts, p. 6, para. 9. *See* Indictment, para. 42, in part: “prisoners in Potočari and in Bratunac were not provided with food or medical treatment, nor with any meaningful rations of water, during their days in detention pending execution.”

⁷⁴ Indictment, para. 40.

⁷⁵ Statement of Facts, p. 3, para. 6.

⁷⁶ Indictment, para. 42.

⁷⁷ Indictment, para. 42.

E. Forcible Transfer of Bosnian Muslims from the Srebrenica Enclave

40. On the evening of 11 July 1995, Ratko Mladić and other VRS officers held two meetings at the Hotel Fontana with members of the Dutch Battalion and, in the case of the second meeting, a representative of the Bosnian Muslim refugees who had fled from Srebrenica. Momir Nikolić was present at the Hotel Fontana during both meetings. During the second meeting, Mladić told the Bosnian Muslim representative that his people could either “survive or disappear.”⁷⁸ At a third meeting held at the Hotel Fontana on 12 July 1995 attended by members of the VRS, Bosnian Serb representatives, Dutch Battalion officers and representatives of the Bosnian Muslim refugees, Ratko Mladić “explained that he would supervise the ‘evacuation’ of refugees from Potočari and that he wanted to see all military-aged Bosnian Muslim men so that they could be screened as possible war criminals.”⁷⁹ It was during these meetings that “the plan to transport the civilian refugee population from Potočari was developed.”⁸⁰

41. Buses began arriving on 12 July 1995 in Potočari; Momir Nikolić was present at that time. The forcible transfer process of Bosnian Muslim women and children began. Bosnian Muslim men, however, were not permitted to board the buses; they were separated and transported to detention sites in Bratunac.⁸¹

42. In his Statement of Facts, Momir Nikolić states that “[d]uring the attack and takeover of the Srebrenica enclave by the VRS forces in July 1995 it was the intention of the VRS forces to cause the forcible removal of the entire Muslim population from Srebrenica to Muslim-held territory.”⁸² The statement continues: “On 11 July 1995, VRS forces captured and occupied the town of Srebrenica causing the Muslim population to move to the Dutch UN base in Potočari.”⁸³

III. GUILTY PLEA AS BASIS FOR CONVICTION

A. Applicable Law of the Tribunal

43. The Statute does not directly address the issue of a guilty plea. Article 20, paragraph 3, of the Statute provides:

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

⁷⁸ Indictment, para. 39.

⁷⁹ Indictment, para. 39.

⁸⁰ Indictment, para. 39.

⁸¹ Indictment, para. 41.

⁸² Statement of Facts, p. 1, para. 1.

⁸³ Statement of Facts, p. 1, para. 2.

44. Rule 62 *bis* of the Rules, which was adopted during the Fourteenth Plenary Session of 20 October and 12 November 1997,⁸⁴ provides the elements which must be established to enter a conviction upon a guilty plea. Rule 62 *ter* 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. These two Rules provide:

Rule 62 *bis*

Guilty Pleas

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

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

Rule 62 *ter*

Plea Agreement Procedure

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

45. The Trial Chamber finds that guilty pleas are provided for in the instruments of other international criminal courts, and that the elements which must be established under Rule 62 *bis* are

⁸⁴ 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.

reflective of the requirements for the acceptance of guilty pleas in national systems as well as on the international level.⁸⁵

B. Plea Agreements

1. History and Mechanics of Rule 62 ter

46. As stated above, Rule 62 *ter* was added to the Rules in December 2001. Prior to that date, what are commonly referred to as “plea agreements” had been reached between the Prosecution and defence teams in relation to six accused who pled guilty.⁸⁶ The Rule was proposed by the Prosecution to establish a formal procedure for a practice which was already somewhat established. It was 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 not used at all.

47. Plea agreements are more frequently used in adversarial common law jurisdictions than in the more inquisitorial civil law jurisdictions, due to the role that judges, prosecutors and defence counsel play in the respective systems.⁸⁷ Even in criminal justice systems where the use of plea agreements is common, the Trial Chamber notes that its use is less frequent in cases of serious felonies or in the most notorious cases.⁸⁸

⁸⁵ See, Rule 62 (“Initial Appearance of Accused and Plea”) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”), and particularly Rule 62(B); Article 65 (“Proceedings on an admission of guilt”) of the Statute of the International Criminal Court (“ICC”), 17 July 1998, U.N. Doc. A/CONF. 183.9, paragraph 1; Special Court for Sierra Leone, Rule 62 (“Procedure upon Guilty Plea”) of the Rules of Procedure and Evidence, as amended 1 August 2003. See also, United States Federal Rules of Criminal Procedure, Rule 11; *R. v. Turner* (1970) 2 Q.B. 321, 54 Cr. App.R. 352, (Eng. CA); Doherty J.A. in *R. v. T.* (R.) (1992), 17 C.R. (4th) 247 (Ont. C.A.) at p. 252: “To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea.”

⁸⁶ *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10; *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1; *Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija*, Case No. IT-95-8. The Trial Chamber notes that the terms of these agreements varied greatly, and that in the case of both Erdemović and Jelisić, the first guilty plea appears to have preceded any plea negotiations between the parties. Additionally, the Trial Chamber notes that there have been numerous pleas of guilty at the Tribunal’s sister tribunal, the ICTR, most of which have been pursuant to plea agreements. The ICTR adopted Rule 62 *bis* (“Plea Agreement Procedure”) at the Thirteenth Plenary held on 26-27 May 2003.

⁸⁷ It is recognised that *some* form of “plea bargaining,” albeit a different form than may exist in common law countries such as the United States, exists in many civil law countries. See, e.g., Craig M. Bradley, ed., *Criminal Procedure: A Worldwide Study* (Durham: Carolina Academic Press, 1999); Nancy Amoury Combs, “Copping a Plea to Genocide: the Plea Bargaining of International Crimes,” *University of Pennsylvania Law Review*, Vol. 151 (November 2002), p. 1 (Combs, “Copping a Plea to Genocide”); Yue Ma, “Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective,” *International Criminal Justice Review*, Vol.12 (2002), p. 22 (Ma, “Prosecutorial Discretion and Plea Bargaining”). See, also, Markus Dirk Dubber, “American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,” *Stanford Law Review*, Vol. 49 (February 1997), p. 547.

⁸⁸ See, Mike McConville, “Plea Bargaining: Ethics and Politics”, in Sean Doran and John Jackson, eds., *The Judicial Role in Criminal Proceedings*, (Oxford: Hart Publishing Ltd., 2000), pp. 68-91. The Trial Chamber finds it is unnecessary for its purposes to go into a detailed account of the use of plea agreements or “plea bargaining” in various

48. In conferring on these agreements, the parties meet without the presence of any member of the trial chamber and effectively “negotiate” the terms of an agreement, the result of which is an accused pleading guilty to one or more of the counts of the indictment.⁸⁹ The “negotiations” can result in the Prosecution agreeing to amend the indictment to withdraw certain charges or drop certain factual allegations.⁹⁰ As part of the agreement, the accused agrees to waive many of the rights guaranteed to him or her under the Statute and recognised as fundamental rights in human rights law.⁹¹ Most critically, the accused waives his or her right to be presumed innocent and have the Prosecution bear the burden of establishing his or her guilt beyond a reasonable doubt at a public trial.

49. 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 that neither party was unfairly treated and particularly that the rights of the accused are respected. As indicated above, 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.⁹² Thus, 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.

50. It is important to recall that under the Statute of the Tribunal and the Rules, the Prosecutor has the sole power to investigate alleged crimes which fall within the jurisdiction of the Tribunal and to prepare an indictment.⁹³ This power extends to the sole competence to determine the crime

national systems. It simply recalls that the frequent and even increasing use of such agreements in those jurisdictions is often in response to heavy caseloads, lack of resources and other administrative concerns.

⁸⁹ Indeed, it is critical that no member of the trial chamber participates in or assists in any manner the discussions related to a possible guilty plea; judges must remain impartial. Furthermore, as judges are the guarantors of an accused’s rights, including the right to be presumed innocent, participation in any discussions towards an accused pleading guilty may be inconsistent with a judge’s obligation and duty to protect an accused’s rights at trial, in the event that the plea negotiations fail. Finally, the Trial Chamber emphasises that an accused must exercise his free will in determining which plea to enter. *See, e.g.,* Welsh S. White, “A Proposal for the Reform of the Plea Bargaining Process,” *University of Pennsylvania Law Review*, Vol. 119 (January 1971), pp. 439, 452-53. *See also*, United States Federal Rules of Criminal Procedure 11(e)(1). The Trial Chamber notes that in certain national systems, such as Germany, judges do play an active role in plea negotiations. *See*, Ma, “Prosecutorial Discretion and Plea Bargaining”, *supra* note 87, p. 37. It is fully appropriate, however, for a judge to encourage the parties to come to points of agreement on matters of facts or law, in accordance with Rule 65 *ter* (H) of the Rules.

⁹⁰ It is suggested in some national systems that as part of the “plea process”, in addition to the views of the parties, appropriate consideration should also be given to the interests of the victims and the interest of the public in the effective administration of justice. *See*, American Bar Association Standards for Criminal Justice Pleas of Guilty, 3rd Ed. (1999), Standard 14-1.1 (b).

⁹¹ *See*, UDHR, Articles 10 and 11; ICCPR, Articles 14 and 15; ECHR, Articles 5 and 6.

⁹² *See*, *Erdemović* Appeal Judgement, 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.”

⁹³ Article 16(1) of the Statute provides, “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.” Article 18 of the Statute (“Investigation and preparation of indictment”) provides, in

or crimes with which an accused is charged. Once the Prosecutor determines that a *prima facie* case exists and has prepared an indictment, the indictment must be confirmed by a judge.⁹⁴ This process requires that the judge make a finding that a *prima facie* case exists, based on supporting material provided by the Prosecutor.⁹⁵ In the event that the Prosecution seeks to amend the indictment after its confirmation and the assignment of the case to a trial chamber, it must seek leave of the trial chamber pursuant to Rule 50. Such leave is necessary also in cases where the Prosecution seeks to withdraw certain charges following a plea agreement. After hearing the parties, the trial chamber will determine whether to grant the Prosecution's request. In cases of plea agreements where the Prosecution has expressed its intention not to proceed to trial on certain charges, such motions are generally granted; a trial chamber may seek to satisfy itself that the remaining charges reflect the totality of the criminal conduct of the accused.

51. In this case, the Trial Chamber notes, with interest, that while the Prosecution moved to dismiss numerous charges against Momir Nikolić, including genocide, it did not seek to remove any of the factual allegations underlying these crimes. Thus, the factual basis upon which the remaining charge of persecutions is based can be found to reflect the totality of Momir Nikolić's criminal conduct.

52. In determining whether the conditions under Rule 62 *bis* have been satisfied, the Trial Chamber will enquire into the circumstances of the guilty plea. In determining if the guilty plea was made voluntarily, a trial chamber may inquire into the reasons for the change of plea and, if the guilty plea is a result of a plea agreement, the conditions under which the agreement was reached. In deciding if the guilty plea is informed, a trial chamber may inquire into the accused's understanding of the elements of the crime or crimes to which he has pled guilty to ensure that his understanding of the requirements of the crime reflects his actual conduct and participation as well

part, "1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. 2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned. [...] 4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber." See also, Rule 47 of the Rules ("Submission of Indictment by the Prosecutor").

⁹⁴ Article 19 of the Statute ("Review of the indictment") provides, in part, "1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

⁹⁵ See, *Prosecutor v. Ratko Mladić*, Case No. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002 (permits the Prosecution to "proceed to trial against the accused on the condition that the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused's being convicted by a reasonable trier of fact"). The fact that an indictment must be confirmed by a judge based on sufficient supporting material for each charge provides a safeguard such that the Prosecutor cannot abuse his or her discretion and "overcharge" an accused.

as his state of mind or intent when he committed the crime.⁹⁶ In determining if a plea is equivocal, a trial chamber may question the defence as to its intention to raise any defences.⁹⁷ In determining whether a sufficient factual basis for the crime exists, a trial chamber may find it necessary to ask the Prosecution to adduce additional or supporting evidence, or may ask the accused specific questions to clarify his particular conduct or involvement in the commission of the crime to which he has pled guilty. In questioning about the factual basis, a trial chamber may seek to ensure that the totality of the accused's criminal conduct is reflected and that an accurate historical record exists, as well as ensure that the accused is pleading guilty to no more than that for which he is, in fact, guilty.

53. A trial chamber may also enquire into the terms of the plea agreement. Indeed, as noted above, in this case the Trial Chamber questioned the Parties about certain terms of the agreement, and specifically the Prosecution's intention to withdraw the remaining counts against Momir Nikolić only at the time that he was sentenced, and not at the time that he entered a plea of guilty, as specified in Rule 62 *ter* (A)(i).⁹⁸

54. The Trial Chamber recalls the language of Rule 62 *bis*: 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 has discretion whether to accept a guilty plea. While the reason for not accepting a guilty plea may be that a trial chamber is not satisfied with the terms of the plea agreement or has concerns that the rights of the accused have not been adequately protected, a trial chamber may also reject a particular guilty plea based on a plea agreement because it does not consider that the plea agreement is in the interests of justice.

55. An additional point of "negotiation" in reaching a plea agreement might include Prosecution's agreement to recommend a particular sentence or sentencing range. Additional consideration for this recommendation on the part of the accused may include agreement to testify for the Prosecution in other cases before the Tribunal. As stated in Rule 62 *ter* (B), a Trial Chamber is not bound by the recommendations of the parties.

56. The Trial Chamber notes a possible distinction in the plea agreement process at the Tribunal and the practice of plea agreements or "plea bargaining" in national jurisdictions with regard to the determination of a sentence. In many national jurisdictions, a sentence or sentencing range for a particular crime is determined by statute or sentencing guidelines. Therefore, in withdrawing a

⁹⁶ See, *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 14-27.

⁹⁷ See, generally, *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 28-31; and *Erdemović* Appeal Judgement, Separate and Dissenting Opinion of Judge Stephen.

⁹⁸ See, *supra* para. 11.

charge of murder and replacing it with the charge of involuntary manslaughter, a prosecutor will almost certainly impact the sentence given, in that the new charge carries a lower sentencing range than the prior charge of murder. The Tribunal does not have such sentencing guidelines. Rather, as will be discussed in detail below, a Trial Chamber has the discretion to determine the appropriate sentence based on the criminal conduct of an accused.

2. Are Plea Agreements Appropriate in Cases Involving Serious Violations of International Humanitarian Law?

57. The Trial Chamber has no doubt that plea agreements are *permissible* under the Statute and the Rules of the Tribunal.⁹⁹ As plea agreements follow discussions or “negotiations” between the Prosecutor and the defence such that the parties agree to which counts or factual allegations an accused will plead guilty, the Trial Chamber does, however, have some concerns about the use of such agreements in cases which come before the Tribunal. These concerns arise from both the nature of the offences over which this Tribunal has jurisdiction and the basis for the establishment of the Tribunal, namely Chapter VII of the United Nations Charter. As seven persons have pled guilty following Momir Nikolić’s guilty plea – all of whom pled guilty pursuant to plea agreements – the Trial Chamber finds that it is particularly important at this time to consider how the increased use of plea agreements may affect the Tribunal’s ability to fulfil its mandate.¹⁰⁰ Therefore, the Trial Chamber finds it necessary to examine the question of whether plea agreements are *appropriate* in cases involving serious violations of international humanitarian law brought before this Tribunal.¹⁰¹

⁹⁹ Under Article 20(3) of the Statute, an accused shall enter a plea to the charges contained in the indictment against him – guilty or not guilty. An accused is presumed innocent and shall not be compelled to confess guilt. *See*, Article 21 of the Statute, paragraphs 3 and 4(g). An accused may, however, plead guilty, and thereby avoid a trial; unlike some national systems, a trial – even an abbreviated or expedited trial – will not be held at the Tribunal in cases where an accused has pled guilty.

¹⁰⁰ The following persons have pled guilty since 7 May 2003: Dragan Obrenović (21 May 2003); Predrag Banović (26 June 2003); Darko Mrđa (24 July 2003); Miodrag Jokić (27 August 2003); Dragan Nikolić (4 September 2003); Miroslav Deronjić (30 September 2003); and Ranko Cesić (8 October 2003).

¹⁰¹ The Trial Chamber recalls that other trial chambers and the Appeals Chamber have previously considered aspects of this issue in relation to guilty pleas generally. *See*, *Erdemović* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, para. 8. Judge Cassese highlighted numerous benefits emanating from a guilty plea: the accused and the Prosecutor avoid a lengthy trial “with all the attendant difficulties. These difficulties – it bears stressing – are all the more notable in international proceedings”; the protection of victims and witnesses; the expense of proceedings. Furthermore, Judge Cassese highlighted benefits specific to the accused: it may help an accused “to salve his conscience and atone for his wrongdoing”; to avoid “the indignity and the possible demoralisation of undergoing a trial” including the “psychological ordeal” experienced during the examination and cross-examination of witnesses; avoid public exposure that may follow from a trial, with “the adverse consequences for his social position and life of his family and relatives;” and a more lenient sentence in recognition of the admission of guilt. Judge Cassese emphasised that a guilty plea could neither curtail the rights of the accused or “prove detrimental to the general principle of fair trial,” stating that “the demands for expeditiousness and efficiency must not turn out to be prejudicial to, nor to have an adverse bearing upon, the requirements of justice.” *See, Id.*, para. 9.

58. The United Nations Security Council established the Tribunal in Resolution 808¹⁰² and adopted the Statute in Resolution 827¹⁰³ pursuant to the its powers under Chapter VII of the United Nations Charter, following the Security Council's finding that the situation in the former Yugoslavia constituted a threat to international peace and security. In establishing the Tribunal, the Security Council expressed its determination to "put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them." The Security Council found the establishment of the Tribunal to be a means for bringing "justice" and "contribut[ing] to the restoration and maintenance of peace."¹⁰⁴

59. The Tribunal was to achieve justice through criminal proceedings. The purpose of such proceedings was multi-fold: the primary objective was to convict – and punish – those individually responsible for their crimes. The suffering and loss of the victims of such crimes would thereby be internationally recognised and acknowledged. Furthermore, through criminal proceedings, the Security Council intended to send the message to all persons that any violations of international humanitarian law – and particularly the practice of "ethnic cleansing" – would not be tolerated and must stop. It was further hoped that by highlighting breaches of obligations under international humanitarian law, and in particular the Geneva Conventions, that the parties to the conflict would recommit themselves to observing and adhering to those obligations, thereby preventing the commission of further crimes.¹⁰⁵ Finally, it was hoped that this commitment to end impunity in the former Yugoslavia would promote respect for the rule of law globally.

60. The Tribunal was further to contribute to the restoration and maintenance of peace through criminal proceedings. The immediate consequence of such proceedings was the removal of those persons most responsible for the commission of crimes in the course of – and even in furtherance of – the armed conflict. Additionally, by holding *individuals* responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political organisation) would not be held responsible for such crimes by members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent.¹⁰⁶ Finally, through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be

¹⁰² S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (22 February 1993) ("S/Res/808").

¹⁰³ S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (25 May 1993) ("S/Res/827").

¹⁰⁴ S/Res/808.

¹⁰⁵ See, S/Res/808 and Provisional Verbatim Record of the 3175th Meeting of the Security Council, 22 February 1993, New York. It was further hoped that the establishment of the Tribunal would serve as a warning to those committing flagrant violations of human rights and guilty of mass crimes beyond the former Yugoslavia.

¹⁰⁶ See, Provisional Verbatim Record of the 3217th Meeting of the Security Council, 25 May 1993, Statement by the Representative of the United States: "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."

determined, thereby establishing an accurate, accessible historical record.¹⁰⁷ The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression.¹⁰⁸

61. When convictions result from a guilty plea, certain aims of having criminal proceedings are not fully realised, most notably a public trial. A public trial, with the presentation of testimonial and documentary evidence by both parties, creates a more complete and detailed historical record than a guilty plea, which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused.

62. Furthermore, at a trial, victims or survivors of victims have an opportunity to have their voices heard as part of the criminal justice process.¹⁰⁹ It is rare that victims will be called as witnesses as part of a plea agreement, though witnesses may be called at the sentencing hearing.

63. Most concerning to this Trial Chamber is that as a result of the negotiations entered into by the Prosecutor and defence, the final plea agreement may include provisions such that the Prosecutor withdraws certain charges or certain factual allegations. The Prosecutor may do so for a variety of reasons.¹¹⁰ 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 or because they were simply a “bargaining chip” in the negotiation process.¹¹¹

64. The Trial Chamber notes with interest that at other international criminal institutions, a trial chamber may order that the prosecutor present additional evidence, including the testimony of witnesses “in the interests of justice, in particular the interests of the victims.”¹¹² Additionally, “in

¹⁰⁷ The Trial Chamber recalls its previous comment that the “truth” can never be fully established or satisfied. *See, Prosecutor v. Blagojević et al.*, Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003.

¹⁰⁸ *See*, Provisional Verbatim Record of the 3175th Meeting of the Security Council, 22 February 1993, New York, and Provisional Verbatim Record of the 3217th Meeting of the Security Council, 25 May 1993.

¹⁰⁹ Eric Stover, *The Witnesses - War Crimes and the Promise of Justice in The Hague*, (Berkeley: Human Rights Centre, University of California, Berkeley) 2003, pp. 65-67.

¹¹⁰ This Trial Chamber does not seek speculate about the various reasons why the Prosecutor may seek to enter into a plea agreement in a particular case. Rather, the Trial Chamber recalls some of the reasons why prosecutors might resort to plea agreements in some national jurisdictions: strength of the case; benefits to be gained in subsequent prosecutions by having the defendant agree to testify in related cases; consideration of available resources. *See, e.g.*, Combs, “Copping a Plea to Genocide”.

¹¹¹ For a critique of the use of plea bargaining, *see, e.g.*, 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.”

¹¹² Article 65(4) of the Statute of the ICC provides, “Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

the interests of justice,” a trial chamber may order that a trial continue before a different trial chamber in order to have a “more complete presentation of the facts of the case” and thereby consider that the admission of guilt as having not been made.¹¹³

65. In cases where charges are withdrawn, extreme caution must be urged. The Prosecutor has a duty to prosecute serious violations of international humanitarian law. The crimes falling within the jurisdiction of this Tribunal are fundamentally different from crimes prosecuted nationally. Although it may seem appropriate to “negotiate” a charge of attempted murder to a charge of aggravated assault, any “negotiations” on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause.¹¹⁴ While the principle of mandatory prosecutions is not part of the Tribunal’s Statute,¹¹⁵ the Prosecutor does have a duty to prepare an indictment upon a determination that a *prima facie* case exists.¹¹⁶ The Prosecutor must carefully consider the factual basis and existing evidence when deciding what charge most adequately reflects the underlying criminal conduct of an accused. Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make 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. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record. . Convictions entered by a trial

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.”

¹¹³ *Id.*

¹¹⁴ In this regard, the Trial Chamber recalls that in many national systems where some form of plea agreements exists, such agreements are not permitted in cases of the most serious offences. *See, e.g.*, Article 444 of the Italian Criminal Procedure Code, as recently modified by the law n. 134 of 12 June 2003 (“*Modifiche al codice di procedura penale in materia di applicazione della pena su richiesta delle parti*”, published on *Gazzetta Ufficiale* n. 136 of 14 June 2003), provides a special proceedings (“*patteggiamento*” or “applying punishment upon request by the parties”) whereby the accused and the public prosecutor can ask the judge to apply a sentence which they agreed upon. The sentence imposed in such proceedings cannot exceed five years in prison. The recent reform replaced the previous limit of two years in prison, and by so doing it widened the possibility of agreement on sentences up to five years (“*patteggiamento allargato*”). The main advantage for the accused is that if he accepts the *patteggiamento* the sentence will be reduced until one third of the sentence foreseen for the crime committed. The judge has the power to assess the facts, to verify the reduction of the sentence and to check on possible incongruities between the sentence agreed and the seriousness of the offence. The *patteggiamento* does not derogate from the principle of legality of prosecutions, according to which the public prosecutor is not entitled to drop the charge at his discretion. The agreement between the parties does not concern the decision whether or not to prosecute, but only affects the measure of the sentence. *See* Italian Criminal Procedure Code, Articles 444-448; *see, Criminal Procedure Systems in the European Community*, Christine Van Den Wyngaert (Ed.), (Butterworths: London, 1993) p. 252-53. *See also*, “Official Gazette” of Brčko District of Bosnia and Herzegovina, July 2000, Article 156 (6): “For criminal acts where the maximum sentence is ten (10) years, the accused and the defence counsel, at any time prior to trial, may negotiate with the Prosecutor on the conditions of admitting guilt on the charges in the indictment.”

¹¹⁵ *See, e.g.*, German Criminal Procedure Code (1987, as amended), Section 152(2)(“Indicting Authority; Principle of Mandatory Prosecution”): “Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications.” This principle is referred to as the “principle of legality” in certain national systems.

¹¹⁶ Article 18(4) of the Statute of the Tribunal.

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.¹¹⁷

66. Additionally, the Trial Chamber has a responsibility to ensure that all accused are treated equally before the law.¹¹⁸ The Prosecutor may seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor may make the terms of such a plea agreement quite generous in order to secure the co-operation of that accused. Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement.

67. The Trial Chamber notes that the savings of time and resources due to a guilty plea has often been considered as a valuable and justifiable reason for the promotion of guilty pleas.¹¹⁹ This Trial Chamber cannot fully endorse this argument. While it appreciates this saving of Tribunal resources, the Trial Chamber finds that in cases of this magnitude, where the Tribunal has been entrusted by the United Nations Security Council – and by extension, the international community as a whole – 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,¹²⁰ the saving of resources cannot be given undue consideration or importance.¹²¹ The *quality* of the justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised. Unlike national criminal justice systems, which often must turn to plea agreements as a means to cope with heavy and seemingly endless caseloads, the Tribunal has a fixed mandate. Its very *raison d'être* is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct – not simply a portion thereof. Thus, 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.

¹¹⁷ If the Prosecutor makes a plea agreement such that the totality of an individual's criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions may arise as to whether justice is in fact being done.

¹¹⁸ Article 21(1) of the Statute of the Tribunal: "All persons shall be equal before the International Tribunal."

¹¹⁹ See, e.g., *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 2. See also, *Banović* Sentencing Judgement, para. 68; *Plavšić* Sentencing Judgement, para. 73.

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.

¹²¹ See, *Prosecutor v. Slobodan Milošević*, 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.

68. Having raised some issues of concern in cases where guilty pleas emanated from plea agreements, the Trial Chamber will now turn to some of the possible benefits of guilty pleas, including those resulting from plea agreements, and consider these in light of the purposes and mandate of the Tribunal.

69. The Tribunal was established to prosecute and punish persons responsible for serious violations of international humanitarian law. Persons who plead guilty are convicted upon the acceptance of the guilty plea. Upon conviction, a trial chamber will determine an appropriate sentence and will take as its principal consideration, as will be discussed below, the gravity of the offence – and not the guilty plea – in determining an appropriate sentence. Thus, a guilty plea leads directly to the fulfilment of a fundamental purpose of this Tribunal.

70. Because a conviction is based on the accused's acceptance of responsibility and acknowledgement of the crime he committed, there can be no question about the actual guilt of that accused. Denial of the commission of the crime may no longer be an option for those who have convinced themselves that the Tribunal is biased or that its judgements are based on weak or even false evidence. As the guilty plea must be based on a sufficient factual basis, which often will include a statement of facts by the accused person and may be supplemented upon the request of the trial chamber, the underlying facts for each crime will be established.¹²² Thus, a purpose of the Tribunal is fulfilled.

71. As is often highlighted by the Prosecution, guilty pleas can substantially assist in its investigations and presentation of evidence at trials of other accused, including high ranking accused. The Trial Chamber recognises and appreciates the assistance that can be given and the knowledge that can be gained by *all* organs of the Tribunal from having persons who may have "inside" information testify in other proceedings.

72. 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. Without seeking to lessen the impact of a public pronouncement by the Tribunal of guilt following a trial, the Trial Chamber recognises that an admission of guilt from a person perceived as "the enemy" may serve as an opening for dialogue

¹²² The Prosecution may consider calling witnesses to testify at the sentencing hearing in order to give a more complete or detailed picture of the events in question.

and reconciliation between different groups. When an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created.

73. The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant to the Statute of the Tribunal, 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.

3. Determination of the Appropriateness of a Guilty Plea pursuant to a Plea Agreement in this Case

74. At the time that the Trial Chamber was seised of the First Joint Motion, it considered both the terms of the plea agreement in light of its obligations to Momir Nikolić as an accused and in light of its obligation to ensure that it was carrying out its function in the interests of justice. As noted above, the Trial Chamber had concerns about the terms of the first plea agreement with regard to the rights of Mr. Nikolić. Upon the filing of the Second Joint Motion, the Trial Chamber had to consider whether the acceptance of Momir Nikolić's plea of guilty pursuant to a plea agreement was appropriate in this case. Of particular concern to the Trial Chamber was the fact that Mr. Nikolić had been charged with genocide and that the crimes with which he was charged, as part of a joint criminal enterprise, emanated from what has been recognised as one of the – if not the – largest crimes committed in Europe since World War II, the crimes committed following the fall of Srebrenica.

75. Numerous individuals have been indicted for the crimes committed in July 1995 following the fall of Srebrenica, many of whom are still at large. These persons include individuals in the highest levels of politics and the military. The fact that “an insider”, and particularly a person who had worked in security and intelligence, would be willing to testify in all cases related to the crimes committed around Srebrenica was a factor that the Trial Chamber took into consideration in deciding on whether to accept Momir Nikolić's guilty plea.

76. While in many corners of the globe, the word “Srebrenica” has become almost synonymous with mass atrocities, the Trial Chamber considered that there might be certain areas of the former Yugoslavia in which the crimes committed there have not been fully acknowledged or have even been denied. Thus, the ground-work for reconciliation is not in place. The Trial Chamber considered Momir Nikolić'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 who

was responsible for their commission. 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.

77. The Trial Chamber recalls that although Momir Nikolić was jointly charged with three other persons for crimes related to Srebrenica, there were certain allegations in the Indictment which went directly to his acts and conduct. To establish these particular allegations, the Prosecution would have had to call witnesses who had specific knowledge related to these allegations. Some of these witnesses have already had to testify before the Tribunal and it may be necessary for them to testify again in subsequent proceedings related to Srebrenica. Following the guilty plea of Momir Nikolić, the Prosecution was able to withdraw numerous witnesses from its witness list. The Trial Chamber considered this factor to weigh in favour of accepting a guilty plea in this case.

78. Having considered the factors in favour of accepting Momir Nikolić's guilty plea, the Trial Chamber found it necessary to consider the request by the Prosecution to withdraw the remaining charges and particularly the charge of genocide. As a starting point, the Trial Chamber considered that the Prosecution was in the best position to assess its case. The Trial Chamber found it significant that the Prosecution did not seek to withdraw any of the factual allegations outlining Momir Nikolić's criminal conduct. The Trial Chamber therefore found that the totality of Momir Nikolić's criminal conduct is reflected in the charge of persecutions, a crime against humanity. The Trial Chamber considered that its discretion in sentencing was linked not to the specific crime charged, but rather to the gravity of the offence, as is discussed below. As to whether Momir Nikolić may have had the requisite *mens rea* to satisfy the specific intent requirement for the crime of genocide, in addition to establishing the remaining elements for genocide, the Trial Chamber deferred to the discretion of the Prosecution on this matter. Accordingly, the Trial Chamber found that the acceptance of the guilty plea pursuant to the Amended Plea Agreement was appropriate in this case, and on 7 May 2003 accepted the guilty plea of Momir Nikolić and entered a conviction thereupon.

IV. PENALTIES AND SENTENCING

A. Applicable Law of the Tribunal

79. Article 24 of the Statute prescribes the possible penalties upon conviction before the Tribunal and the factors to be taken into account in determining the sentence of an accused.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

80. Rules 100 and 101 of the Rules are the provisions applicable to the penalty of imprisonment.¹²³

Rule 100

Sentencing Procedure on a Guilty Plea

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

Rule 101

Penalties

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
 - (i) any aggravating circumstances;
 - (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
 - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
 - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
- (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

81. Article 27 of the Statute is the applicable provision for the enforcement of sentences. It provides:

¹²³ Rules 105 and 106 are the implementing provisions for Article 24(3) of the Statute.

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Furthermore, the competence and procedure for pardon or commutation of sentences is defined in Article 28 of the Statute.¹²⁴

B. Principles and Purposes of Punishment

82. In order to assess the purposes of punishment in the context of the Tribunal, the Trial Chamber finds that it must begin this assessment by once again examining the purposes of the Tribunal. The Tribunal was established to prosecute persons from a particular area, namely the former Yugoslavia, for crimes committed during a specific situation, based on international law. The punishment must therefore 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. As discussed above, it was hoped that through criminal proceedings, the Tribunal would contribute to peace and reconciliation in the former Yugoslavia.

83. Against this backdrop, the Trial Chamber must remember that in this case, as in all cases before the Tribunal, it is called upon to determine a sentence for an individual, based on his particular conduct and circumstances. Each case is part of a *process*, of which the Tribunal itself is only one part. This process, on one level promotes the re-establishment of the rule of law and crime prevention, and on another, reconciliation and peace through justice.

84. As the Tribunal is applying international law, it must also have due regard for the impact of its application of internationally recognised norms and principles on the global level. Thus, a trial chamber must consider its obligations to the individual accused in light of its responsibility to ensure that it is upholding the purposes and principles of international criminal law. This task becomes particularly difficult in relation to punishment. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values of a particular society at a given time. This Trial Chamber must discern the underlying principles and rationales for punishment that respond to both the needs of the society of the former Yugoslavia and the international community.

¹²⁴ Article 28 (“Pardon or commutation of sentences”) provides, “If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.”

85. The Trial Chamber finds that the purposes of punishment recognised under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation.

86. The Trial Chamber observes that by the very wording of Article 24(2) of the Statute and the subsequent jurisprudence of the Tribunal, which has focused on gravity of the offence as the primary consideration in determining a sentence, retribution or “just deserts” as a purpose of punishment has enjoyed prominence.¹²⁵ Classical retributive theory requires that the punishment be proportionate to the harm done. In light of the purposes of the Tribunal and international humanitarian law generally, retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict.¹²⁶ It is also recognition of the harm and suffering caused to the victims.

87. Furthermore, within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail. Recourse to the gravity of the offence, with considerations for the role of the accused in the commission of the offence and the impact of the offence on victims, should help guide a trial chamber in its determination of what sentence is necessary to reflect the indignation and condemnation of the international community for the crimes committed.

88. At the time that the crimes in this case were committed, the Tribunal had only been fully operational for a little over one year. It only had one indictee in custody. No trials had commenced.¹²⁷ The Tribunal was seen by many – including persons in the former Yugoslavia – as more of an academic or diplomatic response to the armed conflict and the violations being committed therein rather than as an operational institution where one might face criminal proceedings for one's actions. International humanitarian law and international criminal law were not seen as enforceable law, but rather aspirational, if not academic, ideals. Thus, expectations of impunity for one's crimes, no matter how egregious, were the norm. A stark example of this expectation of impunity and total disregard for the law in 1995 was provided by Momir Nikolić himself when he was asked during his cross-examination in the *Blagojević* Trial whether he was required to abide by the Geneva Conventions in carrying out his duties in and around Srebrenica in July 1995. Momir Nikolić replied with a mix of incredulity and exasperation:

¹²⁵ See, e.g., *Čelebići* Appeal Judgement, para. 806, *Aleksovski* Appeal Judgement, para. 185.

¹²⁶ See, *Aleksovski* Appeal Judgement, para. 185, *Kupreškić* Trial Judgement, para. 848.

¹²⁷ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, A/50/365 - S/1995/728, 23 August 1995.

Do you really think that in an operation where 7,000 people were set aside, captured, and killed that somebody was adhering to the Geneva Conventions? Do you really believe that somebody adhered to the law, rules and regulations in an operation where so many were killed? First of all, they were captured, killed, and then buried, exhumed once again, buried again. Can you conceive of that, that somebody in an operation of that kind adhered to the Geneva Conventions? Nobody [...] adhered to the Geneva Conventions or the rules and regulations. Because had they, then the consequences of that particular operation would not have been a total of 7,000 people dead.¹²⁸

During the past ten years, as international criminal law has moved from “law in theory” to “law in practice,” the principles of international humanitarian law have taken hold to the extent that in the face of such widespread and massive crimes a person being called to participate in the criminal enterprise *might* consider the Geneva Conventions and the consequences of disregarding the principles contained therein.¹²⁹

89. During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes.

90. One may ask whether the individuals who are called before this Tribunal as accused are simply an instrument to achieving the goal of the establishment of the rule of law. The answer is no. Indeed, the Appeals Chamber has held that deterrence should not be given undue prominence in the overall assessment of a sentence.¹³⁰ The principles of international humanitarian law are well established; there is no question about the illegality of the acts and conduct over which the Tribunal has jurisdiction at the time that the Tribunal was established. The fact that accused did not consider it *likely* that they would be called to account for their actions during the armed conflict in the former Yugoslavia and held responsible for violations of international humanitarian law is no argument that they should not be punished.

91. Punishment usually reflects social norms or practices of a particular society. For this reason, the Trial Chamber has considered the purposes of punishment as contained in the SFRY Criminal Code. Under the SFRY Criminal Code, the purposes of punishment are:

(1) preventing the offender from committing criminal acts and his rehabilitation; (2) rehabilitative influence on others not to commit criminal acts; (3) strengthening the moral fibre of a socialist

¹²⁸ *Blagojević* Trial, Trial Proceedings, 25 September 2003, BT. 1959-60.

¹²⁹ The adoption of the Statute of the International Criminal in July 1998 can be seen as a milestone in the development of international criminal law.

¹³⁰ *Tadić* Sentencing Appeal Judgement, para. 48, endorsed by the *Aleksovski* Appeal Judgement, para. 185.

self-managing society and influence on the development of citizens' social responsibility and discipline.¹³¹

92. Thus, deterrence, both specific and general, and rehabilitation were primary purposes of punishment in the former Yugoslavia. The Trial Chamber interprets the third purpose to include the concepts of public safety and protection, as well as the promotion of the rule of law.

93. The Trial Chamber has considered what can be “accomplished” through punishment, namely condemnation of the crime committed and deterrence of future crimes. The Trial Chamber finds that punishment must strive to attain a further goal: rehabilitation. The Trial Chamber observes that the concept of rehabilitation can be thought of broadly and can encompass all stages of the criminal proceedings, and not simply the post-conviction stage. Particularly in cases where the crime was committed on a discriminatory basis, like this case, the process of coming face-to-face with the statements of victims, if not the victims themselves, can inspire – if not reawaken – tolerance and understanding of “the other”, thereby making it less likely that if given an opportunity to act in a discriminatory manner again, an accused would do so. Reconciliation and peace would thereby be promoted.

94. In conclusion, the Trial Chamber endorses these principles of punishment that readily lend themselves to promoting the rule of law and the realisation that violations thereof will not be tolerated.

C. Sentencing Factors

95. Article 24 of the Statute and Rule 101 of the Rules provide the framework within which the Trial Chamber shall determine the sentence to be imposed. These factors are not exhaustive, but provide guidance in the effort to ensure that the punishment imposed is just and equitable.¹³² Among the factors included are the gravity of the offence and the individual circumstances of the convicted person, as well as the sentencing practice in the former Yugoslavia. The individual circumstances of the convicted person include consideration of aggravating and mitigating factors.

1. Penalties Imposed in the former Yugoslavia

96. It is well recognised within the jurisprudence of the Tribunal that although it must consider sentencing practices in the former Yugoslavia, the Tribunal is not bound by such practice. Rather,

¹³¹ SRFY Criminal Code (1976), Article 33. *See also*, the Criminal Code of the Federation of Bosnia and Herzegovina, published by “Official Gazette of Federation of Bosnia and Herzegovina”, No. 43-98 (1998), Article 38, which lists two purposes of punishment: “(1) prevention of perpetrator committing criminal offenses and his/her rehabilitation; (2) preventive influence on others not to commit criminal offenses.”

¹³² *See*, Article 21(1) of the Statute.

the Tribunal should refer to this practice as an aid in determining an appropriate sentence.¹³³ Rule 101(A) of the Rules, which grants the power to imprison for the remainder of the convicted person's life, is indicative of the fact that the Trial Chamber is not bound by a maximum sentence possible under a particular national legal system.¹³⁴

97. In examining the sentencing practices of the former Yugoslavia, the Trial Chamber takes into consideration the historical and political circumstances particular to the region and the legal implications thereof: the Criminal Code of the Socialist Federative Republic of Yugoslavia was adopted in 1976, and served as the applicable law in the entire territory of the former Yugoslavia until 1991. Following the break-up of SFRY, most of the newly formed countries adopted their own criminal codes between 1994 and 1998, drawing heavily on the provisions of the SFRY Criminal Code.¹³⁵ At the time relevant to this Indictment, the law that was applicable in Bosnia and Herzegovina was the SFRY Criminal Code.

98. The Trial Chamber takes into consideration the offences and the punishments that could have been imposed under the criminal law of the former Yugoslavia. Article 34 of the SFRY Criminal Code establishes the types of punishment to be imposed, including capital punishment and imprisonment.¹³⁶ Further, Article 38 of the SFRY Criminal Code sets out the terms of imprisonment: although imprisonment could not usually exceed 15 years, this was extended to a maximum of 20 years for those crimes eligible for the death penalty.¹³⁷ In 1977, the death penalty was abolished in some republics of the SFRY by constitutional amendment, but Bosnia and Herzegovina was not among them.¹³⁸ The Trial Chamber finds that when Bosnia and Herzegovina

¹³³ *Tadić* Sentencing Appeal Judgement, para. 20, *Kupreškić* Appeal Judgement, para. 418, *Jelisić* Appeal Judgement, para. 117 and *Čelebići* Appeal Judgement, para. 813. The Prosecution submits that such sentencing practice is to be used as a tool to guide, but not delimit, the determination of an appropriate sentence. Prosecution Sentencing Brief, para. 31.

¹³⁴ *Tadić* Sentencing Appeal Judgement, para. 21.

¹³⁵ See e.g. the Criminal Code of the Republic of Croatia, which was ratified on 19 September 1997 and entered into force on 1 January 1998; the Criminal Code of the Republic of Macedonia, enacted on 23 July 1996 and entered into force on 1 November 1996. The Criminal Code of the Federation of Bosnia and Herzegovina, published by "Official Gazette of Federation of Bosnia and Herzegovina", No. 43-98, came into force on 28 November 1998. The Criminal Code for the Republika Srpska was published in the Official Gazette on 31 July 2000 and by virtue of Article 444, entered into force on 1 October 2000.

¹³⁶ Article 34 of the SFRY Criminal Code states, "The following punishments may be imposed on the perpetrators of criminal acts: 1) capital punishment; 2) imprisonment; 3) fine; 4) confiscation of property."

¹³⁷ Article 38 of the SFRY Criminal Code states, "Imprisonment: (1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years. (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. (3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute."

¹³⁸ In light of the Statute of the Tribunal, the Prosecution submits that life imprisonment has been interpreted by the Tribunal as commensurate to the highest penalty that could be imposed in the former Yugoslavia. The Prosecution submits that when Bosnia and Herzegovina abolished the death penalty in 1998, this sentence was replaced by imprisonment of 20-40 years for gravest criminal offence. Prosecution Sentencing Brief, paras 34-35. The Defence submit that the maximum penalty for the most serious offences is 20 years imprisonment, recalling that when capital

abolished the death penalty in 1998, it was replaced by imprisonment of 20-40 years for the gravest criminal offences in the Federation of Bosnia and Herzegovina and with life imprisonment in the Republika Srpska in October 2000.¹³⁹

99. Chapter XVI of the SFRY Criminal Code relates to “Criminal Acts Against Humanity and International Law”, and covers crimes committed during armed conflict. For the purpose of review of the sentences imposed by the courts of the former Yugoslavia, both the Prosecution and Defence direct the Trial Chamber’s attention towards Article 142 of the SFRY Criminal Code.¹⁴⁰ Article 142 permits a range of sentence from five years as a minimum to the maximum penalty of death for violations of international law in times of war or armed conflict.¹⁴¹ Subsequent provisions elaborate upon specific crimes and provide for different punishments.¹⁴²

100. The Trial Chamber finds that of the provisions within the SFRY Criminal Code, Article 142 is most analogous to Article 5(h) of the Statute of the Tribunal and most closely reflects the criminal conduct for which Momir Nikolić has been convicted. In the former Yugoslavia, such criminal conduct would have been eligible for the death penalty, or twenty years in lieu of the death

punishment was abolished in some republics of the SFRY, other than Bosnia and Herzegovina, a 20-year sentence was provided. Therefore, the Nikolić Defence submits that the punishment applicable to Momir Nikolić is a maximum of 20 years imprisonment. Nikolić Sentencing Brief, para. 16-17.

¹³⁹ Article 38 of the Criminal Code of the Federation of Bosnia and Herzegovina provides for long term imprisonment ranging from 20 to 40 years for “the gravest forms of criminal offences [...] committed with intention.” Article 32 of the Criminal Code of the Republika Srpska, which entered into force on 1 October 2000, provides for life imprisonment as a method of punishment. Further, Article 451 provides that “The final and binding death punishment pronounced before the entry into force of this Code is turned into the sentence of life imprisonment.”

¹⁴⁰ Prosecution Sentencing Brief, para. 33, and Nikolić Sentencing Brief, para. 17. The Trial Chamber notes that while the Parties both made submissions on the state of the law regarding sentencing in the former Yugoslavia, neither party made submissions on the actual “practice” regarding prison sentences in the “courts of the former Yugoslavia,” as set out in Article 24(1). It may be argued that such an exercise may prove futile. *See*, William A. Schabas, “Sentencing by International Tribunals: A Human Rights Approach,” *Duke Journal of Comparative and International Law* Vol. 7 (1997) p. 461.

¹⁴¹ Article 142 of the SFRY Criminal Code (“War crime against the civilian population”) states, in part, “Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, order that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering of violation of bodily integrity or health; dislocation or displacement of forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy’s army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, [...] who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.”

¹⁴² Article 154 of the SFRY Criminal Code (“Racial and other discrimination”) states, in part, “(1) Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.” Further, Article 145 of the SFRY Criminal Code (“Organizing a group and instigating the commission of genocide and war crimes”) provides, in part: “(1) Whoever organizes a group for the purpose of committing criminal acts referred to in articles 141 to 144 of this law, shall be punished by imprisonment for not less than five years. (2) Whoever becomes a member of a group referred to in paragraph 1 of this article, shall be punished by imprisonment for not less than one year. [...] (4) Whoever calls on or instigates the commission of criminal acts referred to in articles 141 to 144 of this law, shall be punished by imprisonment for a term exceeding one year but not exceeding 10 years.” Article 141 relates to “genocide”; Article 143 relates to “war crime against the wounded and sick”; and Article 144 relates to “war crime against prisoners of war”.

penalty, based on the discretion of the judge. Subsequent to the abolition of the death penalty, the Trial Chamber finds that long-term imprisonment is foreseen. The Trial Chamber takes these factors relating to sentencing in the former Yugoslavia into consideration in making its determination in this case.

2. Gravity of the Offence

101. Article 24(2) of the Statute dictates that the Trial Chamber must consider the gravity of the offence in determining sentence. As expressed by the *Kupreškić* Trial Judgement:

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of participation of the accused in the crime.¹⁴³

102. The Appeals Chamber has endorsed the view that the gravity of the offence is the “litmus test” in the determination of an appropriate sentence.¹⁴⁴ Furthermore, the Appeals Chamber has stressed that the sentence should be individualised and that the particular circumstances of the case are therefore of primary importance.¹⁴⁵

103. In assessing the “gravity of the offence,” the Trial Chamber considers it appropriate to first examine the crime of persecutions in this case, the underlying criminal conduct generally and the specific role played by Momir Nikolić in its commission. Additionally, the Trial Chamber will take into account the status of the persons who were victims of the criminal activity.

104. The crime to which Momir Nikolić has pled guilty is persecutions, a crime against humanity. This crime requires that the perpetrator commit a discriminatory act or omission, which denies or infringes upon a fundamental right recognised by international customary or treaty law, with the intent to discriminate on racial, religious or political grounds.¹⁴⁶ These elements are in addition to the basic requirements of Article 5 of the Statute for crimes against humanity.¹⁴⁷ Various

¹⁴³ *Kupreškić* Trial Judgement, para. 852. The Parties agree that the gravity of the criminal conduct is considered the most important factor in the sentencing process and submit that such a determination includes not only the nature of the crime but also the circumstances in the particular case, which encompass the extent and nature of involvement of the accused. Prosecution Sentencing Brief, para. 9; Nikolić Sentencing Brief, para. 8.

¹⁴⁴ *Aleksovski* Appeal Judgement, para. 182 and *Čelebići* Appeal Judgement, para. 731 cite the *Čelebići* Trial Judgement, para. 1225 with approval.

¹⁴⁵ *Jelić* Appeal Judgement, para. 101, quoting with approval *Kupreškić* Trial Judgement, para. 852.

¹⁴⁶ See, e.g., *Krnjelac* Appeal Judgement, para. 185.

¹⁴⁷ These requirements are: there must be an attack; the acts of the accused form part of this attack; the attack must be directed against any civilian population; the attack should be widespread or systematic; the perpetrator should know that his acts form part of a pattern of widespread or systematic crimes committed against a civilian population, and know that his acts fit such a pattern, *Kunarac* Appeal Judgement, para. 85.

acts or omissions of a discriminatory character have been found by the Tribunal to constitute persecutions.¹⁴⁸

105. The Trial Chamber considers 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.¹⁴⁹ It is the abhorrent discriminatory intent behind the commission of this crime against humanity that renders it particularly grave. The Trial Chamber further recalls the finding of the Appeals Chamber in relation to crimes against humanity generally,

Because of their heinousness and magnitude “crimes against humanity” constitute egregious attacks on human dignity, on the very notion of humanness. They consequently affect, or should affect, each and every member of [human]kind, whatever his or her nationality, ethnic group and location.¹⁵⁰

106. The Prosecution avers that in making a determination regarding the seriousness of the crime, the circumstances and consequences of the crime need to be considered.¹⁵¹ The Prosecution notes that the campaign of persecutions to which Momir Nikolić pled guilty was enormous in scale and encompassed a criminal enterprise to murder over 7,000 Bosnian Muslim men and displace over 30,000 people. This was a campaign that begun in the spring of 1992 against the Muslim residents of the Drina Valley, from several municipalities including Zvornik, Vlasenica and Srebrenica.¹⁵² The Prosecution further submits that this campaign was conducted with particular brutality prior to the attack as the Srebrenica enclave was deprived of humanitarian aid at a time when food and health care were scarce¹⁵³ and during the period of forcible transfer, people were forced to seek shelter in warehouses and were exposed to intense heat, with little or no water.¹⁵⁴ The Prosecution further notes that detained men were exposed to terrible conditions, were abused and were not given any food or water for days preceding execution.¹⁵⁵ At the execution sites such as Orahovac, victims were gunned down, were further abused while dying, and eventually died agonising deaths.¹⁵⁶ While the Trial Chamber appreciates that Prosecution putting the crimes in context, it recalls that Momir Nikolić is convicted of crimes commencing on 12 July 1995.

¹⁴⁸ Acts found to constitute persecution include, *inter alia*, murder, imprisonment, unlawful detention of civilians, deportation or forcible transfer, comprehensive destruction of homes and property, destruction of towns, villages and other public or private property and the plunder of property, trench-digging and the use of hostages and human shields, destruction and damage of religious or educational institutions. *Kvočka* Trial Judgment, para.186 (references omitted).

¹⁴⁹ The Trial Chamber considers, with approval, the Prosecution’s submissions in the Prosecution Sentencing Brief, paras 10-11.

¹⁵⁰ *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 21.

¹⁵¹ Prosecution Sentencing Brief, para. 13.

¹⁵² Prosecution Sentencing Brief, para. 14.

¹⁵³ Prosecution Sentencing Brief, para. 14.

¹⁵⁴ Prosecution Sentencing Brief, para. 15.

¹⁵⁵ Prosecution Sentencing Brief, para. 16-17.

¹⁵⁶ Prosecution Sentencing Brief, para. 17.

107. The Trial Chamber has examined the evidence adduced by the Prosecution related to the crimes following the fall of Srebrenica, in the form of statements under Rule 92 *bis*.¹⁵⁷ This evidence illustrates the nature and gravity of the crimes and the impact of these crimes not only upon specific individuals, but also upon the entire Bosnian Muslim community.

108. This evidence indicates that following the fall of Srebrenica and the flood of refugees to the United Nations base in Potočari, the refugees were “panicked” and the general situation was “chaotic”.¹⁵⁸ In describing the process of separations of families, one witness stated that the situation was “a combination between the film “Sophie’s Choice” and “Schindlers’ List.”¹⁵⁹

109. Witness I, a farmer and bricklayer born in Srebrenica, had spent most of his life in Srebrenica. He fled to Potočari with his family on 11 July 1995.¹⁶⁰ Witness I described the atmosphere in Potočari on the night of 12 July 1995:

I saw a number of dogs, maybe eight or nine, German Shepherds, walking around with soldiers amongst the people...They [Serb soldiers] were taking some men away, saying that they wanted to have a chat with them. Maybe they were their neighbours. I don’t know. So they kept walking around a little bit, and they took them away. But in the evening, they started taking people away in greater numbers. At one point, people started to scream, and everybody stood up. Afterwards, we heard rumours that a woman had given birth. And after a few minutes, shortly after that, we heard the same thing again. So we were thinking, “What’s going on here?” But actually it was [Serb soldiers] who kept coming and taking men away. ... Women were screaming, everybody screamed. And a little later, maybe 15 minutes later, you could hear people screaming and moaning from the outside. Yes, they were moaning. Occasionally you would hear a shot, but sometimes not, and then everything would be silent for a while, and then nothing. ... It lasted all night. And there were also crazy women, women who had gone round the bend there out of fear there, those whose nerves were not as strong and poor health. And I heard, I didn’t see, but I heard that there were also people who hanged themselves out of fear.¹⁶¹

Witness I tried to board a bus to leave Potočari on 13 July 1995, with his wife and daughter but was stopped at the second barricade which was established to separate men from women and children.¹⁶² He was taken on a bus with other men and detained on the bus in Bratunac. After spending two days detained in a school in Bratunac, having witnessed severe mistreatment of fellow detainees and hearing screams of men taken outside, followed by shots and then silence, Witness I was once again placed on a bus and taken to another school in Pilica. During this entire period almost no food or water was provided to the detainees, and beatings and other forms of mistreatment were common.¹⁶³

¹⁵⁷ *See, supra* fn. 46.

¹⁵⁸ Lieutenant Leenert Van Duijn served as a member of the Dutch Battalion in Srebrenica in July 1995. Prosecution Ex. PS-4, Van Duijn, KT. 1748: “They were panicked, they were scared, and they were pressing each other against the soldiers, my soldiers, the UN soldiers, that tried to calm them. People that fell were trampled on.”

¹⁵⁹ Prosecution Ex. PS-4, Van Duijn, KT. 1748-49.

¹⁶⁰ Prosecution Ex. PS-1, Witness I, KT. 2365-66.

¹⁶¹ Prosecution Ex. PS-1, Witness I, KT. 2370.

¹⁶² Prosecution Ex. PS-1, Witness I, KT. 2371.

¹⁶³ Prosecution Ex. PS-1, Witness I, KT. 2382-86.

110. According to Witness I, on the second day, the men were told that they would be going to Tuzla. Shortly thereafter, Serb soldiers brought in sheets to be torn up and used to tie the detainees' hands: "I offered my hands to be tied, but I was surprised, why were they tying us if we were allegedly going to freedom, to Tuzla?"¹⁶⁴ Instead of being taken to freedom, Witness I and the other Bosnian Muslim detainees were taken by bus to a hilltop where they heard gunfire and voices.¹⁶⁵ Witness I described what he saw next, "I watched as the column [of men] goes down a path, and I watched to where the dead ones are. I got there and I heard Serb troops cursing, making noise. Bursts of fire simply mowed them down. They all fell to the ground."¹⁶⁶ Witness I was then forced to walk down that same path and to stop between the rows of dead bodies. With their backs turned to their executioners, the men in the column were shot and the men began falling to the ground. Witness I also fell and lay among the dead bodies of his fellow detainees as column after column of men were brought to the spot and executed.¹⁶⁷ When Witness I finally was able to stand up and look around, he saw an estimated 1,000 to 1,500 dead people around him.¹⁶⁸

111. Witnesses DD, who was born in Srebrenica and lived in a neighbouring village, described her life after being separated from her two sons and husband, as a refugee living in a collective centre with her surviving son. In response to a comparison between her life before the events at Srebrenica and now she stated, "[t]here's no comparison. I've told you my whole life, what it was like before and what it is like now. How can you compare the two?"¹⁶⁹ Witness DD stated that she sometimes thought that it would have been better if she and her son had not survived.¹⁷⁰ Upon being asked what she thought has happened to her husband and two sons, she replied:

How do I know? As a mother, I still have hope. I just can't believe that this is true. How is it possible that a human being could do something like this, could destroy everything, could kill so many people? Just imagine this youngest boy I had, those little hands of his, how could they be dead? I imagine those hands picking strawberries, reading books, going to school, going on excursions. Every morning I wake up, I cover my eyes not to look at other children going to school, and husbands going to work, holding hands.¹⁷¹

112. Witness DD further highlighted the particular effect of the crimes committed following the fall of Srebrenica on the women. As a housewife and mother of four, she had looked to her husband to take care of all decisions regarding the family, official matters and finance, and "nothing

¹⁶⁴ Prosecution Ex. PS-1, Witness I, KT. 2388.

¹⁶⁵ Prosecution Ex. PS-1, Witness I, KT. 2389.

¹⁶⁶ Prosecution Ex. PS-1, Witness I, KT. 2390.

¹⁶⁷ Prosecution Ex. PS-1, Witness I, KT. 2391-92.

¹⁶⁸ Prosecution Ex. PS-1, Witness I, KT. 2393.

¹⁶⁹ Prosecution Ex. PS-3, Witness DD, KT. 5760.

¹⁷⁰ Prosecution Ex. PS-3, Witness DD, KT. 5760-61.

¹⁷¹ Prosecution Ex. PS-3, Witness DD, KT. 5761.

could be done without him.”¹⁷² Witness DD now lives in a collection centre, is unemployed and relies on the 140 convertible marks she receives from her husband’s former employment.

113. The impact of the events of Srebrenica upon the lives of the families affected has created what is known as the “Srebrenica syndrome”.¹⁷³ The greatest and most stressful traumatic event for Srebrenica survivors is the disappearance of a large number of men, such that every woman suffered the loss of a husband, a father, brothers or uncles. In addition to the loss of numerous relatives,¹⁷⁴ many of the families do not know the truth regarding the fate of their family members and are still waiting for news.¹⁷⁵ Children who witnessed separations suffer from a range of problems years after the events.¹⁷⁶

114. In addition to the scope and impact of the crimes, when assessing the gravity of the offence, the Trial Chamber must also consider the role that Momir Nikolić played in the commission of the crime. The Trial Chamber will examine Momir Nikolić’s formal functions and actual duties performed; the manner in which Momir Nikolić performed his tasks and duties during the planning, preparation and execution of the crimes; and the circumstances in which Momir Nikolić performed these tasks and duties.

115. The Appeals Chamber has held that the sentence imposed should reflect the relative significance of the role of the accused in the context of the conflict in the former Yugoslavia.¹⁷⁷ The Appeals Chamber has interpreted this to mean that even if an accused’s level in the overall hierarchy in the conflict was low, it does not follow that a low sentence is to be automatically imposed.¹⁷⁸ The Appeals Chamber reiterated that the inherent gravity of the crime must be reflected in a sentence.¹⁷⁹

116. The Prosecution submits that Momir Nikolić committed the crime of persecutions as part of a joint criminal enterprise with other VRS officers and Serb leaders, in the position of a brigade level Security and Intelligence Officer. He was assigned to organise and assist in the forcible

¹⁷² Prosecution Ex. PS-3, Witness DD, KT. 5746-47.

¹⁷³ Prosecution Ex. PS-2, Witness Ibrahimefendić, KT. 5817-18. Teufika Ibrahimefendić is a psychologist who specialises in war trauma.

¹⁷⁴ Prosecution Ex. PS-2, Witness Ibrahimefendić, KT. 5817: “A woman I worked with, 56 male members of her immediate and broader family went missing in a single day.”

¹⁷⁵ Prosecution Ex. PS-2, Witness Ibrahimefendić, KT. 5817-18. “The fact that they do not know the truth – even the worst truth, would be better for them than this uncertainty, this constant, perpetual uncertainty as to what happened to their loved ones, because they keep waiting, they’re waiting for something. They cannot begin life, they cannot face up with the reality of the death of a missing person. They only remember the moment they bade farewell, the moment when they had agreed to meet in a spot that would be safe. And this is still something that guides them in their thoughts. This is exhausting, discouraging. They think that life has no value.” *Id.*, T. 5818.

¹⁷⁶ Ibrahimefendić, T. 5818-24.

¹⁷⁷ *Tadić* Sentencing Appeal Judgement, para. 55.

¹⁷⁸ *Čelebići* Appeal Judgement, para. 847.

¹⁷⁹ *Id.*

transfer of the population, as well as the separation and detention of the men prior to their execution, and accepted this assignment with full knowledge of the consequences of his acts.¹⁸⁰

117. The Nikolić Defence does not contest the assertion that the massacres that followed the take-over of Srebrenica are the single largest war crime in Europe since the Second World War and that the events that occurred in July 1995 defy description in their horror.¹⁸¹ The Nikolić Defence, however, emphasises that the Trial Chamber should consider only the individual criminal responsibility of Momir Nikolić, meaning the form and degree of his participation in the crimes that were committed, as well as the relative significance of his role in the context of the conflict in the former Yugoslavia.¹⁸²

118. Though Momir Nikolić accepts responsibility for his conduct, the Nikolić Defence submits that his role was “not of major significance in comparison to the role of other co-perpetrators.”¹⁸³ Further, the events at Srebrenica, though wide in scale, do not reach the magnitude of planning and execution of the wider Serb campaign, such as that orchestrated by Serb leaders like Biljana Plavšić.¹⁸⁴ In addition, the forcible transfer and murder operations following the fall of Srebrenica could only occur in the atmosphere of hatred that was initiated by the Bosnian-Serb leaders, the SDS and the government of Republika Srpska.¹⁸⁵

119. The Nikolić Defence submits that Momir Nikolić performed tasks that were assigned to him and had no part in the actual executions.¹⁸⁶ The Nikolić Defence compared his case with that of Biljana Plavšić, as both pled guilty to persecutions:

The persecution campaign in the Plavšić case included the persecution of Bosnian Muslims, Bosnian Croats, and other non-Serbs in 37 municipalities in Bosnia and Herzegovina. The persecution campaign in the Nikolić case relates only to the Muslims of Srebrenica and to only one municipality, the Srebrenica municipality. In the persecution campaign in the Plavšić case, at least 50.000 persons were killed, while in the Nikolić case only 7.000 persons were killed in this campaign. In the Plavšić case, the persecution campaign lasted longer, from the 1st of July, 1991 to the 30th of December, 1992, while in the Nikolić case it lasted from the 4th of July, 1995 to the 1st of November, 1995.¹⁸⁷

120. The Nikolić Defence further submits that Momir Nikolić was not in a position of command responsibility and was not involved in planning the forcible removal of the Muslim population from the enclave of Srebrenica; he “only” performed tasks asked of him by his superiors, who were from

¹⁸⁰ Prosecution Sentencing Brief, para. 19.

¹⁸¹ Nikolić Sentencing Brief, para. 18.

¹⁸² Nikolić Sentencing Brief, para. 18-19.

¹⁸³ Nikolić Sentencing Brief, para. 20.

¹⁸⁴ Nikolić Sentencing Brief, paras 20-21.

¹⁸⁵ Nikolić Sentencing Brief, para. 22.

¹⁸⁶ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1657.

¹⁸⁷ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1653.

the Main Staff of the VRS or the VRS Drina Corps Command.¹⁸⁸ He was mainly involved in co-ordination and organising the transportation of women and children, and the separation and detention of men.¹⁸⁹ The Nikolić Defence submits that though he was aware of abuse of Muslim men and did not prevent this, Momir Nikolić was not personally involved in such behaviour.¹⁹⁰

(a) Findings

121. The Trial Chamber, in making its determination regarding the gravity and nature of the offence, has reviewed the evidence presented before it. The Trial Chamber has considered the purpose of the joint criminal enterprise in which Momir Nikolić was a participant and his role in furthering that enterprise. The crimes committed at Srebrenica were of an enormous magnitude and scale, and the gravity of these crimes is unquestionable. At least 7,000 men were separated from their families, murdered and buried in mass graves. The manner in which the executions were carried out, as described by Witness I, was both methodical and chilling in its “efficiency” and display of utter inhumanity. Furthermore, the majority of the population of the municipality of Srebrenica was deported and made refugees. Over eight years later, the impact of the crimes committed after the fall of Srebrenica continue to be felt upon the women, children and men who survived the horrific events – many of whom continue to live as refugees due to their forcible displacement from their homes.

122. The Trial Chamber has examined the crime of persecutions for which Momir Nikolić has admitted responsibility. The Trial Chamber was shocked to hear the Nikolić Defence state that “only” 7,000 men – “only” Muslim men (as opposed to all non-Serbs) – from “only” one municipality were murdered. The comparison is not helpful to assess the gravity of the offence, and the use of the term “only” in relation to the number of persons murdered is shameful.

123. The Trial Chamber recalls the Statement of Facts, which forms the basis of Momir Nikolić’s conviction, as outlined above in Section II. The Trial Chamber finds that Momir Nikolić was not simply “following orders” as the Defence submits. Rather, Momir Nikolić took an active role in furthering the commission of the crime. Specifically, the Trial Chamber finds that Momir Nikolić: was in Potočari on 12 July “co-ordinating” activities including the transportation of women and children to Kladanj and the separation and detention of able-bodied Muslim men;¹⁹¹ “directed” the work of the forces present in Potočari on 13 July;¹⁹² identified specific locations in and around

¹⁸⁸ Nikolić Sentencing Brief, para. 23.

¹⁸⁹ Nikolić Sentencing Brief, paras 23-24.

¹⁹⁰ Nikolić Sentencing Brief, para. 24.

¹⁹¹ Statement of Facts, para. 6.

¹⁹² Statement of Facts, para. 9.

Bratunac both for the detention and execution of Muslim men;¹⁹³ and, in the fall of 1995, coordinated the exhumation and re-burial of Muslim bodies.¹⁹⁴ Thus, the Trial Chamber must conclude that Momir Nikolić was an active and willing participant in the massive criminal operation carried out in the days and months following the fall of Srebrenica.

124. The Trial Chamber finds a sentence in the range of 20 years to life imprisonment to be appropriate based solely on the gravity of the crime committed by Momir Nikolić, 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.¹⁹⁵ The Trial Chamber will now consider whether any aggravating or mitigating circumstances exist in this case, and, if so, the effect of any such circumstances on the determination of an appropriate sentence for Momir Nikolić.

3. Individual Circumstances Related to Momir Nikolić

125. The Appeals Chamber has held that as the factors to be taken into account for aggravation or mitigation of a sentence have not been defined exhaustively by the Statute or the Rules, a trial chamber has considerable discretion in deciding what constitutes such factors.¹⁹⁶ The Trial Chamber is obliged to take into account mitigating circumstances when determining the sentence, but the weight to be attached is within the discretion of the Trial Chamber.¹⁹⁷

126. Aggravating factors must be proved beyond a reasonable doubt.¹⁹⁸ Mitigating factors need to be established on the balance of probabilities, and not beyond reasonable doubt.¹⁹⁹ To date, some of the factors that have been considered in mitigation of sentence by the Tribunal are: admission of

¹⁹³ Statement of Facts, para. 4.

¹⁹⁴ Statement of Facts, para. 13.

¹⁹⁵ The Trial Chamber recalls the finding of the Appeals Chamber in the *Jelisić* Appeal Judgement, para. 96: “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 has selected the following examples because of the similarity of offence or gravity. *See e.g.*, Milomir Stakić was sentenced to life imprisonment for crimes including persecutions; Radislav Krstić 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 Blaškić 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 Kordić was sentenced to 25 years for crimes including persecutions; Zoran Zigić was sentenced to 25 years for crimes including persecutions; Mladjo Radić was sentenced to 20 years for crimes including persecutions; Mitar Vasiljević was sentenced to 20 years imprisonment, for crimes including that of persecution; and Vladimir Šantić was sentenced to 18 years for crimes including persecutions. The Trial Chamber recognises that many of these persons were convicted for crimes in addition to persecutions as a crime against humanity.

¹⁹⁶ *Čelebići* Appeal Judgement, para. 780.

¹⁹⁷ *Čelebići* Appeal Judgement, para. 777.

¹⁹⁸ *Čelebići* Appeal Judgement, para. 763, *Kunarac* Trial Judgement, para. 847 and *Sikirica* Sentencing Judgement, para. 110.

guilt,²⁰⁰ co-operation with the Prosecutor,²⁰¹ remorse,²⁰² voluntary surrender,²⁰³ good character,²⁰⁴ comportment in the UNDU,²⁰⁵ and family circumstances.²⁰⁶

127. This practice reflects the law applied in the former Yugoslavia. General rules for the determination of sentence are stated in Article 41 (“General principles for fixing punishment”) of the SFRY Criminal Code, which provides, in part:

The court shall fix the punishment for a criminal act within the limits provided by statute for such an act, taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular, the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

Article 42 (“Reduction of punishment”) of the SFRY Criminal Code specifically provides for circumstances in which punishment that is lower than that prescribed by statute may be imposed. Article 42(2) of the SFRY Criminal Code provides for such a reduction in punishment “when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser punishment.”

128. Article 47 (“Especially grave cases”) of the SFRY Criminal Code provides, in part,

When more severe punishment is provided by statute for an especially grave case of some criminal act, such punishment shall be imposed by the court if the act poses social danger because ... the act has caused particularly grave consequences or has been committed under other, especially aggravating circumstances.

This provision refers to instances in the SFRY Criminal Code which provided for an alternate higher punishment for an offence in particular circumstances. This imposes a duty on the court to punish the offender with the more severe punishment, when prescribed by the statute. For example, Article 146 of the SFRY Criminal Code refers to “Unlawful killing or wounding of the enemy.”

¹⁹⁹ *Kunarac* Trial Judgement, para. 847, *Sikirica* Sentencing Judgement, para. 110 and *Simić* Sentencing Judgement, para. 40.

²⁰⁰ See, e.g., *Plavšić* Sentencing Judgement, para. 65, *Simić* Sentencing Judgement, para. 87, and *Jelisić* Appeal Judgement, para. 122. See also, *Kambanda* Sentencing Judgement, para. 61.

²⁰¹ *Todorović* Sentencing Judgement, para. 88.

²⁰² *Erdemović* First Sentencing Judgement, paras 15-17, *Simić* Sentencing Judgement, para. 94.

²⁰³ *Simić* Sentencing Judgement, para. 107, *Kupreškić* Appeal Judgement, para. 430.

²⁰⁴ *Kupreškić* Appeal Judgement, para. 459, *Krnojelac* Trial Judgement, para. 519.

²⁰⁵ *Tadić* Sentencing Judgement (1999), paras 23-24, *Simić* Sentencing Judgement, para. 112 and *Krnojelac* Trial Judgement, para. 519.

²⁰⁶ *Furundžija* Trial Judgement, para. 284, *Kunarac* Appeal Judgement, para. 362, 408 and *Tadić* Sentencing Judgement (1999) para. 26.

This Article imposes a higher penalty for the killing of a surrendered soldier than would otherwise be imposed if the killing was committed in a cruel manner or for motives of greed.²⁰⁷

(a) Aggravating circumstances

129. Rule 101 (B)(i) of the Rules requires the Trial Chamber, in determining sentence, to examine any aggravating circumstances in relation to the crimes of which the accused stands convicted.

(i) Submissions of the Parties

130. The Prosecution submits that three aggravating factors in this case should be considered by the Trial Chamber: (i) the position of authority of Momir Nikolić; (ii) the role of Momir Nikolić; and (iii) the vulnerability of the victims and the depravity of the crimes.

131. The Nikolić Defence submits that there are no aggravating circumstances, as the aggravating factors submitted by the Prosecution are subsumed in the overall gravity of the offence.²⁰⁸ The Nikolić Defence submits that in other cases vulnerability of the victims and depravity of the crimes may be considered aggravating circumstances, but in this case it should be subsumed in the overall gravity of the offence as was done in the case of Biljana Plavšić.²⁰⁹ Furthermore, the Nikolić Defence maintains that while the Trial Chamber has considerable discretion in relation to the determination of aggravating and mitigating circumstances, only those factors that are directly related to Mr. Nikolić should be considered as aggravating.²¹⁰

a. Position of authority and role of Momir Nikolić

132. The Prosecution submits that Momir Nikolić held an important position of authority in the Bratunac Brigade, as Chief of Security and Intelligence. He directed the military police of the Bratunac Brigade as well as other units, which had an important role in both the transfer of the civilian population and the separation and detention of Muslim men.²¹¹ Momir Nikolić also co-ordinated these activities with other superior officers. Due to his rank and position, the Prosecution

²⁰⁷ Article 146 of the SFRY Criminal Code states “(1) Whoever in violation of the rules of international law in time of war or armed conflict kills or wounds an enemy who has laid down arms or unconditionally surrendered or has no means for the defense, shall be punished by imprisonment for not less than one year. (2) If the killing referred to in paragraph 1 of this article has been committed in a cruel or insidious way, out of greed or from other base motives, or if more persons have been killed, the offended shall be punished by imprisonment for not less than 10 years or by the death penalty.”

²⁰⁸ Nikolić Sentencing Brief, para. 25; Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T.1650-1651.

²⁰⁹ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T.1662.

²¹⁰ Nikolić Sentencing Brief, paras 10-11.

²¹¹ Prosecution Sentencing Brief, paras 19 (a) and (b) [sic].

submits that Momir Nikolić should bear significant responsibility for his actions.²¹² The Nikolić Defence disagrees with this view and submits that as Chief of Security and Intelligence, Momir Nikolić was duty bound to suggest the use of the military police in co-ordination with the commanding officer of the unit.²¹³

133. The Prosecution maintains that in accordance with the jurisprudence of the Tribunal, the leadership position of Momir Nikolić should be considered an aggravating factor, despite his relatively low rank.²¹⁴ The Nikolić Defence, however, argues that Momir Nikolić was not charged with command responsibility and was not in a position of leadership.²¹⁵ The Nikolić Defence further argues that the instances of leadership position referred to by the Prosecution in other cases are distinguishable from this case because they involved persons charged with command responsibility as well as individual responsibility.²¹⁶

b. Vulnerability of victims and depravity of the crimes

134. The Prosecution submits that depravity of the crimes and vulnerability of the victims are factors that the Trial Chamber should take into account as aggravating factors.²¹⁷ In this case, the forcible transfer and executions were a co-ordinated operation between the VRS, the Ministry of Interior Special Police and the civilian police. The Prosecution submits that “the victims were either helpless women, children and elderly, or captured military [aged] men,” who were in a vulnerable position and were subjected to extreme depravity.²¹⁸ The Nikolić Defence submits that these are all offences listed in the Indictment, which Momir Nikolić does not challenge and, therefore, should be subsumed in the overall gravity of the offence.²¹⁹

(ii) Findings

135. The Trial Chamber finds that Momir Nikolić 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 Nikolić directed the military police of the Bratunac Brigade, as well as co-ordinated other units; this was of significance to the implementation and completion of the underlying criminal acts committed following the attack on Srebrenica. The role that Nikolić played and the functions that he performed, while not in the capacity of a commander,

²¹² Prosecution Sentencing Brief, para. 19 (a) [*sic*].

²¹³ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1659-1660.

²¹⁴ Prosecution Sentencing Brief, para. 19(b)[*sic*]- 20.

²¹⁵ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1659-60.

²¹⁶ Nikolić Defence Closing Arguments, Sentencing Hearing, T. 1660.

²¹⁷ Prosecution Sentencing Brief, paras 21-22 referring to the *Čelebići* Trial Judgement, paras 1262, 1264 and 1268 and the *Aleksovski* Appeal Judgement, para. 227.

²¹⁸ Prosecution Sentencing Brief, paras 21-22.

were of significant importance to the overall “murder operation” that was ongoing. Therefore, the Trial Chamber finds his position and role to be aggravating factors.

136. The Trial Chamber finds that the depravity of the crimes is subsumed in the overall gravity of the offence, and has already been addressed above. Therefore, the Trial Chamber does not consider this separately as an aggravating factor.

137. The Trial Chamber takes particular note of the vulnerability of the victims, who included women, children and the elderly, as well as captured men. They were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating factor in the commission of the crimes.

138. As discussed above, the Trial Chamber finds that the comparison to the crimes committed by others is not appropriate in this regard. The penalty imposed by the Trial Chamber relates to the grave nature of the crimes committed at Srebrenica, and the role of the accused in the commission of those crimes.

139. In summary, the Trial Chamber finds that the following aggravating circumstances have been proven beyond reasonable doubt: the position of authority and role of Momir Nikolić; and the vulnerability of the victims.

(b) Mitigating circumstances

140. Rule 101 (B)(ii) of the Rules requires the Trial Chamber, in determining sentence, to take into account “any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction.”

(i) Submissions of the Parties

141. The Prosecution submits that the consideration of mitigating circumstances does not detract from the gravity of the crime but relates to the assessment of the penalty.²²⁰ In this case, the Prosecution submits that the mitigating circumstances that the Trial Chamber should consider are the guilty plea, acceptance of responsibility, remorse, co-operation with the Office of the Prosecutor and prior good character.²²¹ In addition to these factors, the Nikolić Defence further submits that

²¹⁹ Nikolić Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1660-62.

²²⁰ Prosecution Sentencing Brief, para. 24 citing *Kambanda* Sentencing Judgement, para. 56.

²²¹ Prosecution Sentencing Brief, para. 24.

the issues of voluntary surrender, comportment in the UNDU and personal circumstances are factors in mitigation, which “entitle” Momir Nikolić to a significant reduction in sentence.²²²

a. Guilty plea and acceptance of responsibility

142. The Parties submit that the plea of guilt by Momir Nikolić is of great significance as it goes towards the establishment of the truth, which helps the process of reconciliation between the communities in the region.²²³ This is the first time that a Serb has acknowledged criminal responsibility in relation to the events at Srebrenica, the largest single murder operation in Europe since World War II. As such, it represents a “significant contribution” to the establishment of the truth regarding these events, which in turn is a “significant effort toward the advancement of reconciliation.”²²⁴ The Parties submit that the guilty plea will have a tremendous impact upon the people of the region as well as the international community. The Nikolić Defence further submits that a plea of guilt is indicative of honesty and encourages other perpetrators to come forward.²²⁵

143. The Parties further argue that one reason for the importance of the plea of guilt to the process of reconciliation is that this is an account of the crimes committed by an “insider”,²²⁶ at a time when there has been denial about the events at Srebrenica by the Republika Srpska government: this has historic significance.²²⁷

144. Additionally, the Parties submit that a guilty plea before the commencement of trial proceedings should be considered in mitigation of sentence as this does away with the requirement of evidence from witnesses and victims and saves resources.²²⁸

145. The Trial Chamber finds that Momir Nikolić’s guilty plea is significant and can contribute to fulfilling the Tribunal’s mandate of restoring peace and promoting reconciliation. The recognition of the crimes committed against the Bosnian Muslim population in 1995 – crimes that continue to have repercussions into the present – by a participant in those crimes contributes to establishing a historical record.²²⁹ Although the victims of these crimes and family members of those killed were fully aware of the crimes committed before Momir Nikolić pled guilty, it cannot

²²² Nikolić Sentencing Brief, para. 26.

²²³ Prosecution Sentencing Brief, para. 26 citing *Erdemović* Second Sentencing Judgement, para. 21 and *Todorović* Sentencing Judgement, paras 80-81; Nikolić Sentencing Brief, para. 28; Prosecution Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1646-47.

²²⁴ Prosecution Sentencing Brief, para. 27; Nikolić Sentencing Brief, para. 28.

²²⁵ Nikolić Sentencing Brief, para. 27.

²²⁶ Prosecution Closing Arguments, Sentencing Hearing, 29 October 2003, T.1650-51.

²²⁷ *Id.*; Defence Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1664.

²²⁸ Prosecution Sentencing Brief, para. 25; *Nikolić* Closing Arguments, Sentencing Hearing, 29 October 2003, T. 1658.

²²⁹ The Trial Chamber accepts the Defence submissions that a guilty plea can contribute to precluding revisionism. See Nikolić Defence Brief, para. 28.

be doubted that the *recognition* of the crimes committed against them by a former member of the Army of Republika Srpska provides some form of closure.²³⁰

146. At the Sentencing Hearing, the Trial Chamber heard two witnesses from the Bosniak community, who both stated that they found Mr. Nikolić's admission of guilt to be a positive occurrence.²³¹ Additionally, the Defence tendered an article by Emir Suljagić, a Bosnian Muslim from Srebrenica on the impact of Momir Nikolić's guilty plea on him as an individual who had survived but who had lost relatives and close friends during the executions in July 1995, and as a member of the Bosnian Muslim community.²³² Mr. Suljagić writes that while much evidence exists to establish what had happened following the fall of the Srebrenica enclave, "until the moment Mr. Nikolić confessed, I had never heard a Bosnian Serb admit that the massacre even happened." Mr. Suljagić writes that in the Republika Srpska, most people claim that the killings never took place or that Muslims killed one another or that the people killed were soldiers. He draws attention to a report issued last year by the government of the Republika Srpska in which it was written that 2,000 Bosnian Muslims were killed, of whom 1,800 were soldiers. Mr. Suljagić asserts that Mr. Nikolić's detailed confession "punches a big hole in the Bosnian Serb wall of denial." Mr Suljagić writes that, while the confession of Mr. Nikolić (and that of Mr. Obrenović) will likely not transform Bosnian Serb views, for him personally:

the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgement I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed – we no longer have to prove they were innocent.

147. The Defence also tendered an "Open Letter" from the current mayor of the Srebrenica municipality, dated 8 October 2003.²³³ In this letter, the mayor, who is a Bosniak, calls upon the government of the Republika Srpska to "confess to the crimes perpetrated by the Serbian army in July 1995 against the residents of the Srebrenica UN Safe Area," as Momir Nikolić had done. The mayor continues by stating:

the admission of Momir Nikolić and others [to] the crimes cannot alone compensate the families of the victims of genocide, but it is an encouragement and hope that finally the truth will come to light, reveal the criminals' monstrous plan, wake up the deluded Serbs and bring them to their senses. Momir Nikolić is the first officer of the Serbian Army who found the strength and courage

²³⁰ See, *Plavšić* Sentencing Judgement, paras 75-77 on the testimony of Dr. Alex Boraine, an expert on reconciliation and accountability issues and the former Deputy Chairperson on the Truth and Reconciliation Commission in South Africa, on the importance of the acknowledgement and acceptance of responsibility for grave crimes on the process of reconciliation.

²³¹ See, Witness DB, Sentencing Hearing, 27 October 2003, T.1514 (private session); Witness DA, Sentencing Hearing, 27 October 2003, T. 1523 (private session)("Admission of guilt contributes to establishing the truth and also to reducing tensions between various ethnic groups.")

²³² "Truth at The Hague", Emir Suljagić, *New York Times*, 1 June 2003, Defence Ex. DS-18.

²³³ Defence Ex. DS-17.

to confess the crimes and his participation in them. I hope this is due to the pangs of conscience and therefore I support his admission and appeal to the others to do the same.

The admission of the crime against the residents of Srebrenica is of multifold importance when we know that the RS authorities have not officially admitted it yet. I believe that not only Momir Nikolić and others confessing their personal responsibility, but the clarification of the role of others in the Serbian Army and officials of the Serbian people, will force the RS authorities to finally admit that a crime occurred in Srebrenica, perpetrated by individuals and groups from the ranks of the Serbian people.

Only by recognising and admitting the real and whole truth about the crime of July 1995 and other crimes in BH can trust be rebuilt among the citizens of BH.

148. The Trial Chamber notes that Momir Nikolić's guilty plea came before the start of trial; indeed, the First Joint Motion was filed on the date that Mr. Nikolić's trial was set to commence. At the same time, the Trial Chamber recalls that Momir Nikolić's plea of guilty came only after concluding a plea agreement with the Prosecution. An accused is always permitted to change his plea for one or more of the charges against him *without* having reached any agreement with the Prosecution.²³⁴ Of course, under the Statute of the Tribunal, an accused has the right to be presumed innocent, to have a fair and public trial and to not be compelled to confess guilt.²³⁵ Additionally, the accused is under no obligation to relieve the Prosecution of its burden to prove guilt beyond reasonable doubt.²³⁶

149. Taking into account these considerations, the Trial Chamber finds that Momir Nikolić's guilty plea is an important factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Momir Nikolić's acceptance of his individual criminal responsibility for his role in the crime of persecutions.

150. The Trial Chamber also considers Momir Nikolić's guilty plea as a mitigating factor because it spared witnesses from being required to come and testify about painful and traumatic events. This is particularly appreciated in the case of Srebrenica where there are numerous indictments brought by the Prosecution, and future trials will likely require the presence of these witnesses.

151. Finally, the Trial Chamber takes 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. Both parties have made submissions that this aspect of a guilty plea should be

²³⁴ The Trial Chamber recalls "Annex Tab B" to the Plea Agreement and Mr. Nikolić's explanation for why he fabricated his involvement in the Kravica Warehouse massacre. *See, Blagojević* Trial, 19 September 2003, BT. 1595 and 29 September 2003, BT. 2133-35, 2145-47

²³⁵ *See*, Article 21 of the Statute.

²³⁶ *See*, Rule 87 of the Rules. While a Trial Chamber may view a plea of guilty as a mitigating factor, the Trial Chamber considers it important to recall that no accused shall be penalised for exercising his or her right to go to trial and have the Prosecution prove its case.

considered as a mitigating factor.²³⁷ For the reasons stated above,²³⁸ the Trial Chamber will allocate little weight to this aspect of the benefits of a guilty plea.

b. Co-operation with the Prosecution

152. Rule 101 of the Rules specifies that substantial co-operation with the Prosecutor is a mitigating factor. The Nikolić Defence submits that as this is the only factor listed, it is of special significance.²³⁹ It further submits that there has been substantial co-operation between Momir Nikolić and the Prosecutor: Momir Nikolić has met with the representatives of the Prosecutor on numerous occasions and has provided detailed information, which was not previously known to the Prosecution.²⁴⁰ The Nikolić Defence asserts that it is of special significance that Momir Nikolić is the first Serbian officer to co-operate with the Prosecutor, in view of the fact that the events in Srebrenica in July 1995 have been denied by the authorities of Republika Srpska.²⁴¹ The Nikolić Defence maintains that the plea entered by Nikolić has and will encourage others involved in crimes to step forward and acknowledge responsibility, which will further the mandate of the Tribunal.²⁴²

The Nikolić Defence further submits that Momir Nikolić has testified truthfully in the *Blagojević* Trial and has fulfilled his obligations under the Amended Plea Agreement.²⁴³

153. The Prosecution agrees that Momir Nikolić has co-operated fully with the Prosecution.²⁴⁴ In particular, Momir Nikolić has agreed to not only testify in the trials related to Srebrenica, but also to co-operate in relation to the entire wartime period²⁴⁵ and he has “worked hard to answer truthfully and completely all questions posed to him.”²⁴⁶ Apart from his initial false comments in relation to the Kravica warehouse killings, which he subsequently explained, the Prosecution is unaware of any other false statements made by Momir Nikolić.²⁴⁷ The Prosecution submits that the testimony of Momir Nikolić is credible as it is supported by documentary as well as witness testimony, in

²³⁷ Prosecution Sentencing Brief, para. 25; Nikolić Sentencing Brief, para. 27.

²³⁸ See, *supra*, para. 67.

²³⁹ Nikolić Sentencing Brief, para. 30.

²⁴⁰ Nikolić Sentencing Brief, para. 32.

²⁴¹ Nikolić Sentencing Brief, para. 32-33; Nikolić Defence Closing Arguments, Sentencing Hearing, T.1663-64.

²⁴² Nikolić Sentencing Brief, para. 34. The Nikolić Defence further argues that due to the complexity and nature of the conflict in the former Yugoslavia, it is not possible for every perpetrator to be found and punished. It is in this context that when persons involved in crimes accept responsibility and supplement investigative work, it furthers the process of establishing the truth and bringing about reconciliation in the region. Nikolić Sentencing Brief, para. 31.

²⁴³ Addendum to Nikolić Sentencing Brief, paras 2-3.

²⁴⁴ Prosecution’s Supplemental Submissions, para. 3.

²⁴⁵ Prosecution Closing Arguments, Sentencing Hearing, T.1652-53.

²⁴⁶ Prosecution’s Supplemental Submissions, para. 7.

²⁴⁷ Prosecution’s Supplemental Submissions, para. 7.

relation to the VRS offensive in Srebrenica, Nikolić's role in co-ordination of the separation, detention, execution, burial and reburial of the Muslim prisoners.²⁴⁸

Findings

154. In making its determination regarding the nature and extent of Momir Nikolić's co-operation with the Prosecution, the Trial Chamber has taken many factors into consideration.

155. The Office of the Prosecutor has submitted that Momir Nikolić was helpful and co-operative towards the Prosecution, meeting them whenever requested and providing valuable information regarding the events in and around Srebrenica.²⁴⁹ Further, he has provided the Prosecution with information regarding events in Eastern Bosnia, which is beyond what was agreed upon as part of the Amended Plea Agreement.²⁵⁰ The Prosecution has also submitted that information provided by Momir Nikolić has resulted in the positive identification of mass graves, which were previously unknown.²⁵¹ The Trial Chamber takes these aspects into consideration, and particularly the closure which may now come to the surviving family members and friends due to the discovery of new mass graves. The Trial Chamber acknowledges that in the view of the Prosecution, Momir Nikolić has co-operated fully.

156. However, it is for the Trial Chamber to make an assessment of the credibility of Momir Nikolić, which ultimately impacts upon the value of such co-operation. Of primary importance to the Trial Chamber is the truthfulness and veracity of the testimony of Momir Nikolić in the *Blagojević* Trial, as well as how forthcoming the information was. The Trial Chamber takes into consideration numerous instances where the testimony of Momir Nikolić was evasive and finds this to be an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge.²⁵² Further, the Trial Chamber has taken into consideration Tab "B" to the Amended Plea Agreement, in which Momir Nikolić admitted that he previously made false statements, particularly that he ordered executions at Sandići and Kravica when in fact he had not. Had he been completely sincere about co-operating, Momir Nikolić would have been more open in all aspects of his testimony and been more forthright in his responses before, and to, the Trial Chamber. Additionally, while recognising that Mr. Nikolić was

²⁴⁸ Prosecution's Supplemental Submissions, para. 8.

²⁴⁹ Prosecution Sentencing Brief, para.30; Prosecution's Supplemental Submissions, para.7.

²⁵⁰ Prosecution Supplemental Sentencing Brief, para.4.

²⁵¹ "Prosecution's Addendum to its 15 October 2003 Supplemental Submission regarding the sentencing of Momir Nikolić", filed 14 November 2003. Attached is a declaration from the Investigations Team Leader from the Office of the Prosecutor, confirming that one mass grave has been probed and confirmed; a further two more locations will be revisited in spring 2004, for purposes of confirmation.

testifying about events which occurred over eight years ago, the Trial Chamber found that his testimony was not as detailed as it could have been in certain areas. This is an indicator of the character and a certain lack of candour on the part of Momir Nikolić, which the Trial Chamber has taken into consideration in its overall evaluation.

c. Remorse

157. The Parties submit that Momir Nikolić has demonstrated remorse publicly by pleading guilty and has shown remorse in meetings with representatives of the Prosecutor.²⁵³ The Nikolić Defence submits that the expression of remorse by Momir Nikolić is sincere, and should be considered as a mitigating factor,²⁵⁴ as it has been recognised in other cases.²⁵⁵

158. Momir Nikolić made the following statement at the Sentencing Hearing, in which he expressed his remorse and the reasons for his plea of guilt:

I sincerely wish before this Chamber and before the public, especially the Bosniak public, to express my deep and sincere remorse and regret because of the crime that occurred and to apologise to the victims, their families, and the Bosniak people for my participation in this crime. I am aware that I cannot bring back the dead, that I cannot mitigate the pain of the families by my confession, but I wish to contribute to the full truth being established about Srebrenica and the victims there and for the government organs of Republika Srpska, and all the individuals who took part in these crimes should follow in my footsteps and admit to their participation and their guilt, that they should give themselves in and be held responsible for what they have done.

By my guilty plea, I wanted to help the Tribunal and the Prosecutors to arrive at the complete and full truth and the victims, their brothers, mothers, and sisters should -- I wanted to avoid their being subjected to additional suffering and not to remind them of this terrible tragedy. Your Honours, I feel that my confession is an important step toward the rebuilding of confidence and coexistence in Bosnia and Herzegovina, and after my guilty plea and sentencing, after I have served my sentence, it is my wish to go back to my native town of Bratunac and to live there with all other peoples in peace and harmony, such as prevailed before the outbreak of the war.²⁵⁶

Findings

159. This Trial Chamber has had the opportunity to observe Momir Nikolić at his two-day Plea Hearing, over the course of his eight days of testimony in the *Blagojević* Trial and at his three-day Sentencing Hearing. The Trial Chamber has carefully considered Momir Nikolić's expression of remorse and his apology to the victims, their families and the Bosniak people for his participation in the crime of persecutions.

²⁵² The Trial Chamber notes, for example, the apparent discrepancy in the testimony of Momir Nikolić and Col. Franken, in relation to the demand for payment of rent for the United Nations Military Observer's by the Dutch Battalion. (*Blagojević* Trial, Witness Robert Franken, BT. 1557-1560)

²⁵³ Nikolić Sentencing Brief, para. 35; Prosecution Sentencing Brief, para. 28.

²⁵⁴ Nikolić Defence Closing Arguments, Sentencing Hearing, T.1665.

²⁵⁵ Nikolić Sentencing Brief, para. 35 referring to *Simić* Sentencing Judgement, para. 92; *Sikirica* Sentencing Judgement, para. 152; *Todorović* Sentencing Judgement, para. 89 and *Blaškić* Trial Judgement, para. 775.

²⁵⁶ Sentencing Hearing, T. 1681-1682.

160. The Trial Chamber recalls Momir Nikolić's explanation of his reasons for pleading guilty, as well as his related reason for providing the Prosecution with false information during the plea negotiations.²⁵⁷

161. Recalling that the standard for mitigating factors is on the balance of probabilities, the Trial Chamber finds that Momir Nikolić's expression of remorse is a mitigating factor, but cannot afford substantial weight to this factor.

d. Character of the accused prior to the war

162. The Nikolić Defence submits that Momir Nikolić led an honest and private life until the conflict and, while working as a school teacher, he did not discriminate among his students on the basis of ethnicity.²⁵⁸ Furthermore, he did not support the idea of a "greater Serbia", was not a member of the SDS and did not take part in any nationalistic rallies.²⁵⁹ The Nikolić Defence further submits that Momir Nikolić is a person of good character. His lack of a prior criminal record and the fact that no court has rendered a verdict against him should be taken into consideration.²⁶⁰ The Prosecution accepts that prior to the war Momir Nikolić was a respected teacher and a member of good standing in the community.²⁶¹

163. Long-time friends and colleagues, including non-Serbs, testified at the Sentencing Hearing that Momir Nikolić had friends from different ethnic groups and that he did not discriminate.²⁶² They also testified that he was not a member of the SDS.²⁶³ A non-Serb student of Momir Nikolić's testified that he socialised with Bosniak colleagues and was not discriminatory in his attitude towards students of non-Serb ethnicity.²⁶⁴

Findings

164. The Trial Chamber finds that on the evidence presented, Momir Nikolić did not discriminate prior to the war, and was a respected member of his community. The Trial Chamber finds this a factor in mitigation of sentence.

²⁵⁷ *Blagojević* Trial, 19 September 2003, BT. 1595 and 29 September 2003, BT. 2133-35, 2145-47. The Trial Chamber further recalls that while Momir Nikolić pled guilty before any evidence had been presented by the Prosecution at a public hearing, his guilty plea came after one year of full disclosure by the Prosecution of its case against him.

²⁵⁸ Nikolić Sentencing Brief, para. 41.

²⁵⁹ Nikolić Sentencing Brief, para. 41.

²⁶⁰ Nikolić Sentencing Brief, para. 39. Defence Ex. DS-2 is a certificate from the Bratunac Police Station dated 6 June 2003 and Defence Ex. DS-3 is a certificate from the District Court of Bijeljina dated 9 June 2003, both testifying to his lack of criminal record.

²⁶¹ Prosecution Sentencing Brief, para. 29.

²⁶² Witness Milorad Krsmanović, T. 1491; Witness Bozo Momčilović, T. 1504; Witness DA, T. 1521.

²⁶³ Witness Milorad Krsmanović, T. 1493-1494; Witness Bozo Momčilović, T. 1504; Witness DA, T. 1522.

²⁶⁴ Witness DB, T. 1510-1511.

e. No opportunity for voluntary surrender

165. The jurisprudence of the Tribunal recognises voluntary surrender as a mitigating factor, because it indicates co-operation with the Tribunal.²⁶⁵ In this case, Momir Nikolić submits that he was unaware of the indictment against him as it was sealed and therefore was unable to surrender voluntarily.²⁶⁶ This is further corroborated by Milorad Krsmanović, who testified on his behalf.²⁶⁷ In such an instance, it is submitted that the behaviour of Momir Nikolić prior to his arrest should be taken into account, which included co-operation with the Prosecutor and no attempts to evade or hide.²⁶⁸

Findings

166. The Trial Chamber, while recognising that Momir Nikolić did not evade the investigators from the Tribunal, cannot make the finding that had he known of his impending arrest, Nikolić would have surrendered voluntarily. In order to do so the Trial Chamber would have to engage in speculation. The Trial Chamber therefore does not take this factor into consideration.

f. Comportment in the UNDU

167. The Nikolić Defence submits that the comportment of a person while in detention should be considered as a mitigating factor.²⁶⁹ In the case of Momir Nikolić, it is submitted that in light of his behaviour while in detention, this factor be applied in mitigation of sentence.²⁷⁰

Findings

168. The behaviour of Momir Nikolić while in custody at the UNDU and in the course of the proceedings before the Tribunal has been proper. While this has been recognised as a mitigating factor in numerous cases before this Tribunal, the Trial Chamber recalls that all accused are expected to comport themselves appropriately while at the UNDU; failure to do so may constitute an aggravating factor. Accordingly, this Trial Chamber will not accord significant weight to this factor.

²⁶⁵ Nikolić Sentencing Brief, para. 37.

²⁶⁶ Nikolić Sentencing Brief, para. 38.

²⁶⁷ Milorad Krsmanović, Sentencing Hearing, T. 1495.

²⁶⁸ Defence Exhibit DS1 is a statement from a Prosecution investigator in relation to the behaviour of Momir Nikolić in the investigation.

²⁶⁹ Nikolić Sentencing Brief, para. 44 referring to *Simić* Sentencing Judgement, para. 112; *Krnjelac* Trial Judgement, para. 520 and *Krstić* Trial Judgement, para. 715.

²⁷⁰ See, Addendum to Nikolić Sentencing Brief, Tab A/14, "Report On The Behaviour of Momir Nikolić Whilst In Custody" from the Commanding Officer of the UNDU. This Report has been admitted as Defence Exhibit DS14. This states: "During his time in custody, he has shown good respect for the management and staff of the unit and has

g. Personal circumstances

169. The Nikolić Defence presented the Trial Chamber with factors related to Momir Nikolić's personal circumstances which it considers relevant to the Trial Chamber's consideration of an appropriate sentence. Momir Nikolić worked as a teacher in Bratunac and is married with two sons.²⁷¹ He took care of his family including his mother who lives with the family.²⁷² Since Momir Nikolić's arrest, the costs of living of his family are covered by his wife's salary as a teacher and his mother's pension, making the family's economic situation "tense".²⁷³

Findings

170. The Trial Chamber, recalling the Appeals Chamber finding in the *Kunarac* Appeal Judgement,²⁷⁴ notes the family circumstances of Momir Nikolić. In determining the appropriate weight to give this factor, the Trial Chamber recalls with approval the finding in the *Furundžija* Trial Judgement in relation to the fact that the accused in that case had no prior convictions and was the father of a young child: "this may be said of many accused persons and cannot be given any significant weight in a case of this gravity."²⁷⁵

(ii) Findings

171. In summary, the Trial Chamber finds that the following mitigating circumstances have been established on the balance of probabilities and has accorded each factor appropriate weight: guilty plea; co-operation with the Prosecution; remorse; character of the accused prior to the war; comportment in the UNDU, and personal circumstances of the accused.

V. DETERMINATION OF SENTENCE

172. Under the Amended Plea Agreement, the Prosecution has recommended a sentence of between 15 and 20 years, pursuant to Rule 62 *ter* (A)(ii). The Nikolić Defence submits that Momir Nikolić be sentenced to not more than 10 years imprisonment.²⁷⁶ The Parties rightly acknowledged that under Rule 62 *ter* (B), the Trial Chamber "shall not be bound" by any agreement between the

complied with both the Rules of Detention and the instructions of the guards. He has at all times had cordial relations with his fellow detainees."

²⁷¹ Nikolić Sentencing Brief, para. 40.

²⁷² Nikolić Sentencing Brief, para. 43.

²⁷³ Nikolić Sentencing Brief, para. 43.

²⁷⁴ *Kunarac* Appeal Judgement, para. 362, in which the Appeals Chamber held that "[f]amily concerns should in principle be a mitigating factor."

²⁷⁵ *Furundžija* Trial Judgement, para. 284.

²⁷⁶ Nikolić Sentencing Brief, para. 49.

parties on the sentence. The Trial Chamber has given due consideration to the recommendations of both the Prosecution and Defence.

173. Additionally, Momir Nikolić explicitly waived his right to appeal a finding of guilt or any matters relating to sentencing “if the sentence imposed is with the range of sentence agreed upon by the parties.”²⁷⁷

A. Conclusions

174. The count of persecutions for which Momir Nikolić has pled guilty is based on some of the most horrific events to befall the former Yugoslavia during its long war, in which hundreds of thousands of people lost their lives and even more were displaced. Murder and forced displacement based on religion and ethnicity are the underlying acts in the case of Momir Nikolic. Following the fall of Srebrenica, Mr. Nikolić took part in a joint criminal enterprise that had as its goal the murder of thousands of men and the forcible displacement of tens of thousands of Muslims, so that this part of eastern Bosnian could be “cleansed” of non-Serbs. Civilians who were forced to flee the Srebrenica safe area were subjected to acts of humiliation, terror and cruelty at all stages of this operation.

175. Momir Nikolić has accepted his responsibility for the criminal acts he committed in furtherance of the commission of these crimes. He has offered his co-operation to the Prosecution. He has expressed his remorse to the victims. Momir Nikolić’s guilty plea will likely have some positive impact on all communities in the former Yugoslavia and may have opened avenues for reconciliation. The Trial Chamber has taken these factors into consideration in determining an appropriate sentence for him.

176. Momir Nikolić was an active participant in the crimes committed in Potočari, Bratunac and Zvornik. He did not try to avoid his official duties during those fateful days or remain on the sidelines; by his own account, he appears to have taken a very active – even pro-active – role in ensuring that the operation went forward and was “successful”.

177. Momir Nikolić was not unaware of the crimes unfolding following the fall of Srebrenica. Rather, Mr. Nikolić appears to be right at the centre of criminal activity as the operation spread from Potočari, to Bratunac and on to Zvornik. Momir Nikolić was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed and decided. He did not raise any objections to what he was told was the plan: to deport Muslim women and children to Muslim held territory, and to separate, detain, and ultimately kill the Muslim men.

Rather than resist, Momir Nikolić recommended possible detention and execution sites. On 12 July 1995, Momir Nikolić was in Potočari – he saw with his own eyes the separation of men from their families; he heard the cries of children as they saw their fathers taken away; he saw the fear in the eyes of the women pushed on to buses as they knew that the fate of their fathers, husbands and sons was beyond their control. He has described himself as the co-ordinator of various units operating in Potočari, but he did nothing to stop the beatings, the humiliation, the separations or the killings.

178. Mr. Nikolić returned to Potočari on 13 July 1995, and by his own account, he established that “all was going well” – the deportations continued as did the separations. He busied himself with security arrangements for General Mladić and when they met, reported that “there were no problems”. On the same day, Momir Nikolić saw columns of prisoners being marched to various sites, to await their death. Later that night, Momir Nikolić was present when three other persons involved in the crimes openly discussed the killing operation. The intricate details of the operation were discussed, in order to facilitate the execution of the plan. Momir Nikolić was an integral part of the implementation of the plan, in order that the aims of the operation were achieved.

179. Further, in the months subsequent to the executions, Momir Nikolić “co-ordinated the effort to exhume and re-bury Muslim bodies”. This ongoing support proved valuable in that crucial evidence was destroyed – and has prevented many families knowing the whereabouts of their missing family members.

180. The Trial Chamber has taken into consideration the crimes committed in July through November of 1995 for which Momir Nikolić has been convicted, as reflected in the charge of persecutions, and the degree and form of Momir Nikolić’s participation in the commission of those crimes. The Trial Chamber has accorded appropriate weight to each aggravating and mitigating factor. As the Trial Chamber has continually stressed to both Parties and to Momir Nikolić, it is not bound by their recommendations relating to the sentence. The Trial Chamber has carefully considered the submissions, and the recommended sentence, by each party. In conclusion, the Trial Chamber finds, however, that it cannot accept the sentences recommended by either the Defence or the Prosecution; neither sentence adequately reflects the totality of the criminal conduct for which Momir Nikolić has been convicted.

181. Accordingly, Mr. Nikolić enjoys the right to appeal the sentence.

²⁷⁷ Amended Plea Agreement, para. 14.

B. Credit for Time Served

182. Momir Nikolić was detained by SFOR on 1 April 2002. On 2 April 2002, he was transferred to the seat of the Tribunal, and has remained detained at the United Nations Detention Unit since that date. Pursuant to Rule 101 (C) of the Rules of the Tribunal, Momir Nikolić is entitled to credit for the time he has spent in detention, namely 610 days in total.

VI. DISPOSITION

183. For the foregoing reasons, having considered the arguments of the parties, the evidence presented at the Sentencing Hearing, and the Statute and the Rules, the **TRIAL CHAMBER SENTENCES** Momir Nikolić to **TWENTY-SEVEN** years imprisonment. He is entitled to credit for 610 days in relation to the sentence imposed by the Trial Chamber, as credit for time served in detention as of the date of this Sentencing Judgement, together with such additional time as he may serve pending the determination of any appeal of this Sentencing Judgement.

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

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

Liu Daqun
Presiding

Volodymyr Vassylenko

Carmen Maria Argibay

Dated this second day of December 2003,
At The Hague
The Netherlands

[Seal of the Tribunal]

VII. ANNEX A: GLOSSARY

Addendum to Nikolić Sentencing Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Addendum to Defendant's Sentencing Brief, 10 October 2003
<i>Aleksovski</i> Appeal Judgement	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, Judgement, 24 March 2000
Amended Plea Agreement	Annex "A" to the Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor, 7 May 2003
BT.	Transcript of hearings in the case <i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No, IT-02-60-T
<i>Banović</i> Sentencing Judgement	<i>Prosecutor v. Predrag Banović</i> , Case No. IT-02-65/1-S, 28 October 2003
<i>Blagojević</i> Trial	<i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No. IT-02-60-T
<i>Blaškić</i> Trial Judgement	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, 3 March 2000
Bratunac Brigade	1 st Bratunac Light Infantry Brigade
<i>Čelebići</i> Appeal Judgement	<i>Prosecutor v. Zejnil Delalić et al</i> , Case No. IT-96-21-A, Judgement, 20 February 2001
<i>Čelebići</i> Trial Judgement	<i>Prosecutor v. Zejnil Delalić et al</i> , Case No. IT-96-21-T, Judgement, 16 November 1998
Defence or Nikolić Defence	Defence for Momir Nikolić
Defence Ex. DS-	Exhibits tendered by the Defence and admitted into evidence by the Trial Chamber
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 U.N.T.S 221.
<i>Erdemović</i> Appeal Judgement	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-A, Judgement, 7 October 1997
<i>Erdemović</i> First Sentencing Judgement	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996
<i>Erdemović</i> Second Sentencing Judgement	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998

First Joint Motion	Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor, 6 May 2003
<i>Furundžija</i> Trial Judgement	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, Judgement, 10 December 1998
Geneva Conventions	Geneva Conventions I through IV of August 12, 1949
ICCPR	International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violation of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994
Indictment	<i>Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić and Momir Nikolić</i> , Case No. IT-02-60-PT, Amended Joinder Indictment, 27 May 2002
Initial Indictment	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-56-I, dated 26 March 2002 and filed on 28 March 2002
International Tribunal or Tribunal or ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
<i>Jelisić</i> Appeal Judgement	<i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-A, Judgement, 5 July 2001
KT.	Transcript of hearings in the case <i>Prosecutor v. Radislav Krstić</i> , Case No, IT-98-33-T
<i>Kambanda</i> Sentencing Judgement	<i>Prosecutor v. Jean Kambanda</i> , Case No. ICTR-97-23-S, Judgement, 4 September 1998
<i>Kordić</i> Trial Judgement	<i>Prosecutor v. Dario Kordić & Mario Čerkez</i> , Case No. IT-95-14/2-T, Judgement, 26 February 2001
<i>Krnojelac</i> Appeal Judgement	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, Judgment, 17 September 2003
<i>Krnojelac</i> Trial Judgement	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, Judgment, 15 March 2002
<i>Krstić</i> Trial Judgement	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-T, Judgement, 2 August 2001

<i>Kunarac</i> Appeal Judgement	<i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23/1-A, Judgement, 12 June 2002
<i>Kunarac</i> Trial Judgement	<i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23/1-T, Judgement, 22 February 2001
<i>Kupreškić</i> Appeal Judgement	<i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-A, Judgement, 23 October 2001
<i>Kupreškić</i> Trial Judgement	<i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-T, Judgement, 14 January 2000
<i>Kvočka</i> Trial Judgement	<i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No. IT-98-30-T, Judgement, 2 November 2001
MUP	Ministry of the Interior
Nikolić Sentencing Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Momir Nikolić's Sentencing Brief, (Partly Confidential), 14 July 2003
Parties	Defence and Prosecution
<i>Plavšić</i> Sentencing Judgement	<i>Prosecutor v. Biljana Plavšić</i> , Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003
Prosecution or The Prosecutor	The Office of the Prosecutor
Prosecution Ex. PS-	Exhibits tendered by the Prosecution and admitted into evidence by the Trial Chamber
Prosecution Sentencing Brief	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Prosecutor's Brief on the Sentencing of Momir Nikolić, 14 July 2003
Prosecution's Supplemental Submissions	<i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-S, Prosecution's Supplemental Submission Regarding the Sentencing of Momir Nikolić, 15 October 2003
Rules	Rules of Procedure and Evidence of the International Tribunal, IT/32/Rev.28, 17 July 2003
SDS	Serbian Democratic Party
SFOR	International Stabilisation Force
SFRY or former Yugoslavia	Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Criminal Code of the Socialist Federal Republic of Yugoslavia, published in the Official Gazette SFRJ No. 44 of October 8, 1976 and took effect on July 1, 1977

Second Joint Motion	Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor, 7 May 2003
<i>Sikirica</i> Sentencing Judgement	<i>Prosecutor v. Duško Sikirica et al</i> , Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001
<i>Simić</i> Sentencing Judgement	<i>Prosecutor v. Milan Simić</i> , Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002
Statement of Facts	Statement of Facts and Acceptance of Responsibility, Tab A to Annex A to the Joint Motion for Consideration of Plea Agreement Between Momir Nikolić and the Office of the Prosecutor, 6 May 2003
T.	Transcript of hearing in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript
<i>Tadić</i> Sentencing Appeal Judgement	<i>Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-A and IT-94-1-Abis, Judgement in sentencing appeals, 26 January 2000
<i>Tadić</i> Sentencing Judgement (1997)	<i>Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997
<i>Tadić</i> Sentencing Judgement (1999)	<i>Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-Tbis-R117, Sentencing Judgement, 11 November 1999
<i>Todorović</i> Sentencing Judgement	<i>Prosecutor v. Stevan Todorović</i> , Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001
Transcript witness	Testimony of witness who gave evidence in another case before the Tribunal and has been admitted into these proceedings by decision of the Chamber
Trial Chamber	Trial Chamber I Section A of the Tribunal
UDHR	Universal Declaration of Human Rights, 10 December 1948, G.A.Res.217A (III), U.N. Doc.A/810 (1948).
UNDU	United Nations Detention Unit
UNPROFOR	United Nations Protection Force
<i>Vasiljević</i> Trial Judgement	<i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-T, Judgement, 2 November 2002
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska
Zvornik Brigade	1 st Zvornik Infantry Brigade

**VIII. ANNEX B: STATEMENT OF FACTS AND ACCEPTANCE OF
RESPONSIBILITY**