UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991	Case No.	IT-95-17-S
		Date:	7 December 2005
		Original:	ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Judgement of: **7 December 2005**

PROSECUTOR

v.

MIROSLAV BRALO

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon

Counsel for Miroslav Bralo:

Mr. Jonathan Cooper

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I. INTRODUCTION AND PROCEDURAL HISTORY

A. Introduction

1. Miroslav Bralo was indicted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") in a sealed indictment confirmed on 10 November 1995 by Judge McDonald. At that time, Anto Furundžija and two others were also named on the indictment as co-accused. Furundžija was transferred to the Tribunal in December 1997, and was convicted and sentenced to ten years imprisonment.[1] In July 2000, the Appeals Chamber upheld his conviction and sentence.[2] On 21 December 1998, a revised version of the indictment against Miroslav Bralo ("Accused") was filed, also under seal, which differed from the original indictment only in the removal of the names of, and charges against, his co-accused. In October 2004, Judge Kwon issued an order vacating the original order for non-disclosure of the indictment, and instructing the Registrar to release the warrant of arrest and order for surrender of the Accused.[3] Thus, until July 2005, the operative indictment against the Accused was that filed on 21 December 1998, charging him with nine counts of grave breaches of the Geneva Conventions and twelve counts of violations of the laws or customs of war.

2. On 10 November 2004, the Accused surrendered in Bosnia and Herzegovina and was transferred to the Tribunal shortly thereafter. On 15 November 2004, an initial appearance was held before Judge El Mahdi, and the Accused was granted a period of thirty days in which to consider his plea. At a further hearing before Judge El Mahdi on 14 December 2004, he pleaded not guilty to all 21 counts of the indictment.

3. The Office of the Prosecutor ("Prosecution") filed a proposed amended indictment on 19 July 2005, immediately prior to a hearing before Trial Chamber I. At that hearing, the Prosecution stated that it had "streamlined" the previous indictment, reducing the number of counts from twenty-one to eight.[4] These eight included one new charge of persecution as a crime against humanity. On the same date, the Prosecution filed a Plea Agreement pursuant to Rule 62 *ter* of the

[1] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").
[2] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000.
[3] *Prosecutor v. Bralo*, Case No. IT-95-17-I, Order on Motion for Vacation of Order for Non-Disclosure and for Release of Confidential Documents, 12 October 2004.
[4] *Bralo*, Transcript, T. 33 (19 July 2005).

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Rules of Procedure and Evidence of the Tribunal ("Rules"), in which the Accused agreed to plead guilty to all eight counts of the amended indictment ("Plea Agreement" or "Agreement"). At the hearing on 19 July, Trial Chamber I orally confirmed the amended indictment ("Indictment") and the Accused (hereafter referred to as "Bralo") formally entered his guilty pleas to each of the eight counts. The Trial Chamber accepted the guilty pleas and entered a conviction for each of the eight counts charged.[5]

4. On 14 September 2005, Trial Chamber I issued an order directing the Prosecution and the Defence of Miroslav Bralo ("Defence") to submit their Sentencing Briefs no later than 23 September 2005. The Trial Chamber also scheduled a Sentencing Hearing for 10 October 2005. Subsequently, the Prosecution and the Defence were granted an extension of time until 30 September 2005 to file their Sentencing Briefs. However, on 27 September 2005, the President of the Tribunal issued an order re-assigning the case to Trial Chamber III.[6] On 29 September 2005, following the submission by the Defence of a motion for a further extension of time in which to file its Sentencing Brief, this Trial Chamber re-scheduled the Sentencing Hearing for 20 October 2005, and ordered the Prosecution and the Defence to file their Sentencing Briefs by 10 October 2005.[7]

B. The Plea Agreement

5. In the Plea Agreement, Bralo agrees to plead guilty to the eight charges contained in the Indictment, being:

1. Persecutions on political, racial and religious grounds, a crime against humanity punishable under Articles 5(h) and 7(1) of the Statute of the Tribunal ("Statute"), (Count 1);
2. Murder, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 2);
3. Torture or inhuman treatment, a grave breach of the Geneva Conventions of 12 August 1949, punishable under Articles 2(b) and 7(1) of the Statute, (Count 3);
4. Torture, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 4);

[5] *Bralo*, Transcript, T. 44 (19 July 2005).

[6] *Prosecutor v. Bralo*, Case No. IT-95-17-S ("*Bralo* Sentencing"), Order Assigning a Case to a Trial Chamber, 27 September 2005.

[7] *Bralo* Sentencing, Decision on Confidential Motion for Extension of Time and Order Scheduling a Sentencing Hearing, 29 September 2005.

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5. Outrages upon personal dignity including rape, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 5);
6. Unlawful confinement, a grave breach of the Geneva Conventions of 12 August 1949, punishable under Articles 2(g) and 7(1) of the Statute, (Count 6);
7. Unlawful confinement, a grave breach of the Geneva Conventions of 12 August 1949, punishable under Articles 2(g) and 7(1) of the Statute, (Count 7); and
8. Inhuman treatment, a grave breach of the Geneva Conventions of 12 August 1949, punishable under Articles 2(b) and 7(1) of the Statute, (Count 8).

6. The Agreement also states that Bralo and the Prosecution agree that the guilty pleas "represent a full accounting of [Bralo's] criminal behaviour for the events charged" and that "no promises or inducements have been made by the Prosecutor" to persuade Bralo to enter into the Agreement.[8]

7. The Factual Basis appended to the Agreement sets out the facts underlying the charges against Bralo. The Trial Chamber may rely upon these facts, discussed in Section II below, as proved, and base its determination of sentence upon them.

C. The Sentencing Proceedings

8. In its Sentencing Brief filed on 10 October 2005 ("Prosecution Brief"), the Prosecution outlines the factors it considers relevant, and makes submissions on aggravating and mitigating circumstances.[9] Appended to the Brief are several attachments, including photographs and statements from some of the victims of Bralo's crimes. The Defence filed its Sentencing Brief confidentially on 10 October 2005, making submissions about the circumstances of the crimes committed and on the mitigating circumstances that it wishes the Trial Chamber to consider.[10] The Defence also appended documents intended to assist the Trial Chamber in determining sentence. These included statements from Bralo and from others familiar with him. On 20 October 2005, the day of the Sentencing Hearing, the Defence re-filed many of these documents, and submitted additional statements for the Chamber's consideration.[11] On 25 November 2005, the Defence filed

[8] Plea Agreement, para. 9.
[9] Prosecution's Sentencing Brief, 10 October 2005.
[10] Sentencing Brief on Behalf of Miroslav Bralo, filed confidentially on 10 October 2005.
[11] Complete Annexes A and B to Sentencing Brief on Behalf of Miroslav Bralo, filed confidentially on 20 October 2005.

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a public version of its Sentencing Brief and annexes ("Defence Brief"), and on 29 November it filed two further statements.[12]

9. The Sentencing Hearing on 20 October 2005 lasted approximately four hours. The Prosecution and the Defence made additional oral submissions on the factors that they seek to have taken into consideration by the Trial Chamber in its determination of sentence. In addition, Bralo made a short oral statement, apologising to the victims of his crimes and their families, and to "all of those who experienced the horrors of war through me or my co-fighters."[13] At the end of the hearing, the Trial Chamber reserved judgement on sentence.

II. FACTUAL BASIS OF GUILTY PLEA

10. Miroslav Bralo, also known as "Cicko," was born in Kratine, in the municipality of Vitez, now in Bosnia and Herzegovina, on 13 October 1967. In the evening of 15 April 1993, he was released from Kaonik prison, on the condition that he agree to participate in an attack on the village of Ahmići to be carried out the following day by forces of the Croatian Defence Council ("HVO"). Upon his release, he was taken to a building known as the "bungalow" that was being used as the headquarters of the "Jokers," which was the anti-terrorist platoon of the 4th Military Police Battalion of the HVO. He thereupon became a member of the "Jokers" and was given weapons and a uniform.

11. Early the following morning while it was still dark, Bralo and other members of the "Jokers" walked to Nadioci, where they entered the home of Osman Salkić, a Bosnian Muslim. Two other members of the "Jokers" then killed Osman Salkić and his wife, Rediba Salkić, and Bralo killed their daughter, Mirnesa Salkić, using a knife.

12. Later that morning, Bralo and others participated in a surprise attack on the village of Ahmići, with instructions to ethnically cleanse the village, to kill the Muslim men of military age, to burn all Muslim residences, and to expel all the Muslim residents from the village. In the course of the attack, Bralo set fire to numerous homes belonging to the Muslim inhabitants of Ahmići, using incendiary materials including incendiary bullets, and aided and abetted others in setting fire to further Muslim residences. In addition, he captured, interrogated, and shot and killed an adult male

[12] Sentencing Brief on behalf of Miroslav Bralo, 25 November 2005, and Supplementary Sentencing Material, 29 November 2005.

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of unknown identity. He and another member of the "Jokers" also planted explosives in and around the lower mosque in Ahmići, which they then detonated, destroying the mosque.

13. In a separate incident occurring between 16 April and 1 May 1993, Bralo and an HVO soldier took custody of fourteen Bosnian Muslim men, women and children, all members of the Salkić and Mehmet Čeremić families who had fled their homes following the attacks on Ahmići and Nadioci. While transporting these fourteen persons towards Kaonik, the soldier accompanying Bralo informed him of his intention to kill some of them. Bralo then assisted this soldier by taking the group to a clearing in a forest, and standing guard while the soldier shot and killed all fourteen men, women and children. Of these victims, two were approximately seven years old, one was eight, one was ten, one was eleven, one was thirteen, one was fourteen, and two were approximately sixteen years old.

14. On an occasion between 21 April and 10 May 1993, HVO soldiers arrested three unarmed Muslim men in the area of the village of Kratine. Subsequently, Bralo, who believed these men to be soldiers seeking either to gain intelligence about the HVO military lines, or to join up with other military units, took these detained men to a barn and, along with others, interrogated and beat them. Several hours later, Bralo took the detainees to a wooded area and killed them.

15. On yet another occasion, on or about 15 May 1993, members of the "Jokers" took a Bosnian Muslim woman ("Witness A") to the "bungalow," where she was interrogated. While she was held in the "bungalow," she was repeatedly raped and sexually assaulted by Bralo. At one point while she was being interrogated, Bralo beat a Bosnian Croat man in her presence and threatened to kill her. He raped her in front of other soldiers and ejaculated repeatedly over her body. He also bit her about the body, including her nipples.

16. Witness A was then taken from the "bungalow" to another house in the Nadioci area, where she was detained by the "Jokers," including Bralo, until some time in July 1993. During that period she was again repeatedly raped by members of the "Jokers," with the knowledge of Bralo. Bralo failed to release her, even though he was in a position to effect her release.

17. Between 21 April and 10 May 1993, Bralo was assigned to the digging of trenches in and around the village of Kratine. In that period, Bosnian Muslim prisoners were directed to work on

[13] *Bralo* Sentencing Transcript, T. 88 (20 October 2005).

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the trench-digging operations, to the orders of Bralo and others, and did so under adverse weather conditions with limited food and rest. Bralo and other members of the "Jokers" prevented these prisoners from escaping and Bralo forced them to practice a Catholic religious ritual. In addition, the Bosnian Muslim detainees were used as "human shields" to protect the HVO forces from sniper-fire from the Army of Bosnia and Herzegovina. Bralo was aware that these detainees under his control were at risk of injury or death as a result.

III. APPLICABLE LAW

A. The Statute and Rules

18. The provisions of the Statute relevant to sentencing are as follows:

Article 24
Penalties

1. The penalties 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.

Article 27
Enforcement of sentences

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.

19. The Rules also contain provisions on sentencing, of which the following are of immediate relevance in the present case:

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.

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(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.

20. The Trial Chamber must therefore consider a number of factors in its assessment of the appropriate sentence to be imposed upon Bralo, and these are discussed further below. Ultimately, however, the sentence imposed is a matter for the discretion of the Trial Chamber after examining the particular facts of the case.[14]

B. General Considerations

21. As a preliminary matter, the Trial Chamber draws attention to the purposes of punishment in the context of the Tribunal. The Tribunal was established to prosecute individuals who committed serious violations of international humanitarian law in the course of conflicts in the states of the former Yugoslavia, as a measure to contribute to the restoration and maintenance of peace in that region.[15] That aim must be borne in mind by a Trial Chamber in the sentencing process.

22. In previous cases before the Tribunal, Trial Chambers and the Appeals Chamber have set out three broad purposes of punishment in this particular context. The first of these has been

[14] *See Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeals Judgement"), para. 241.
[15] Security Council Resolution 827 (1993), 25 May 1993.

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termed "retribution," with the qualification that it is "not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these [international] crimes."[16] Thus, retribution as a purpose of punishment is here used to denote the concept that whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct. The second purpose of punishment is that of deterrence, either individual or general. The Appeals Chamber has held that, while a Trial Chamber may properly consider deterrence as a purpose of punishment that might influence its determination of sentence, it should not give "undue prominence" to deterrence in its overall assessment of an appropriate sentence.[17] Rehabilitation of the individual offender is also considered as a legitimate purpose of punishment, albeit one that should not be given "undue weight."[18]

23. In light of these general considerations, the Trial Chamber now turns to the factors to be considered in determining sentence, being: the gravity of the offences and the individual circumstances of Bralo, including any aggravating or mitigating circumstances; and the general practice regarding prison sentences in the courts of the former Yugoslavia.

IV. SENTENCING FACTORS

A. The gravity of the crimes and aggravating circumstances

24. The most important factor to be taken into account by the Trial Chamber in its determination of sentence is the gravity of Bralo's criminal conduct.[19] The Prosecution has placed considerable emphasis on the gravity of the crimes committed. The Defence "acknowledge[s] the gravity of the offending," including "not only the suffering of those directly affected in 1993, but also the continued suffering of those directly or indirectly affected in every month of every year from that date to this."[20]

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[16] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeals Judgement"), para. 185.

[17] *Prosecutor v. Tadić*, Case No. IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000, para. 48.

[18] *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 806.

[19] *See, e.g.*, *Čelebići* Appeals Judgement, para. 731; *Aleksovski* Appeals Judgement, para. 182; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement"), para. 1225.

[20] *Bralo* Sentencing, Transcript, T. 115 (20 October 2005).

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25. While noting that the matter is not one in dispute between the parties, the Trial Chamber must nonetheless analyse the various indicia put forward by the Prosecution in order to assess the gravity of the crimes committed by Bralo and reach the necessary conclusions with regard to the appropriate sentence for those crimes. In this regard, the Trial Chamber relies only upon facts contained in the Factual Basis agreed between the parties, in addition to the statements concerning the impact of the crimes on the various victims appended to the Prosecution Brief.

26. In addition, the Prosecution asserts that there are three main aggravating factors that the Trial Chamber should consider: the large number of victims; the youth of the victims; and the exacerbated humiliation and degradation of Witness A by Bralo.[21] The Defence has not made any submissions concerning these matters, but stated at the Sentencing Hearing its agreement that the three categories put forward by the Prosecution should be considered as aggravating factors.[22]

27. The aggravating circumstances identified by the Prosecution are all factors which may add to the gravity of the offences. Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise. Therefore, the Trial Chamber here examines the crimes of which Bralo has been convicted to assess their inherent gravity, along with any circumstances that serve to make the gravity of Bralo's criminal conduct worse. By taking this approach, the Trial Chamber also avoids any possible double-counting of particular factors, which would be impermissible.[23] The determination of which factors may count in aggravation is a matter for the discretion of the Trial Chamber,[24] although it is only those factors that have been proved beyond a reasonable doubt that it may consider.[25]

1. Nature of the crimes

28. The Trial Chamber notes first that the crimes of which Bralo has been convicted are of the utmost gravity. Count 1 of the Indictment is a charge of persecution as a crime against humanity,

[21] Prosecution Brief, paras. 68–78.

[22] At the Sentencing Hearing, Counsel for Bralo stated: "Might I go on by acknowledging the aggravating factors that have been relied on by the Prosecution in this case. I don't take issue with a single one of the factors that have been brought forward." *Bralo* Sentencing, Transcript, T. 116 (20 October 2005).

[23] The Appeals Chamber has stated that "factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*." *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Appeals Judgement"), para. 106.

[24] *See Čelebići* Appeals Judgement, para. 780.

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an extremely serious offence involving a deliberate intention to discriminate against a particular group of people in the context of a widespread or systematic attack on a civilian population. Similarly, the remaining counts of the Indictment are a catalogue of serious, violent offences, namely murder, rape, torture, unlawful confinement, and inhuman treatment, constituting grave breaches of the Geneva Conventions and/or violations of the laws or customs of war.[26] Bralo has explicitly acknowledged his personal culpability for these crimes, in addition to recognising their gravity.[27]

29. Beyond the inherently shocking nature of these crimes, the Trial Chamber also takes account of the specific manner in which they were committed by Bralo. In the course of his persecution of the Bosnian Muslim residents of Nadioci and Ahmići, who were the targets of attack on 16 April 1993, Bralo killed a young woman—Mirnesa Salkić—with a knife, while his associates murdered her parents. In addition, he shot and killed an unidentified adult male after capturing and interrogating him. Moreover, Bralo set fire to many houses belonging to the Muslim residents of Ahmići using incendiary materials, aided and abetted others in doing so, and participated in the destruction of the lower mosque in Ahmići by setting and detonating approximately four kilos of explosives. At some time after the attack on Ahmići, Bralo aided another member of the HVO in the killing of fourteen Bosnian Muslim civilians.

30. There can therefore be little doubt that Bralo was a willing participant in one of the most brutal attacks upon a community in the entire conflict in Bosnia and Herzegovina. As a consequence of this attack, the Muslim community of Ahmići was decimated and those who survived the killing were driven from their homes, which were razed or burned. According to the report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, all of the approximately 180 Muslim homes in Ahmići were destroyed and all of the

[25] *Ibid*, para. 763.

[26] The Trial Chamber notes that Bralo has been convicted under Counts 3 and 4 of the Indictment for torture as a grave breach of the Geneva Conventions, and as a violation of the laws or customs of war, for the same underlying acts. In light of the Tribunal's jurisprudence on cumulative convictions, the Trial Chamber bases its sentence in the present case on the gravity of the crime of torture as a grave breach of the Geneva Conventions and does not additionally consider the gravity of torture as a violation of the laws or customs of war. See, e.g. *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeals Judgement"), paras. 1032–1035.

[27] At the Sentencing Hearing, the Defence stated "[t]he second thing that I have to acknowledge on Mr. Bralo's behalf is his personal responsibility for each of the actions which have led to harm. Whatever the context, those were acts which he acknowledges were wrong, and that he always knew to be wrong." *Bralo* Sentencing, Transcript, T. 115 (20 October 2005).

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surviving Muslim residents fled or were forced to leave.[28] A clearer example of "ethnic cleansing" would be difficult to find. The scale of the attack and the number of victims who were persecuted by Bralo in its course serve to further aggravate the seriousness of his criminal conduct, which is a factor taken into account by the Trial Chamber in its determination of sentence.[29]

31. The Trial Chamber also finds that in some circumstances a crime can be aggravated by the youth of the victim involved. Such is the case, for example, where an accused is convicted of rape or sexual assault, or where he has committed murder. The fact that many of those who were killed, displaced, and traumatised by the attack on Ahmići were children, and that, of the fourteen members of the Salkić and Čeremić families who were killed by an HVO soldier with the assistance of Bralo, nine were children, are important considerations. The Trial Chamber therefore finds that this aspect of the commission of the crime of persecution by Bralo in the present case is a factor that aggravates the gravity of the crime.

32. Count 2 of the Indictment relates to the murder of three captured Muslim men, one of whom was Fuad Kermo, by Bralo. The beating and cold-blooded killing of persons detained during an armed conflict is a brutal crime. Belief that they were enemy agents is irrelevant. It is the very essence of international humanitarian law that individuals who are captured and detained—civilian or combatant—must be treated in accordance with the law, and Bralo violated this fundamental rule three times over. Once again, the fact that there were multiple murder victims is an element which serves to aggravate the seriousness of Bralo's criminal conduct.

[28] Second Periodic Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of the Commission resolution 1993/7 of 23 February 1993, UN Doc. No. E/CN.4/1994/4, 19 May 1993 (appended to the Prosecution Brief as Attachment B), at para. 20.

[29] In the *Nikolić* case, Trial Chamber II accepted that the high number of victims and the multitude of criminal acts counted as factors aggravating the crimes committed. *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Judgement"), para. 213. In the *Deronjić* case, the Appeals Chamber discussed whether the offence of persecution as a crime against humanity requires that there be a large number of victims of a particular accused person. *Deronjić* Appeals Judgement, paras. 108–111. If this were the case, then the number of victims could not additionally be considered as an aggravating factor, as it would already be an aspect of the gravity of the offence. The Appeals Chamber emphasised that "in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population; however, this requirement only applies to the attack and not to the individual acts of the accused." *Ibid*, para. 109, footnotes omitted. Therefore, "a single or limited number of acts on [the accused's] part would qualify as a crime against humanity." *Ibid*. The Appeals Chamber found that the appellant had not established an error on the part of the Trial Chamber in its determination that the large number of victims in that case constituted an aggravating factor, as he had not demonstrated that the Trial Chamber took this into account twice as part of the gravity of the offence *and* as an aggravating factor.

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33. The Factual Basis for Counts 3 to 6 of the Indictment describes the horrific ordeal of a Bosnian Muslim woman—Witness A—at the hands of Bralo and other members of the "Jokers," over a lengthy period of time. Her brutal rape and torture, and her imprisonment for approximately two months to be further violated at the whim of her captors, are crimes of a most depraved nature. The Trial Chamber emphasises once again that international humanitarian law, along with basic principles of humanity, require that individuals who are detained during an armed conflict must be treated humanely, and that the rape and torture of a woman in this context is a most heinous crime requiring unequivocal condemnation.

34. With regard to the exacerbated humiliation and degradation of Witness A by Bralo, the Trial Chamber finds that this should be considered as a factor which further aggravates the gravity of an already extremely serious offence. Bralo threatened Witness A's life while she was being interrogated, he raped her in front of an unknown number of other people over an extended period of time, and he bit her and ejaculated repeatedly over her body during his prolonged assault of her. These actions demonstrate a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors. It is therefore incumbent upon the Trial Chamber to take into account these particular circumstances as having aggravated the gravity of his rape of Witness A.

35. The charges contained in counts seven and eight of the Indictment pertain to the role of Bralo in the detention of Bosnian Muslim civilians, who were used as labourers in the digging of trenches in and around the village of Kratine. Bralo was among members of the HVO who guarded these detainees and directed their work, in adverse weather conditions and with limited food or rest, under threat of physical harm. The enthusiasm of Bralo for this task, and his desire to humiliate these Muslim detainees, is evidenced by his conduct in forcing them to perform a Catholic religious ritual before work began. Moreover, the detainees were also at risk of being struck by sniper-fire from the Army of Bosnia and Herzegovina, as their positioning was such that they were used, by Bralo and others, as "human shields" to protect the HVO forces from such sniper attack. Bralo was aware of the prospect that the detainees under his control might be injured or killed as a result of their positioning in this way, and yet did nothing to alleviate the situation. He must therefore be considered as a knowing participant in yet another crime involving the serious mistreatment of detained civilians, a reprehensible offence. The fact that there were numerous victims of the crimes charged in counts seven and eight is also taken into account by the Trial Chamber as a factor that aggravates the gravity of these crimes.

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2. Impact on victims

36. In addition to examining the manner in which Bralo committed the crimes of which he has been convicted, the Trial Chamber takes into consideration the submissions of the Prosecution on the impact of these crimes on his victims. It notes that the Defence has explicitly acknowledged the suffering of Bralo's victims, both at the time of commission of his crimes, and in the months and years afterwards.[30] The Defence has further agreed with the Prosecution that the victim impact statements provided to the Trial Chamber are both powerful and affecting.[31] These statements are discussed here in turn, relating to Counts 1, 2 and 3–6 of the Indictment.

37. The Prosecution has submitted several statements from people who survived the attack on Ahmići and whose relatives were killed in the course of that attack. The Trial Chamber appreciates the willingness of these victims to describe their ordeal and the consequences of the attack upon their lives since. Elver Ahmić, who turned fourteen years old in 1993, watched as his mother and eight-year old brother were killed on 16 April of that year. He was also wounded in the attack, and still has medical problems as a result of bullets and shrapnel that remain in his body, along with the emotional pain caused by the death of his mother and brother.[32] Adnan Zec, who was thirteen years old at the time of the attack, also witnessed his mother, father and eleven-year old sister being killed and was himself injured. His statement expresses the mental and physical trauma that he has experienced since the time of the attack and the heavy toll that the loss of his family has exacted upon him.[33] In his statement, Abdullah Ahmić describes how HVO soldiers executed his father on the day of the attack, and also attempted to kill him by shooting him in the head. His physical and psychological health has suffered enormously as a consequence of the attack.[34] Fatima Ahmić and Ćazim Ahmić also lost their spouses in the attack and have described the serious hardships that they now face in their daily lives.[35] A statement was also given by a person whose family members were part of the group of fourteen men, women and children killed by Bralo and another soldier as they escorted them towards Kaonik following the attack on Ahmići. The loss of these family members has caused this person immense distress, manifesting itself in serious physical and psychological problems.

[30] *Bralo* Sentencing, Transcript, T. 115 (20 October 2005).
[31] *Ibid.*
[32] Prosecution Brief, Attachment G.
[33] Prosecution Brief, Attachment H.
[34] Prosecution Brief, Attachment I.
[35] Prosecution Brief, Attachments K and L.

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38. The Trial Chamber further notes the statement made by the widow of one of the men murdered by Bralo, as well as that of a care-worker who works with her. She has experienced, and continues to experience, constant fear and emotional distress as a result of the loss of her husband and her expulsion from her home.

39. Finally, the Trial Chamber has read a summary of an interview with Witness A, the woman who was so brutally raped and mistreated by Bralo and other members of the "Jokers." The trauma experienced by Witness A at the time of her detention and rape, and on an ongoing basis, is undeniable, and the Trial Chamber appreciates her agreement to once again describe her ordeal and its consequences.

40. These statements paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma. The Trial Chamber is therefore mindful of the suffering of these victims, and of all of the other Muslim residents of Ahmići and Nadioci who were persecuted or otherwise abused by Bralo in the course of the attacks on their villages. It observes that the consequences of the persecution, murders, rape, and other crimes committed by Bralo are profound and long-lasting and takes this into consideration in its determination of sentence.

41. In conclusion, the Trial Chamber finds that Bralo committed a range of appalling crimes, the gravity of which is aggravated by the particular manner in which he committed them, including the number of victims (Counts 1, 2 and 7–8), the youth of some of his victims (Count 1), and the degree of humiliation and degradation of Witness A (Counts 3–6).

B. Mitigating Circumstances

42. Mitigating circumstances may result in an adjustment of the sentence that would otherwise be imposed on a convicted person. The acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions. Indeed, such circumstances may be unconnected with the commission of the crime itself, and can arise many months or years after the event. While aggravating circumstances must be proved beyond a reasonable doubt, mitigating circumstances need only be proved on a balance of probabilities.[36]

[36] *See Čelebići* Appeals Judgement, para. 590.

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1. Arguments of the Parties

43. The Defence submits that there are a number of mitigating circumstances that the Trial Chamber should consider in the present case. In its Sentencing Brief, it lists these as:

- the prior good character of Bralo;
- the immediate background to the commission of the offences;
- the use of Bralo by his superiors;
- the time period covered by the Indictment;
- the sheltering of others by Bralo;
- his steps towards rehabilitation;
- his voluntary surrender;
- his guilty pleas;
- his remorse;
- his co-operation of value to the Tribunal; and
- his co-operation of value to the people of Ahmići.[37]

The Defence also requests that the Trial Chamber take into account the circumstances of the individual offences,[38] and the personal circumstances of Bralo,[39] although these are not explicitly listed as mitigating factors. Given that these additional circumstances are pleaded, in essence, as mitigatory in nature, the Trial Chamber will consider them along with the other mitigating circumstances asserted. Moreover, among the additional material submitted by the Defence to the Trial Chamber on 29 November 2005 was a memorandum from Tim McFadden, the Chief of the United Nations Detention Unit in the Hague, relating to Bralo's good conduct while in detention. The Trial Chamber regards the inclusion of this statement as the submission by the Defence of evidence of a further proposed mitigating factor, and discusses it accordingly below.

44. In its Sentencing Brief, the Prosecution argues that mitigating circumstances should not be given too much weight in a case of this nature.[40] It further states that the low rank of the perpetrator of a crime is not a mitigating circumstance.[41] It does, however, agree that Bralo should be given credit for his voluntary surrender to the Tribunal, and for his guilty plea. With regard to the family circumstances of Bralo, the Prosecution states that these should not be given any significant weight in a case of this gravity.[42]

[37] Defence Brief, paras. 64–85.
[38] Defence Brief, paras. 46–61.
[39] *Ibid*, paras. 2–24.
[40] Prosecution Brief, para. 79.
[41] *Ibid*, para. 80.
[42] *Ibid*, para. 87.

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45. At the Sentencing Hearing, the Prosecution reiterated that Bralo was entitled to plead his voluntary surrender and his guilty plea as mitigating circumstances.[43] The Prosecution further acknowledged that Bralo was genuinely remorseful, and that this should also be taken into account as a mitigating circumstance.[44] However, with regard to substantial co-operation by Bralo with the Office of the Prosecutor, the Prosecution disputed that such co-operation had occurred.

2. Discussion

46. Much of the information supplied by the Defence for consideration by the Trial Chamber in its determination of sentence falls into overlapping categories, which may or may not be considered as mitigating circumstances. The Trial Chamber here examines this information and makes findings on its relevance with regard to sentencing.

(a) Personal background of Bralo and prior character

47. In its Sentencing Brief, the Defence describes Bralo's childhood as one that was difficult but not extraordinary. It further outlines his conscription into the HVO in 1991, and his training and combat activities, which had an emphasis on mining and de-mining. The Defence asserts that prior to February 1993 Bralo had no criminal record. He was then detained for the killing of a neighbour, Esad Salkić, before he committed the crimes for which he has been convicted by this Tribunal. At the time of his commission of these crimes, he was 25 years old. He has been married twice, and his second wife and daughter were tragically killed in a fire in 1998. He also has a son. The Defence has submitted statements from people, including close family members, who knew him before and after the commission of his crimes. They variously describe him as being honest, hardworking and decent prior to the armed conflict, but as a broken man after the period in which he committed the crimes of which he has been convicted.[45]

48. While prior good character and the family circumstances of an accused may, in some cases, be taken into account as mitigating factors, the Trial Chamber finds that in the present case they have only limited bearing on the sentence to be imposed.[46] Where an accused has been convicted of extremely serious crimes, committed in a particularly brutal manner, the fact that he may have no

[43] *Bralo* Sentencing, Transcript, T. 108 (20 October 2005).
[44] *Bralo* Sentencing, Transcript, T. 109 (20 October 2005).
[45] Statements of Ruza Bralo, Goran Gogic, Branko Perkovic, Bozica Jukic, appended to the Defence Brief.

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history of offending does not necessarily militate in favour of a more lenient sentence. Moreover, the family circumstances of this Accused are of minor relevance to his sentence, and he was not of such a young age at the time of commission of his crimes that this should be taken into consideration by the Trial Chamber.[47] Therefore, the Trial Chamber notes the mitigating family and personal circumstances of Bralo, but ascribes little weight to them in its determination of sentence.

(b) Circumstances of Bralo prior to and surrounding his commission of the offences, and use of Bralo by his superiors

49. The Defence submits that the political situation in Vitez was very unstable in 1991, and that in September of that year Bralo was conscripted into the HVO. It states that for more than a year, he underwent military training and was involved in active combat with Serb forces. It asserts that, in February 1993, Bralo's home was targeted in a grenade attack, which broke the windows and brought down some of the roof. The Defence states that Bralo chased down the individual he believed responsible for the attack, who was one of his neighbours, and shot and killed him. He then used explosives to destroy this man's house. Subsequently, Bralo was arrested by the local police and taken to prison in Kaonik.

50. According to the Defence, after spending several weeks in prison, Bralo was released on 15 April 1993, on the condition that he participate in the attack on Ahmići that was planned for the following day, as a member of the "Jokers." With regard to the commission of the crimes for which he has been convicted, the Defence asserts that he was under orders to kill civilians and destroy homes in the course of the attack on Ahmići. While no further evidence of the existence of such orders has been tendered, the Factual Basis for the Plea Agreement states that those who participated in the attack on Ahmići were given express instructions to ethnically cleanse it, to kill all the Muslim males of military age, and others bearing arms, to burn all Muslim residences, and to forcibly expel all the Muslim residents from the village. The Defence also argues that Bralo was used as a "weapon of war" by his superiors, in the period between April and May 1993. The

[46] *See, e.g.*, *Kordić* Appeals Judgement, para. 1090; *Prosecutor v. Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement"), para. 75; *Furundžija* Trial Judgement, para. 284.

[47] In the *Kunarac* case, the Appeals Chamber stated "Article 24(2) of the Statute requires the Trial Chambers to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. Such circumstances can be either mitigating or aggravating. Family concerns should in principle be a mitigating factor." *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002, para. 362.

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Defence finally submits that Bralo continued to fight for the HVO from his release from prison until late in 1994, when he refused to participate in the conflict any more.

51. The Trial Chamber is aware of the deteriorating political and military situation in the municipality of Vitez, and indeed in central Bosnia, in the 1992–1993 period. It further notes that tension and animosity between the Bosnian Croat and Muslim communities in the region escalated in mid-1992,[48] resulting in armed conflict between the HVO and the army of Bosnia and Herzegovina.[49] The Defence requests that the Trial Chamber be mindful of the "enormous pressures placed on many people of good character and of bad character" in this particular context.[50] While it is notorious that such pressures existed, the Trial Chamber nonetheless finds that they cannot be considered in any way relevant to the sentence to be imposed upon Bralo for the crimes of which he has been convicted. Large sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.

52. Moreover, the Trial Chamber finds that the attack on Bralo's home in February 1993, and his subsequent killing of the person he believed responsible for that attack, cannot serve as a mitigating circumstance in the present case. Indeed, it is surprising that the Defence should bring evidence of a prior violent crime apparently committed by Bralo, but for which he has not been convicted, as a mitigating factor. If this evidence has been brought in order to demonstrate some kind of justifiable fear felt by Bralo in the context of the breakdown of community relations between the Croat and Muslim communities in his home area, then the Trial Chamber reiterates that the tensions that existed in the region at the relevant time can in no way act in mitigation of the sentence to be imposed upon Bralo for his commission of serious, violent crimes.

53. Separately, the Trial Chamber notes the Defence submission that, as a consequence of his actions in February 1993, Bralo was held in custody in Kaonik prison until 15 April of that year. The Factual Basis for the Plea Agreement between the Prosecution and Bralo also indicates that he was released from this prison on the condition that he participate in the attack on Ahmići. The Trial Chamber therefore accepts that Bralo was under some pressure to become a member of the "Jokers" and to be actively involved in combat operations carried out by the HVO. There is no evidence to

[48] *See Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, and Vladimir Šantić*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 125.

[49] *See ibid.*, para. 162. See also *Prosecutor v. Kordić and Čerkez*, Case No. IT95-14/2-T, Judgement, 26 February 2001, paras. 531–533.

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suggest that he attempted to resist this pressure, but the question is nonetheless raised of whether he was acting under duress when he committed his crimes and, or alternatively, whether his crimes were committed as a result of superior orders. Duress and superior orders are separate, but related, concepts and either may count in mitigation of sentence.[51]

54. Bralo has not, however, alleged any form of duress emanating from his superiors such that he was compelled to commit the crimes of which he has been convicted. Nor has he specifically pleaded superior orders as a factor in mitigation of sentence. He has taken full personal responsibility for those crimes and has acknowledged that he knew them to be wrong. It is the duty of any person involved in an armed conflict to comply fully with the relevant norms of international humanitarian law and, while Bralo may have been pressured to participate in combat activities, he remained legally and morally obliged to conduct himself in accordance with those norms. Once again, the Trial Chamber recalls the particularly brutal treatment of Witness A by Bralo, his participation in the killing of numerous civilians, including children, and his humiliation of civilian detainees by forcing them to perform a religious ritual. All of his actions display his complete contempt at the time for the laws governing armed conflict, along with a shocking disregard for the value of human life and dignity.

55. In addition, the Trial Chamber notes that Bralo did indeed have a choice with regard to his continued participation in the combat activities of the HVO following his release from prison. The Defence has stated in its Sentencing Brief that he chose, in late 1994, not to fight any more, and refused to leave his bed in Nadioci.[52] It has not been argued that he suffered any negative consequences in the sense of disciplinary or other action following his refusal to fight at that point. Bralo therefore could, and should, have refused to participate in combat activities at an earlier stage if he was given orders that he knew to be unlawful, or was required to engage in activities that he knew to be illegal. While the Trial Chamber has not received evidence of the orders that he was given to kill civilians and destroy civilian homes in the context of the attack on Ahmići, such orders are referred to in the Factual Basis, and their existence is therefore not questioned. However, these

[50] *Bralo* Sentencing, Transcript, T. 120 (20 October 2005).

[51] Article 7(4) of the Statute of the International Tribunal provides: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." In the *Erdemović* case, the Appeals Chamber held that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings." In its subsequent decision in the case, the Trial Chamber found that duress could be pleaded in mitigation. *See Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997, para. 19; and *Prosecutor v. Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, para.17.

[52] Defence Brief, para. 10.

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orders would have been so manifestly unlawful that Bralo should have refused to implement them. No evidence has been submitted, and no argument made, that he made any attempt to resist the undertaking of the crimes he committed.

56. The Trial Chamber therefore finds that Bralo's circumstances in the period leading up to and surrounding the commission of his crimes do not amount to mitigating circumstances. The Chamber also finds that any orders given to Bralo to kill civilians and destroy homes would have been manifestly unlawful, such that they have no mitigatory value in the determination of sentence in the present case. While it may be the case that Bralo was used by his superiors as a "weapon of war," once again the Trial Chamber finds that this has no bearing upon the appropriate punishment that he should receive for his crimes.

(c) Time period covered by the Indictment

57. The Defence argues that the time period of the Indictment is limited to approximately three months, and that this limited time period should be taken into account as a mitigating circumstance.[53] The Defence cites the *Kordić and Čerkez* case in support of its position, where the Appeals Chamber noted, with regard to the accused Čerkez, "[as] [o]pposed to the timeframe in the Indictment, his criminal responsibility is limited to a relatively short period of time (approximately 14 days)."[54]

58. In the present case, however, there is only one person accused and convicted of the crimes charged in the Indictment and there cannot therefore be any comparison between the timeframe of the offences committed by this person and any co-accused. In addition, the crimes of which Bralo has been convicted were perpetrated over a period from 15 April 1993, to some time in July 1993, that is, over eleven to fifteen weeks. The Trial Chamber does not consider this to be a short period of time and notes that Bralo has been convicted on the basis of a series of violent and depraved acts, rather than for a single act or set of acts committed on one occasion. The Trial Chamber does not, therefore, attribute any weight to the time period of the Indictment as a mitigating circumstance.

[53] Defence Brief, paras. 69–70.
[54] *Kordić and Čerkez* Appeals Judgement, para. 1090.

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(d) Sheltering of others

59. The Defence submits that there is evidence that Bralo sheltered and assisted some people in the same time period as his crimes were committed. It provides statements from three people who say they were helped and protected by Bralo in this period.[55] The Trial Chamber notes that, in some cases, substantial assistance to, or protection of vulnerable individuals by an accused person may constitute mitigating circumstances. For example, where an accused person participated in the detention of a number of people, and where he assisted some of those detainees, or alleviated their suffering in some way, this may be considered as a factor in mitigation of sentence.[56] In the present case, of the people who have given statements to the effect that they were helped by Bralo, one states that he and Bralo were old friends, and the others had a family connection to him. The Trial Chamber finds that the fact that he chose to act in this manner with regard to these particular people demonstrates that he was capable of moral action. It does not, however, have any bearing on the sentence that he should receive in punishment for his particular crimes.

(e) Voluntary surrender, guilty plea, remorse, and steps towards rehabilitation

60. Bralo's voluntary surrender and guilty plea before the Tribunal are inextricably linked to his remorse and steps towards rehabilitation, and are therefore considered here together.

61. The Defence submits, and the Prosecution does not dispute, that Bralo surrendered voluntarily to the Tribunal in 2004, when he learned of the Indictment against him. The Trial Chamber agrees that the voluntary surrender of an accused person should be considered as a mitigating circumstance, and thus will give credit to Bralo for this.

62. The Defence also submits that the fact that Bralo pleaded guilty to the charges against him, and indeed voluntarily gave information that led to the addition of a new charge to the Indictment, are important mitigating circumstances. The Prosecution agrees that Bralo's guilty plea constitutes a mitigating factor, as it spares witnesses from being required to come and give evidence; it was

[55] Statements of Ferid Ahmic, Bozica Jukic and Natalija Krizenac, attached to the Defence Brief.

[56] *See, e.g., Prosecutor v. Sikirica, Došen and Kolundžija*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001, para. 195.

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made long before trial and therefore results in the saving of limited resources; and it may contribute to the process of reconciliation in the region of central Bosnia.[57]

63. The Trial Chamber notes that Bralo pleaded guilty to an Indictment that contains significantly fewer charges than the indictment that was originally filed against him. However, the Plea Agreement between the parties states unequivocally that the guilty pleas were not entered on the basis of any promises or inducements on the part of the Prosecution. Furthermore, while some counts were removed from the Indictment, it is noteworthy that a new charge of persecution as a crime against humanity was added, based partly on information supplied by Bralo.

64. The entering of a guilty plea prior to trial, to charges of the seriousness of those contained in the Indictment, is a significant step for an accused person to take. Substantial human and practical benefits flow from a plea of guilty, particularly one tendered at an early stage in the proceedings. Victims and witnesses who have already suffered enormous psychological and physical harm are not required to travel to the Hague to recount their experiences in court, and potentially re-live their trauma. In addition, scarce legal, judicial and financial resources that would otherwise be expended in preparing for and conducting a lengthy and expensive trial may be redeployed in the interests of securing the wider objectives of the Tribunal.

65. Furthermore, where the plea, and the circumstances in which it came to be made, involves a profound acknowledgement of personal responsibility, it may demonstrate that an accused is genuinely remorseful.

66. As additional evidence of his genuine remorse, the Defence submits that Bralo took steps to atone for his crimes, prior to his surrender and transfer to the Hague. It states that, between late 1999 or early 2000 and his surrender in 2004, he worked in the community at Majcino Celo and Citluk, in south-eastern Bosnia and Herzegovina, and has provided witness statements to this effect.[58] The Defence argues that there is evidence to suggest that, in the period after the armed conflict, Bralo found it increasingly difficult to cope with his conscience, but that he made a significant positive contribution to those with whom he lived.[59]

[57] Prosecution Brief, para. 85.
[58] Defence Brief, para. 20, and statements of Witness J and Witness L, attached to the Defence Brief.
[59] *Ibid*, para. 73.

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67. The Defence also refers to Bralo's statement, which is appended to its Sentencing Brief, acknowledging his responsibility for his crimes and apologising to his victims.[60] In addition, it has submitted evidence that Bralo has attempted to assist in the location and exhumation of the bodies of those who were killed by him and others during the attack on Ahmići, and in the identification of areas that were mined by the HVO during the conflict.[61] The Defence argues that these actions demonstrate his remorse, his desire for personal rehabilitation, and his desire to assist in the rehabilitation of the communities so badly damaged by the conflict in which he was involved.

68. At the Sentencing Hearing, the Prosecution stated that it was of the view that Bralo is genuinely remorseful and has "embarked on a personal voyage of reconciliation and atonement."[62]

69. The Trial Chamber accepts that, after the end of the armed conflict, Bralo was devastated by the trauma of the conflict and the part that he played in it. He attempted to surrender himself to the Tribunal in 1997, despite being unaware of the actual existence of an indictment against him.[63] He also engaged in community work in a different region of Bosnia and Herzegovina. His efforts to assist in the location of the remains of his victims and others killed in the course of the conflict, and to aid de-mining operations, are to be commended, and the Trial Chamber is mindful of the statement given by Zaim Kablar, who has been involved in the location and exhumation of bodies in central Bosnia, and who has described the importance of Bralo's contribution to finding the remains of several of his victims, and the positive effect that this has had on the families of those victims and the local community.[64] His acknowledgement of responsibility for his crimes and expressions of regret directed to his victims are important indicators that he has undergone a personal transformation. The Trial Chamber is confident that this transformative process will continue as he serves his sentence and that his punishment will have a further rehabilitative effect.

70. The Trial Chamber therefore considers that Bralo's plea, taken with his behaviour following the appalling events of the Indictment, and particularly the efforts he has made to try to atone for his crimes, demonstrate that he is genuinely remorseful.

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[60] *Ibid*, para. 78.

[61] *Ibid*, paras. 79–80. A statement from Zaim Kablar, a member of the Federal Commission for Finding Missing Persons in Bosnia and Herzegovina, is among the Supplementary Sentencing Materials filed by the Defence on 29 November 2005. This statement describes Bralo's assistance in locating the remains of several people killed during the conflict, including victims of some of the crimes of which he has been convicted.

[62] *Bralo* Sentencing, Transcript, T. 109 (20 October 2005).

[63] Defence Brief, para. 13.

[64] Statement of Zaim Kablar, appended to the Supplementary Sentencing Materials filed on 29 November, Annex E2.

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71. The Trial Chamber further recognises that Bralo's guilty plea, combined with his genuine remorse, is likely to have a positive effect on the rehabilitation of the victims of his crimes, and their communities. As stated by Mehmed Ahmic, the current President of the Ahmići Municipality Council, Bralo is the first person charged by the Tribunal with crimes committed in that area who has admitted his criminal conduct. It accepts his view that this acknowledgement of wrongdoing is extremely important for the entire community in its continuing process of recovery and reconciliation.[65]

72. The Trial Chamber accordingly considers that Bralo's voluntary surrender, his plea of guilty, the steps he has taken to atone for his crimes, and his genuine remorse, are all significant mitigating factors.

(f) Co-operation with the Office of the Prosecutor

73. Rule 101(B)(ii) clearly states that "substantial co-operation with the Prosecutor" by a convicted person may count as a mitigating circumstance in sentencing. In its Sentencing Brief, the Defence includes a section on "positive co-operation of value to the Tribunal." In this section, it states that (a) Bralo handed over documents to UN authorities in 1997, which have been used in at least one trial; (b) Bralo renders himself compellable before the Tribunal as a witness in future proceedings, and has placed no restriction on the use of the Factual Basis for the Plea Agreement in other cases; and (c) Bralo has supplemented the Factual Basis with a further detailed statement, which may be the basis for further enquiries by the Prosecution.[66]

74. In addition, at the Sentencing Hearing the Defence argued that, while Bralo refused to meet privately with the Prosecution in the United Nations Detention Unit, to give an interview, he is willing to be questioned by the Prosecution, or the Chamber, in some formalised way. The Defence proposed a kind of deposition procedure as a possible manner in which such formal questioning could take place, emphasising Bralo's desire that it be done on the record rather than behind closed doors, in order to minimise the threats to his and his family's safety that would be consequent upon any hint that a private deal had been struck by him with the Prosecution. The Defence requested guidance from the Trial Chamber on how such a process could be undertaken, and submitted that the willingness of Bralo to go through the process should be taken into account as a form of co-

[65] Statement of Mehmed Ahmic, appended to Defence Brief.
[66] Defence Brief, paras. 81–83.

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operation with the Prosecution. The Defence finally argued that the Factual Basis for the Plea Agreement may be being used in another case, which is not the subject of public proceedings, and it sought to know whether this was indeed the case as it might be evidence that goes to Bralo's co-operation.

75. In response to the proposal for some kind of deposition proceedings, the Prosecution stated at the Sentencing Hearing that this would not amount to "substantial co-operation" within the meaning of Rule 101(B)(ii). It further argued that any person could be compelled to appear as a witness before the Tribunal, and that Bralo's willingness to be so compelled could not therefore amount to a positive act of co-operation. The Prosecution cited the *Blaškić* Judgement and the *Todorović* Judgement in support of the view that any evaluation of the co-operation of an accused person depends on the extent and quality of the information that he provides.[67] It also argued that the written statement given by Bralo, and appended to the Defence Brief, is incomplete, in that there are areas which he did not discuss. The Prosecution further compared the purported co-operation of Bralo with the types of co-operation that it has received from other accused in other cases, in which original documentation has been provided; the accused person has submitted himself to interviews with the Prosecution; and the accused has given actual testimony in cases. Finally, the Prosecution stated that it was not able to confirm whether or not the Factual Basis was being used in another case, due to its confidentiality obligations, but noted that it had provided the Trial Chamber on an *ex parte* basis with information that could be analysed to determine its value as evidence of co-operation by Bralo with the Prosecution.

76. There exists, therefore, a profound difference between the submissions of the Prosecution and the Defence over whether Bralo has provided "substantial co-operation" that should be taken into account as a mitigating circumstance. This dispute does not concern the facts of what Bralo has or has not done, but rather the meaning to be attached to his acts or omissions and the value to be placed on them as evidence of co-operation. The Trial Chamber concurs with the finding in the *Vasiljević* Trial Judgement, which was upheld on appeal, that the amount of co-operation given by an accused need not be "substantial" for it to be taken into account in the first place.[68] In other words, the Trial Chamber can assess any purported co-operation given by Bralo to the Prosecution and determine its value and the weight to be given to it, if any, as a mitigating circumstance. The

[67] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement"), para. 774; *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Judgement, 31 July 2001, para. 86.

[68] *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 299; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 180.

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Trial Chamber also agrees with the *Blaškić* Trial Chamber that "the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides."[69]

77. In the Prosecution's view, co-operation of a nature that should be considered as a factor in mitigation of punishment has not occurred in the present case. The Trial Chamber notes, however, that the Prosecution has not disputed that Bralo did provide some documents to the international forces in Bosnia and Herzegovina in 1997, which have been used in other proceedings before the Tribunal. Without having itself received this information, it is difficult for the Trial Chamber to assess its quantity and quality, but it takes into account its provision nonetheless.

78. In addition to the provision of documentary material, the Trial Chamber takes into consideration the professed willingness of Bralo to provide further information to the Prosecution in the form of some kind of deposition. It notes, however, that Bralo has refused to meet privately with the Prosecution for an interview, which is the normal procedure for the taking of information from an accused or convicted person, out of a fear that this would have consequences for his and his family's safety. Whether or not these fears are justified, it remains the case that it is the function of the Prosecution to gather information and evidence for use in trials before the Tribunal, and it is not for a Trial Chamber to interfere in that evidence-gathering process. It is in the context of a particular trial that the Chamber hearing that particular case is empowered to issue orders for the taking of depositions pursuant to Rule 71. Therefore, this Trial Chamber cannot issue a general order for a deposition to be taken from Bralo, which does not relate to specific trial proceedings. Nonetheless, for the purposes of assessing Bralo's "substantial co-operation" with the Prosecution, the Trial Chamber takes into account his willingness to be available to give some kind of deposition to the Prosecution, as discussed at the Sentencing Hearing.

79. The Trial Chamber finds, however, that his willingness to give oral or written testimony in future cases has limited value, for it does not go beyond what is required of any individual who is called to give evidence to the Tribunal.

80. Finally, with regard to the use that may be made of the Factual Basis agreed between Bralo and the Prosecution, the Trial Chamber finds that this is also of limited value as evidence of co-operation from Bralo. While he has placed no restriction on the use of the Factual Basis, and therefore is not being obstructive, it does not necessarily follow that he is being positively co-

[69] *Blaškić* Trial Judgement, para. 774.

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operative with the Prosecution. Therefore, even if the Factual Basis is being used by the Prosecution in other cases before the Tribunal, its use does not imbue it with value as evidence of co-operation from Bralo.

81. In conclusion, the Trial Chamber finds that there is not evidence of "substantial" co-operation from Bralo with the Prosecution. There is evidence of some co-operation, in the form of provision of documents and a willingness to give information, albeit in a prescribed format, and the Trial Chamber gives that appropriate weight as moderate co-operation.

(g) Behaviour in the United Nations Detention Unit

82. The Defence has submitted a statement from Tim McFadden, Chief of the United Nations Detention Unit in the Hague, which describes Bralo's behaviour in detention as good. The Trial Chamber notes that good behaviour in detention may be considered as a mitigating circumstance,[70] and accordingly takes it into account in the determination of sentence in the present case.

3. Conclusion

83. The Trial Chamber therefore finds that Bralo is entitled to have the following mitigating circumstances taken into consideration:

(1) his family and personal circumstances;
(2) his guilty plea long before trial;
(3) his remorse and efforts to atone for his crimes;
(4) his voluntary surrender to the Tribunal;
(5) his co-operation with the Prosecution; and
(6) his good behaviour in detention.

While the Trial Chamber gives little weight to the first, fifth and sixth of these circumstances, it does consider that Bralo's guilty plea and the time at which it was tendered, along with his remorse and efforts to atone for his crimes, and his voluntary surrender, together warrant substantial modification of the sentence that would otherwise be appropriate.

[70] *See, e.g., Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 728; *Kordić and Čerkez* Appeals Judgement, para. 1091; *Banović* Sentencing Judgement, para. 63.

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C. The General Practice Regarding Prison Sentences in the Courts of the former Yugoslavia

84. The Prosecution correctly points out in its Sentencing Brief that the Trial Chamber is required to take into account the sentencing practices of the courts of the former Yugoslavia.[71] While a Trial Chamber should have "recourse to"[72] and should "take into account"[73] the general practice regarding prison sentences in the courts of the former Yugoslavia, it is not bound by such practice.[74] In the *Krstić* case, the Appeals Chamber endorsed the position enunciated in the *Kunarac* Trial Judgement:

> Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.[75]

85. The Criminal Code of the Socialist Federative Republic of Yugoslavia ("SFRY") was adopted in 1976, and served as the applicable law in the entire territory of the former Yugoslavia until 1991.[76] 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.[77] Therefore, at the time relevant to this Indictment, the law that was applicable in Bosnia and Herzegovina was the SFRY Criminal Code.

86. 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 that may be imposed in that jurisdiction, including capital punishment and imprisonment.[78] Further, Article 38 of the SFRY Criminal Code sets out the terms of imprisonment: although imprisonment could not usually exceed 15 years, this

[71] Prosecution Brief, para. 89.
[72] Article 24 of the Statute.
[73] Rule 101(B) of the Rules.
[74] *See*, e.g., *Blaškić* Appeals Judgement, para. 681.
[75] *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 829, cited with approval in *Krstić* Appeals Judgement, para. 260.
[76] *See Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 57.
[77] *Ibid*.
[78] *Ibid*, para. 58.

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was extended to a maximum of 20 years for those crimes otherwise eligible for the death penalty.[79] In 1977, the death penalty was abolished in some republics of the SFRY by constitutional amendment, but Bosnia and Herzegovina was not among them.[80] When Bosnia and Herzegovina 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.[81]

87. The Prosecution directs the attention of the Trial Chamber to Article 142 of the SFRY Criminal Code, entitled "Criminal Offences Against Humanity and International Law," which covers crimes committed during armed conflict. Article 142 of the SFRY Criminal Code 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.[82]

88. The Trial Chamber finds that of the provisions within the SFRY Criminal Code, Article 142 most closely reflects the criminal conduct for which Bralo has been convicted under count 1 to 8 of the Indictment. In the former Yugoslavia, such criminal conduct would have been eligible for the death penalty, or twenty years in lieu of the death 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 also notes that Article 41(1) of the SFRY Criminal Code directs courts in that jurisdiction to take into consideration all of the relevant circumstances,

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[79] *Ibid*. 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.

[80] Prosecution Brief, para. 92 (citing *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Momir Nikolić* Sentencing Judgement"), para. 98).

[81] *See* Prosecution Brief, para. 96 (citing, *inter alia*, *Momir Nikolić* Sentencing Judgement, at para. 98). 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."

[82] 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.

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including the personal circumstances of the convicted person and his conduct after the commission of the offences, in their determination of the appropriate punishment to be imposed.

89. The Trial Chamber takes all of these factors relating to sentencing practices in the former Yugoslavia into consideration in making its determination in this case.

V. TRIAL CHAMBER'S DETERMINATION OF SENTENCE

A. Submissions of the Parties

90. Following all of the arguments raised in its Sentencing Brief, the Prosecution requests that the Trial Chamber impose a minimum term of imprisonment of 25 years on Bralo.[83] It further clarified at the Sentencing Hearing that it was requesting a mandatory minimum of 25 years imprisonment, before Bralo could be considered for release. Citing the case of *Dragan Nikolić*, the Prosecution argued that it is permissible for a Trial Chamber to specify a minimum term of imprisonment.[84]

91. While the Defence did not specify in its Sentencing Brief the sentence that it believes appropriate in the present case, in response to the Prosecution argument about the mandatory minimum sentence of 25 years, it stated at the Sentencing Hearing that this would amount to a sentence of 40 to 50 years in a country which gives between one third and one half of credit for good behaviour.[85]

92. In its Sentencing Brief, the Defence chose three previous cases before the Tribunal as comparators with the present case, for the purpose of examining the sentences imposed and ensuring proportionality. The first of these is the *Kordić* case, in which the accused Dario Kordić received a sentence, at trial, of 25 years imprisonment. Kordić had been convicted of overall responsibility for crimes committed by HVO forces in central Bosnia between November 1991 and March 1994, including some of the same crimes charged in the present Indictment. The second case cited by the Defence is the *Kupreškić* case, in which the accused Vladimir Šantić was sentenced at trial to 25 years imprisonment for his commanding role in the attack on Ahmići in

[83] Prosecution Brief, para. 97.
[84] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 95.

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1993, which was reduced to 18 years on appeal. Finally, the Defence also cited the *Furundžija* case, in which the accused Anto Furundžija had originally been charged on the same indictment as Bralo. At trial, Furundžija was sentenced to 10 years imprisonment for his role in the interrogation, torture and rape of Witness A. With regard to the sentences imposed on Kordić and Šantić, the Defence notes that they did not plead guilty to their crimes, that their level of command was considered as an aggravating factor, and that they did not express any remorse.[86] It submits that a lower sentence is therefore appropriate for Miroslav Bralo.

B. Findings

93. The Trial Chamber takes note of the sentences imposed in the cases cited by the Defence, and other prior cases before the Tribunal. However, in none of these cases have individuals been convicted of exactly the same crimes as Miroslav Bralo, committed in the same manner, and with the same aggravating and mitigating circumstances. It is the duty of this Trial Chamber to ensure that the punishment of Bralo is tailored to fit the particular crimes of which he has been convicted, taking into account their gravity and their individual circumstances.[87] Therefore, while other cases may provide guidance on sentencing ranges, they cannot determine the most appropriate sentence to be imposed on Miroslav Bralo.

94. With regard to the imposition of a mandatory minimum sentence, the Trial Chamber notes that, while it may choose to recommend a minimum term of imprisonment to be served by Bralo, this has occurred only rarely in cases before the Tribunal.[88] Article 28 of the Statute and Rules 123, 124 and 125 of the Rules provide for a procedure whereby the State in which a convicted person is serving his sentence must notify the Tribunal of the eligibility of the convicted person for early release, and the President of the Tribunal then determines whether such release is appropriate, taking into account the considerations specified in Rule 125.[89] Therefore, when a Trial Chamber sentences a convicted person to a certain number of years' imprisonment, it does so in the

[85] *Bralo* Sentencing, Transcript, T. 114 (20 October 2005).

[86] Defence Brief, para. 86.

[87] *See Čelebići* Appeals Judgement, para. 717.

[88] *See Krstić* Appeals Judgement, para. 274. Minimum periods of imprisonment to be served prior to release were recommended in the *Tadić* case, the *Stakić* case, and the *Nikolić* case. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997, para. 76; *Prosecutor v. Stakić, Case No.* IT-97-24-T, Judgement, 31 July 2003, para. 253; *Dragan Nikolić* Judgement, para. 282.

[89] Rule 125 states that: "[i]n determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

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awareness that there is a possibility of early release under the law of whatever State the sentence is served in, but also that the President of this Tribunal ultimately determines the matter. In the circumstances of the present case, the Trial Chamber finds it unnecessary to make a recommendation on the minimum sentence to be served by Bralo before he should be eligible for early release.

95. The Trial Chamber has conducted a careful review of the sentences that have been imposed by this Tribunal in other cases. In light of this sentencing practice, and taking account only of the gravity of the crimes committed by Bralo, including the aggravating circumstances, the Trial Chamber finds that a sentence of at least 25 years' imprisonment would be warranted. However, having carefully weighed the mitigating circumstances that have also been found, the Trial Chamber concludes that a single sentence of 20 years' imprisonment is a proportionate and appropriate punishment.

C. Credit for Time Served

96. Miroslav Bralo is entitled to credit for the time he has spent in detention since his transfer to the custody of the Tribunal on 12 November 2004.

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VI. DISPOSITION

97. For the foregoing reasons, the Trial Chamber

PURSUANT TO the Statute and the Rules,

SENTENCES Miroslav Bralo to a single sentence of 20 years' imprisonment;

STATES that, pursuant to Rule 101(C) of the Rules, he is entitled to credit for time served from 12 November 2004, up to and including the day of this Judgement;

ORDERS that, pursuant to Rule 103(C) of the Rules, Miroslav Bralo 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.

_____
Iain Bonomy, Presiding

_____ _____
Patrick Robinson O-Gon Kwon

Dated this seventh day of December 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

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