



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-96-23/2-S

Date: 4 April 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Judgement of: 4 April 2007

PROSECUTOR

v.

DRAGAN ZELENOVIĆ

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. Vladimir Tochilovsky
Ms. Christina Moeller
Mr. Manoj Sachdeva

Counsel for the Accused:

Mr. Zoran Jovanović

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General abbreviations

Bosnia-Herzegovina	Republic of Bosnia and Herzegovina
Bosnian-Serb Republic	Serbian Republic of Bosnia-Herzegovina; on 12 August 1992, the name of the republic was officially changed to <i>Republika Srpska</i>
Factual Statement	Joint Motion for consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 <i>ter</i> , Tab 1 Factual Statement, 14 December 2006
JNA	<i>Jugoslovenska Narodna Armija</i> – Yugoslav People’s Army
Plea Agreement	Joint Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 <i>ter</i> , 14 December 2006
SFRY	Socialist Federal Republic of Yugoslavia
SJB	<i>Stanica Javne Bezbednosti</i> – Public Security Station
TO	<i>Teritorijalna Odbrana</i> – Territorial Defence
UNDU	United Nations Detention Unit
VRS	<i>Vojska Republike Srpske</i> – Army of the Bosnian-Serb Republic

1. Procedural history and plea

1. The initial indictment of 18 June 1996 against Dragan Zelenović was confirmed on 26 June 1996 and included seven other persons.¹ The indictment was amended on 5 October 1999.² A redacted version of the amended indictment (“Indictment”) was filed on 20 April 2001.³ The Indictment charged Mr. Zelenović with seven counts of torture and rape as crimes against humanity and seven counts of torture and rape as violations of the laws or customs of war.

2. Since the initial indictment, a number of warrants for the arrest of Mr. Zelenović have been issued, including one directed to Bosnia-Herzegovina on 26 June 1996 and one to the authorities of all member states of the United Nations on 12 January 2004.⁴

3. On 29 November 2004, the Prosecution requested the President of the Tribunal to appoint a Trial Chamber, in the case of *Prosecutor v. Dragan Zelenović and Gojko Janković*, to which a request under Rule 11 *bis* of the Rules of Procedure and Evidence (“Rules”) could be filed for review.⁵ On the same day, the Prosecution filed a motion for the referral of the case of Dragan Zelenović and Gojko Janković to the authorities of Bosnia-Herzegovina (“11 *bis* Motion”).⁶ On 1 December 2004, the President of the Tribunal appointed a Referral Bench to deal with the motion.⁷ The case of Gojko Janković was referred to the authorities of Bosnia-Herzegovina in accordance with a decision of the Referral Bench on 22 July 2005.⁸

4. According to Mr. Zelenović, he had left Foča in 2000 or 2001 and travelled to Russia under a false name in order to avoid detection and arrest for the crimes charged in the indictment. His

¹ Indictment, 18 June 1996 (filed 19 June 1996) and Review of Indictment Pursuant to Article 19(1) of the Statute, 26 June 1996. The other seven accused were Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovać, Zoran Vuković, Dragoljub Kunarac, and Radovan Stanković. The indictment was amended on 19 August 1998, consolidating the charges against Dragoljub Kunarac, and leaving out references to the seven other accused (Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 19 August 1998). On 30 July 1999, the Prosecutor withdrew the indictment against Dragan Gagović, who had died in the meantime (Order Granting Leave to Withdraw Indictment, 30 July 1999). A second amended indictment against Dragoljub Kunarac and Radomir Kovać was confirmed on 3 September 1999 (Order Granting Leave to File a Second Amended Indictment and Confirming the Second Amended Indictment, 3 September 1999).

² Amended Indictment, 5 October 1999 (filed 7 October 1999).

³ Redacted version of the Amended Indictment, 5 October 1999 (filed 20 April 2001). Janko Janjić was excluded from this redacted version as he had died in the meantime. On 16 February 2000, the Trial Chamber had ordered the severance of the case against Zoran Vukovic (Order for Severance and Combined Case Number, 16 February 2000).

⁴ See Warrant of Arrest and Order for Surrender, 26 June 1996; Warrant of Arrest and Order for Surrender, 29 May 2001; Warrant of Arrest and Order for Surrender, 6 September 2002; Warrant of Arrest and Order for Surrender, 12 January 2004.

⁵ Motion by the Prosecutor under Rule 11 *bis* (A), 29 November 2004.

⁶ Motion by the Prosecutor under Rule 11 *bis* (A) with Annexes I, II, II and Confidential Annexes IV and V, 29 November 2004.

⁷ Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should be Referred to Another Court Under Rule 11 *bis*, 1 December 2004.

family remained in Foča. Mr. Zelenović lived in Russia until he was arrested on 22 August 2005.⁹ On 23 August 2005, the Acting Public Prosecutor of Khanti-Mansiysk, in the Russian Federation, ordered the detention of Mr. Zelenović. The detention was carried out pursuant to “the Decision of the [Tribunal]”.¹⁰ On 8 June 2006, Mr. Zelenović was transferred to Bosnia-Herzegovina, and two days later, on 10 June 2006, he was transferred to the Tribunal and detained at the United Nations Detention Unit (UNDU).¹¹

5. On 9 June 2006, the case was assigned to Trial Chamber I,¹² and on 19 June 2006, Judge Alphons Orié was appointed pre-trial judge.¹³

6. On 12 June 2006, Mr. Tjarda van der Spoel was appointed counsel for the initial appearance.¹⁴ At his initial appearance on 13 June 2006, Mr. Zelenović requested 30 days to enter a plea to the Indictment as he did not have a permanent counsel at that time.¹⁵ At the further initial appearance on 13 July 2006, the pre-trial judge granted Mr. Zelenović additional time to enter a plea since at this time he had still no assigned counsel.¹⁶ At the second further initial appearance on 14 July 2006, after having discussed the Indictment with a lawyer who had been chosen by Mr. Zelenović but not been appointed as counsel, Mr. Zelenović entered a plea of not guilty.¹⁷ On 16 August 2006, Mr. Zoran Jovanović was assigned as counsel for Mr. Zelenović.¹⁸

7. On 17 August 2006, the Referral Bench ordered the parties, and invited the Government of Bosnia-Herzegovina, to file submissions with regard to the 11 *bis* Motion and to submit responses to specific questions, including whether the gravity of the crime and the level of responsibility were compatible with the referral of the case to the War Crimes Chamber of the State Court in Bosnia-Herzegovina.¹⁹ On 20 September 2006, the Government of Bosnia-Herzegovina filed its submission in response to the invitation of the Referral Bench.²⁰ On 21 and 22 September 2006, the

⁸ *Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11 *bis*, 22 July 2005. The decision was upheld on appeal (*Prosecutor v. Gojko Janković*, Decision on 11 *bis* Referral, 15 November 2005).

⁹ Defence Sentencing Brief, Annex A (Detention Order by Acting Khanti-Mansiysk Inter-Municipal Public Prosecutor, 23 August 2005); T. 522-527.

¹⁰ Defence Sentencing Brief, Annex A (Detention Order by Acting Khanti-Mansiysk Inter-Municipal Public Prosecutor, 23 August 2005); T. 552-554.

¹¹ Defence Sentencing Brief, Annex A (Order by the State Court in Bosnia-Herzegovina, 9 June 2006); Order for Detention on Remand, 12 June 2006.

¹² Order Assigning a Case to a Trial Chamber, 9 June 2006.

¹³ Order Designating Pre-Trial Judge, 19 June 2006.

¹⁴ Decision by the Deputy Registrar, 12 June 2006.

¹⁵ T. 370.

¹⁶ T. 388-389.

¹⁷ T. 392-397.

¹⁸ Decision of Deputy Registrar, 16 August 2006.

¹⁹ Order for Further Information in the Context of Prosecutor’s Motion Pursuant to Rule 11 *bis*, 17 August 2006.

²⁰ Response by the Government of Bosnia-Herzegovina to Questions Posed by the Referral Bench in its Decision of 17 August 2006, 20 September 2006 (filed on 10 October 2006).

Prosecution and the Defence, respectively, filed their submissions in response to the order of the Referral Bench.²¹

8. On 14 September 2006, the Defence filed a preliminary motion alleging defects in the form of the Indictment, in particular that the Indictment was “not sufficiently particular to inform [Mr. Zelenović] clearly of the nature of the charges against him”.²² On 22 September 2006, the Prosecution responded that the motion of the Defence should be denied.²³ On 11 October 2006, the Trial Chamber denied the preliminary motion.²⁴

9. On 13 October 2006, a hearing regarding the 11 *bis* Motion was held by the Referral Bench with the parties present, and a delegation of the Government of Bosnia-Herzegovina participating through video-conference link from Sarajevo.²⁵ Concluding this session, the Referral Bench informed the parties that its decision would be given in due course.²⁶ Because of subsequent events no decision was taken on the 11 *bis* Motion. The Prosecution has indicated to the Trial Chamber that it will withdraw the motion subsequent to the rendering of the present sentencing judgement.

10. On 14 December 2006, the Prosecution and the Defence jointly filed a Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 *ter*.²⁷ According to this Plea Agreement, Mr. Zelenović agreed to plead guilty to seven counts of crimes against humanity, three of which charge torture, as provided for by Article 5(f) of the Statute (counts 5, 13, and 41), and four of which charge rape, as provided for by Article 5(g) of the Statute (counts 6, 14, 42, and 49).²⁸ Mr. Zelenović declared his intention to plead guilty, as individually criminally responsible, for the crimes mentioned in relation to the incidents contained in the following paragraphs of the Indictment: 5.4, 5.5, 6.6, 6.8, 6.9, 6.10, 7.13, and 9.2.²⁹ He also agreed to cooperate with the Office of the Prosecutor, including testifying at any trial before the Tribunal.³⁰ The Prosecution agreed to withdraw the remaining charges against Mr. Zelenović at the time of the acceptance of the guilty plea by the Trial Chamber.³¹ Finally, the Prosecution

²¹ Prosecutor’s Further Submissions Pursuant to Referral Bench’s Order of 17 August 2006, 21 September 2006; Defence Submissions Pursuant to Referral Bench’s Order of 17 August 2006, 22 September 2006.

²² Defence Preliminary Motion, 14 September 2006.

²³ Prosecution’s Response to Defence Preliminary Motion, 22 September 2006.

²⁴ Decision on Defence Preliminary Motion, 11 October 2006.

²⁵ T. 404-425.

²⁶ T. 425.

²⁷ Joint Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 *ter*, 14 December 2006 (“Plea Agreement”).

²⁸ Plea Agreement, para. 2.

²⁹ *Ibid.*

³⁰ *Ibid.*, para. 9.

³¹ *Ibid.*, para. 3.

recommended the Trial Chamber to impose a term of imprisonment within the range of 10 to 15 years, while the Defence recommended a term of imprisonment within the range of 7 to 10 years.³²

11. During a hearing on 16 January 2007, the Trial Chamber requested the parties to clarify certain points of the Plea Agreement, in particular the relationship between the incidents which Mr. Zelenović admitted to and the counts he intended to plead guilty to, as well as why certain incidents were qualified as both torture and rape while one incident was qualified only as rape. In response to a question by the Trial Chamber, the Prosecution explained that the exclusion of certain victims, referred to in the Indictment, from the Plea Agreement was based on a consideration of the available evidence.³³ After having heard submissions from both parties, the Trial Chamber stated that it was “not satisfied with the plea agreement as a written basis for receiving pleas from Mr. Zelenović”.³⁴ The Trial Chamber requested the parties to file, as an annex to the Plea Agreement, a copy of the Indictment in which the parties would strike out all parts to which Mr. Zelenović did not intend to plead guilty. This would include a clarification of the mode of liability and the number of victims under each count.³⁵

12. On 16 January 2007, the parties filed an annex to the Plea Agreement, consisting of a redacted and revised copy of the Indictment reflecting the charges and underlying incidents Mr. Zelenović agreed to plead guilty to.³⁶

13. On 17 January 2007, after the Trial Chamber had asked questions to clarify some outstanding matters concerning the aforementioned annex to the Plea Agreement,³⁷ the Prosecution requested leave to withdraw counts 7, 8, 15, 16, 43, 44, and 50 of the Indictment dealing with violations of the laws or customs of war.³⁸ The Trial Chamber granted the request.³⁹ The Trial Chamber further invited Mr. Zelenović to enter a plea to the counts of torture and rape as crimes against humanity.⁴⁰ Mr. Zelenović pleaded guilty to aiding and abetting the rape against FWS-75 and committing the rape against FWS-87 as torture and rape as crimes against humanity (counts 5 and 6),⁴¹ and to co-perpetration of rape in relation to FWS-87 and two unidentified women and committing rape three times against FWS-75 and three times against FWS-87 as torture and rape as

³² *Ibid.*, para. 3.

³³ T. 464-465.

³⁴ T. 467.

³⁵ T. 467-473, 482.

³⁶ Joint Submission of Annex to Plea Agreement, 16 January 2007 (“Annex to Plea Agreement”).

³⁷ T. 477-482.

³⁸ T. 483.

³⁹ T. 484.

⁴⁰ T. 484.

⁴¹ T. 486.

crimes against humanity (counts 13 and 14).⁴² Mr. Zelenović further pleaded guilty to committing rape against FWS-87 as torture and rape as crimes against humanity (counts 41 and 42),⁴³ and to co-perpetration of rape in relation to FWS-75 and two unidentified women and committing the rape against FWS-87 as rape as a crime against humanity (count 49).⁴⁴ The Trial Chamber accepted the guilty pleas, and found Mr. Zelenović guilty in accordance with his pleas.⁴⁵ The Prosecution proceeded to withdraw counts 7, 8, 15, 16, 43, 44, and 50.⁴⁶ Finally, the Trial Chamber lifted the confidentiality of the Plea Agreement.⁴⁷

14. On 31 January 2007, the Prosecution filed its sentencing brief specifying the sentencing factors that should be taken into consideration and reiterating its recommendation that the Trial Chamber impose a term of imprisonment within the range of 10 to 15 years.⁴⁸ On 14 February 2007, the Defence filed its sentencing brief asking the Trial Chamber to take into account the gravity of the crime and certain mitigating circumstances and reiterating its recommendation that Mr. Zelenović should be sentenced to a term of imprisonment of between 7 and 10 years.⁴⁹

15. During the sentencing hearing on 23 February 2007, the parties emphasized the sentencing factors that the Trial Chamber, in their view, should take into consideration (as developed below). The Trial Chamber also sought the parties' submissions as to which case law would be of guidance in determining the sentence in the present case.⁵⁰ Accordingly, the parties filed additional submissions on the question of the extent to which the judgement of 14 November 2006 in the case of *Prosecutor v. Radovan Stanković* would be a suitable precedent.⁵¹

16. On 27 March 2007, the Prosecution provided notice to the Trial Chamber of cooperation of Mr. Zelenović with the Office of the Prosecutor.⁵² On 29 March 2007, the Defence responded to this notice.⁵³

⁴² T. 488-489.

⁴³ T. 489-490.

⁴⁴ T. 490.

⁴⁵ T. 491-492.

⁴⁶ T. 493; Prosecution's Submission Regarding Withdrawal of Charges, 17 January 2007.

⁴⁷ T. 496.

⁴⁸ Prosecution's Sentencing Brief, 31 January 2007.

⁴⁹ Defence Sentencing Brief, 14 February 2007.

⁵⁰ T. 561.

⁵¹ Prosecution's Submission Regarding Use of Stanković Judgement, 27 February 2007; Defence Submission Regarding Use of Prosecutor v. Stanković Judgement, 28 February 2007. The case of Radovan Stanković was referred to the authorities of Bosnia-Herzegovina in accordance with a decision of the Referral Bench on 17 May 2005 (*Prosecutor v. Radovan Stanković*, Decision on Referral of Case under Rule 11 bis, 17 May 2005). The decision was upheld on appeal (*Prosecutor v. Radovan Stanković*, Decision on 11 bis Referral, 1 September 2005). On 14 November 2006, the State Court of Bosnia-Herzegovina convicted Stanković of crimes against humanity and sentenced him to 16 years of imprisonment. Both the Prosecution and the Defence have appealed the judgement.

⁵² Prosecution's Notice to Trial Chamber of Co-operation Pursuant to Plea Agreement, 27 March 2007.

⁵³ Defence Response to Prosecution's Notice to Trial Chamber of Co-operation Pursuant to Plea Agreement, 29 March 2007.

2. Facts

17. Dragan Zelenović was born on 12 February 1961 in Foča, eastern Bosnia-Herzegovina. Prior to 1992, he worked as an electrician in Miljevina.⁵⁴ Mr. Zelenović was a member of the “Dragan Nikolić Unit”, a military unit in Foča which, in the beginning of the war, was part of the Bosnian-Serb TO and, from the summer of 1992 onwards, part of the Bosnian-Serb army (VRS). Mr. Zelenović was a soldier and, *de facto*, a military policeman.⁵⁵

18. Foča municipality is located south-east of Sarajevo, in Bosnia-Herzegovina. According to the 1991 census, the population of Foča consisted of 40,513 persons of whom 52% were Muslim, 45.3% Serbian and 3.1% of other ethnicity. The political and military take-over of the municipality started with Serb forces shelling Foča town, with heavy artillery, on 8 April 1992. This attack was part of an armed conflict in Bosnia-Herzegovina between forces of the government of Bosnia-Herzegovina and Serb forces, comprised of the JNA, the TO (later the VRS), the Serb police and various irregular Serb military formations. By mid-April 1992, the take-over of the town of Foča by the Serb forces was completed. The attacks on the surrounding villages, most of which were undefended and had no military targets, lasted until mid-July 1992. The Serb forces effected the forcible removal of the majority of the non-Serb civilian population from Foča municipality through violence.⁵⁶

19. During and after the take-over of Foča town and its surrounding villages and municipalities, Muslim and other non-Serb inhabitants were subjected to a widespread and systematic pattern of abuses, designed to remove the majority of them from the municipality. Muslim and other non-Serb inhabitants were methodically rounded up. In the course of their capture, civilians were frequently brutalized, beaten, and sometimes killed. Men and women were separated and transported to various detention facilities, such as school and community buildings and the Foča prison, where they were subjected to humiliating and degrading treatment. After extended periods of detention, the detainees were deported or forcibly transferred to Montenegro or locations controlled by the government of Bosnia-Herzegovina. The remaining non-Serb population outside the detention facilities was subjected to various discriminatory measures, such as restriction of movement, searching of homes, plunder and destruction of private as well as cultural and religious property,

⁵⁴ Joint Motion for consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 *ter*, Tab 1 Factual Statement, 14 December 2006 (“Factual Statement”), para. 2.

⁵⁵ Factual Statement, paras 2, 6.

⁵⁶ Factual Statement, para. 3.

beatings, and killings.⁵⁷ Mr. Zelenović was involved in the attack on Foča town and its surrounding villages and the subsequent arrest of civilians, between mid-April and mid-July 1992.⁵⁸

20. As a consequence of the attack against the civilian population of Foča and its surrounding municipalities, Muslim civilians were to a very large extent expelled from the region. Out of the 52% of the population residing in Foča who were Muslims, only ten persons remained. In January 1994, Foča was renamed Srbinje for the reason that it was now almost exclusively inhabited by Serbs.⁵⁹

21. On 3 July 1992, Mr. Zelenović, along with other men, arrested a group of about 60 Muslim women, children and elderly men from Tosanj and Mjesaja and took them to a temporary detention facility called Buk Bijela.⁶⁰ At the detention centre, Mr. Zelenović and other men separated the women from the children and interrogated the women about the hiding places of the male villagers and of weapons. The women were threatened with sexual assault and murder.⁶¹ On or about 3 July 1992, Mr. Zelenović and another man interrogated FWS-75 about her village and whether the villagers had weapons. FWS-75 was warned by the other man that she would be raped by soldiers, and killed afterwards, if she did not answer truthfully. In the course of her interrogation she was taken by a soldier to another room where ten soldiers raped her in turn. Mr. Zelenović knew that his action in respect of the interrogation and his omission to act with regard to the threats of rape and death, and the eventual transfer of FWS-75 to the room where she was raped, substantially assisted in the commission of the crime.⁶² Mr. Zelenović pleaded guilty to aiding and abetting this rape against FWS-75.⁶³

22. On or about 3 July, Mr. Zelenović and three unidentified soldiers interrogated FWS-87, a 15-year-old girl, in a room at Buk Bijela. During the interrogation, Mr. Zelenović and the three soldiers accused the girl of not telling the truth and proceeded to rape her. During the rape one of the soldiers threatened FWS-87 by putting a gun to her head.⁶⁴ Mr. Zelenović pleaded guilty to committing this rape against FWS-87.⁶⁵

23. Between 3 and 13 July 1992, the group of women, children, and elderly men who had been detained at Buk Bijela were transferred and detained together with other persons in two classrooms

⁵⁷ Factual Statement, para. 4.

⁵⁸ Factual Statement, para. 6.

⁵⁹ Factual Statement, para. 5; T. 439.

⁶⁰ Factual Statement, para. 7.

⁶¹ Factual Statement, para. 8.

⁶² Factual Statement, paras 8-9.

⁶³ T. 486 (this refers to a part of counts 5 and 6).

⁶⁴ Factual Statement, para. 10; Annex to Plea Agreement, para. 5.5.

⁶⁵ T. 486 (this refers to a part of counts 5 and 6).

at Foča high school.⁶⁶ On or about 6 or 7 July 1992, Mr. Zelenović, in concert with other men, selected four women and girls from the classrooms, among them FWS-75 and FWS-87. Mr. Zelenović led them to another classroom where soldiers were waiting. He then decided which woman should go with which soldier. Mr. Zelenović raped FWS-75, while the other co-perpetrators raped the other women and girls.⁶⁷ Mr. Zelenović pleaded guilty to committing the rapes against the four women, as principal perpetrator and as co-perpetrator.⁶⁸

24. Between 8 and 13 July 1992, on three occasions, FWS-75 and FWS-87 were taken from Foča high school to various locations. On the first occasion, the women were taken to an apartment owned by Mr. Zelenović. There, Mr. Zelenović and three other men raped FWS-75. Mr. Zelenović also raped FWS-87 on that occasion.⁶⁹ On the second occasion, FWS-75 and FWS-87 were taken to another apartment, where Mr. Zelenović again raped them.⁷⁰ On the third occasion, Mr. Zelenović took FWS-75 and FWS-87 to an abandoned house in Gornje Polje where he raped FWS-87.⁷¹ Mr. Zelenović pleaded guilty to committing the two rapes against FWS-75 and the three rapes against FWS-87.⁷²

25. The physical and psychological health of many of the female detainees seriously deteriorated as a result of the sexual assaults. The detainees lived in constant fear and some of the sexually abused women became suicidal. Others became indifferent as to what happened to them and suffered from depression.⁷³

26. On 13 July 1992, the detainees at Foča high school were transferred to Partizan Sports Hall where they were detained until 13 August 1992, after which most detainees were deported to Montenegro. The detainees, who numbered about 70, were all Muslim civilians from villages in Foča municipality.⁷⁴ Living conditions at Partizan Sports Hall were brutal and the detention was characterized by inhumane treatment, unhygienic conditions, overcrowding, starvation, and physical and psychological torture, including sexual assaults.⁷⁵ During July 1992, Mr. Zelenović and other men took FWS-87 away from Partizan Sports Hall and raped her.⁷⁶ Mr. Zelenović pleaded guilty to committing this rape against FWS-87.⁷⁷

⁶⁶ Factual Statement, para. 11.

⁶⁷ Factual Statement, para. 12.

⁶⁸ T. 488-489 (this refers to a part of counts 13 and 14).

⁶⁹ Factual Statement, para. 13.

⁷⁰ Factual Statement, para. 14.

⁷¹ Factual Statement, para. 15.

⁷² T. 488-489 (this refers to a part of counts 13 and 14).

⁷³ Factual Statement, paras 10, 16.

⁷⁴ Factual Statement, paras 11, 17, 20.

⁷⁵ Factual Statement, paras 18-19.

⁷⁶ Factual Statement, para. 19.

⁷⁷ T. 489-490 (this refers to counts 41 and 42).

27. On or about 3 August 1992, FWS-87 and FWS-75 were taken from Partizan Sports Hall and detained in a house close to Miljevina Hotel known as Karaman's house.⁷⁸ On or about 30 October 1992, Mr. Zelenović and two men took FWS-87, FWS-75, and two other women from that house to an apartment in Foča town. There, Mr. Zelenović raped FWS-87 while the other two men raped the other women.⁷⁹ The women remained detained at several houses and apartments, and continued to be subject to sexual assaults by various groups of soldiers.⁸⁰ Mr. Zelenović pleaded guilty to committing the rapes against the four women, as principal perpetrator and as co-perpetrator.⁸¹

28. The parties agree that an armed conflict existed in Bosnia-Herzegovina at all times relevant to the Indictment.⁸² Furthermore, the parties agree that Mr. Zelenović's criminal acts and omissions were part of a widespread or systematic attack against the civilian population, especially the Muslim population of Foča municipality.⁸³ Finally, the parties agree that Mr. Zelenović was aware of the existence of the armed conflict and of the widespread or systematic attack against the non-Serb, primarily Muslim, civilian population and of the fact that his conduct occurred within and contributed to that attack.⁸⁴

3. Law

3.1 Applicable law

29. The following provisions of the Tribunal's Statute and Rules are relevant to the present sentencing judgement:

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 Chamber 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.

⁷⁸ Factual Statement, para. 21.

⁷⁹ Factual Statement, para. 22.

⁸⁰ Factual Statement, para. 23.

⁸¹ T. 490 (this refers to count 49).

⁸² Factual Statement, para. 24.

⁸³ Factual Statement, para. 25.

⁸⁴ Factual Statement, para. 26.

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.

[...]

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.

30. The following factors must be considered when imposing a sentence: (i) the gravity of the offences or the totality of the conduct; (ii) the individual circumstances of the convicted person, including aggravating and mitigating circumstances; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the credit to be given for time spent in detention pending transfer to the Tribunal and pending trial and appeal; and (v) 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.⁸⁵ The last factor is not applicable in this case.⁸⁶

3.2 Purposes of sentencing

31. The case law of the Tribunal indicates two primary purposes of sentencing, namely retribution and deterrence.⁸⁷

32. As a form of retribution, punishment expresses society's condemnation of the criminal act and of the person who committed it.⁸⁸ To fulfil the objective of retribution, the Trial Chamber must

⁸⁵ *Blaškić* Appeal Judgement, para. 679.

⁸⁶ T. 437-438.

⁸⁷ *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806; *Stakić* Appeal Judgement, para. 402.

⁸⁸ *Jokić* Sentencing Judgement, para. 31; *Mrđa* Sentencing Judgement, para. 14.

therefore impose a punishment which properly reflects the personal culpability of the wrongdoer.⁸⁹ The Trial Chamber considers that this purpose is reflected in the obligation that the Trial Chamber has to take into account the gravity of the crime or the totality of the conduct.

33. Both special and general deterrence are important purposes of sentencing in criminal law.⁹⁰ The rationale of special deterrence is to dissuade the wrongdoer from recidivism in the future, whereas general deterrence aims at discouraging others from committing similar kinds of crime.⁹¹ In the present case, and in view of the circumstances in which the crimes were committed, the Trial Chamber considers that the risk that Mr. Zelenović would commit the same kinds of crime in the future is small, which considerably reduces the relevance of special deterrence.

34. As far as general deterrence is concerned, persons who believe themselves to be beyond the reach of international criminal law must be warned that they have to abide by the norms underpinned by substantive criminal law or face prosecution.⁹² The Trial Chamber is confident that an appropriate sentence for Mr. Zelenović in his case will have general deterrent effect.

35. Rehabilitation is also considered to be a relevant, though less important, purpose of sentencing.⁹³

4. Sentencing factors

4.1 The gravity of the offences or the totality of the conduct

36. The gravity of the offences is the primary consideration in imposing a sentence.⁹⁴ Mr. Zelenović has pleaded guilty to torture and rape as crimes against humanity. Torture requires the intentional infliction of severe pain or suffering with the aim of obtaining information or a confession, or of punishing, intimidating or coercing the victim or a third person, or of discriminating against the victim or a third person.⁹⁵ Torture is among the most serious crimes in international criminal law and this must be properly reflected in the sentence. Moreover, torture by means of rape is a particularly grave form of torture.⁹⁶ Rape requires a sexual penetration of the

⁸⁹ *Kordić and Čerkez* Appeal Judgement, para. 1075.

⁹⁰ *Ibid.*, para. 1076.

⁹¹ *Ibid.*, paras 1077-1078; *Dragan Nikolić* Appeal Sentencing Judgement, para. 45.

⁹² *Kordić and Čerkez* Appeal Judgement, para. 1078.

⁹³ *Čelebići* Appeal Judgement, para. 806; *Kordić and Čerkez* Appeal Judgement, para. 1079; *Stakić* Appeal Judgement, para. 402.

⁹⁴ *Čelebići* Appeal Judgement, para. 731; *Kupreškić et al.* Appeal Judgement, para. 442; *Blaškić* Appeal Judgement, para. 683; *Momir Nikolić* Appeal Sentencing Judgement, para. 11; *Galić* Appeal Judgement, para. 442.

⁹⁵ *Kunarac et al.* Appeal Judgement, paras 142, 144.

⁹⁶ *Furundžija* Trial Judgement, para. 295.

vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration occurs without the consent of the victim.⁹⁷ The violation of the moral and physical integrity of the victims makes rape a particularly serious crime.⁹⁸ Rape is an inherently humiliating offence, and humiliation is generally taken into account when assessing the gravity of a crime.⁹⁹

37. The law on torture and rape as crimes against humanity requires that the crimes are committed as part of a widespread or systematic attack against a civilian population. This element is what distinguishes crimes against humanity from ordinary crimes. The targeting of a collective in the form of a civilian population, rather than the individual victim, places crimes against humanity among the gravest of crimes.

38. The determination of the gravity of the offences also requires consideration of the particular circumstances of the case and the form and degree of the participation of the convicted person in the crimes.¹⁰⁰ Of central concern when assessing the gravity of a crime is the scale of the crime, including the number of victims and its duration.¹⁰¹ The crimes which Mr. Zelenović has pleaded guilty to were part of a pattern of sexual assaults that took place over a period of several months, and in four different locations, and involved multiple victims. Mr. Zelenović took direct part in the sexual abuse of victims in a number of detention facilities, including the multiple rape of victims FWS-75 and FWS-87. Mr. Zelenović has been found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape. He has also been found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting. Four of the instances of sexual abuse were gang rapes, committed together with three or more other perpetrators. In one of those instances he participated as aider and abettor in the rape of FWS-75 by at least ten soldiers, which was so violent that the victim lost consciousness. He participated as co-perpetrator in an incident during which the victim was threatened with a gun to her head while being sexually abused. The Trial Chamber finds that the scale of the crimes committed was large and that Mr. Zelenović's participation in the crimes was substantial.

⁹⁷ *Kunarac et al.* Appeal Judgement, paras 127-128.

⁹⁸ *Češić* Sentencing Judgement, para. 35.

⁹⁹ *Ibid.*, para. 53.

¹⁰⁰ *Aleksovski* Appeal Judgement, para. 182; *Furundžija* Appeal Judgement, para. 249; *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 683; *Kordić and Čerkez* Appeal Judgement, para. 1061; *Dragan Nikolić* Appeal Sentencing Judgement, para. 18; *Babić* Appeal Sentencing Judgement, para. 39; *Galić* Appeal Judgement, para. 409.

¹⁰¹ *Plavšić* Sentencing Judgement, para. 52; *Češić* Sentencing Judgement, para. 32; *Mrđa* Sentencing Judgement, para. 21; *Babić* Sentencing Judgement, para. 47.

39. An important factor when assessing the gravity of a crime is the vulnerability of the victims.¹⁰² The victims in this case were arrested and detained under brutal conditions for long periods of time. They were unarmed and defenceless. The victims were therefore in a particularly vulnerable situation at the time of the commission of the crime. In addition, victim FWS-87, who was raped by Mr. Zelenović on numerous occasions, was about 15 years old at the time of the commission of the crimes. This further increases the gravity of the crimes committed against her.¹⁰³ Mr. Zelenović was aware, and took advantage of, this vulnerability of the victims.

40. Another important factor is the physical and mental trauma suffered by the victims, even long after the commission of the crime.¹⁰⁴ In 1992, FWS-75 and FWS-87 were 25 and 15 years old, respectively.¹⁰⁵ After their initial arrest, they were taken from one detention centre to another where they were repeatedly sexually abused by Mr. Zelenović and others. The victims of sexual abuse in the detention centres in Foča suffered the unspeakable pain, indignity, and humiliation of being repeatedly violated, without knowing whether they would survive the ordeal. As a result of the violent sexual assaults, the physical and psychological health of many of the victims was seriously damaged. The women and girls in the detention centres lived in constant fear of repeated rapes and sexual assaults. Some became suicidal and others became indifferent to what happened to them. The scars left from the crimes committed against them were deep and might never heal. This, perhaps more than anything, speaks about the gravity of the crimes in this case.

41. The Prosecution argued that the discriminatory grounds upon which the Accused committed the offences may be taken into account where discrimination is not an element of the offence.¹⁰⁶ An element of the crime cannot also constitute a separate factor for the purposes of sentencing.¹⁰⁷ However, when convictions for the same criminal conduct are properly entered, as in the present case, a factor taken into account as an element of the crime under one count does not prevent it from being considered as an aggravating factor in relation to the other count, where it is not an element of the crime, for the determination of the sentence.¹⁰⁸

42. The Prosecution argued that all the incidents to which Mr. Zelenović has pleaded guilty are to be classified as torture because they were committed on discriminatory grounds.¹⁰⁹ As for the

¹⁰² *Kunarac et al.* Appeal Judgement, para. 352; *Blaškić* Appeal Judgement, para. 683; *Kordić and Čerkez* Appeal Judgement, para. 1088; *Deronjić* Appeal Sentencing Judgement, para. 124.

¹⁰³ *Kunarac et al.* Trial Judgement, para. 864; *Deronjić* Appeal Sentencing Judgement, para. 124.

¹⁰⁴ *Vasiljević* Appeal Judgement, para. 167; *Blaškić* Appeal Judgement, para. 683.

¹⁰⁵ T. 510.

¹⁰⁶ Prosecution's Sentencing Brief, para. 13.

¹⁰⁷ *Vasiljević* Appeal Judgement, para. 173; *Blaškić* Appeal Judgement, paras 693, 695; *Kordić and Čerkez* Appeal Judgement, para. 1089; *Galić* Appeal Judgement, para. 408.

¹⁰⁸ *Vasiljević* Appeal Judgement, para. 172.

¹⁰⁹ T. 458.

incidents at Buk Bijela, the purpose of the rapes was to obtain information or a confession, which would be an additional reason to classify the incidents as torture.¹¹⁰ As for the other instances of rape that occurred in July and August 1992, the Prosecution argued that they were committed for the purpose of punishing and intimidating or coercing the victim or a third person, which again would be a reason to classify the incidents as torture.¹¹¹ As for Count 49, according to which Mr. Zelenović is charged with rape, but not torture, as a crime against humanity, the parties agreed that also this act was committed on discriminatory grounds.¹¹² The Prosecution submits that, although it could have charged this act as torture, in its discretion it chose not to do so.¹¹³ Although permissible, the Trial Chamber will not consider the discriminatory grounds upon which Mr. Zelenović acted as a separate aggravating factor for the crime of rape but rather take them into account once when assessing the gravity of all the crimes to which Mr. Zelenović has pleaded guilty.

43. Mr. Zelenović has pleaded guilty to torture and rape as crimes against humanity. In addition to the inherent seriousness of these crimes, the Trial Chamber has considered the active and substantial participation of Mr. Zelenović as well as the scale and duration of the crimes. Furthermore, the Trial Chamber has considered the vulnerability of the victims and the physical and mental trauma suffered by them. All these factors make up the gravity of the offence and the totality of the conduct in this case.

4.2 Individual circumstances of the convicted person, including aggravating and mitigating circumstances

44. Any reduction of the penalty stemming from the application of mitigating circumstances does not diminish the gravity of the crime.¹¹⁴ Both parties argued for a number of mitigating circumstances which relate to the behaviour of Mr. Zelenović after the commission of the crime, including the guilty plea. In particular, they emphasized that witnesses are relieved from giving evidence in court as a reason for giving the guilty plea considerable mitigating weight.¹¹⁵

45. A guilty plea may have a mitigating effect on the sentence since the admission of guilt may show honesty and readiness to take responsibility,¹¹⁶ it may help establishing the truth and

¹¹⁰ T. 457-458.

¹¹¹ T. 458.

¹¹² T. 542.

¹¹³ T. 458, 546.

¹¹⁴ *Erdemović* First Sentencing Judgement, para. 46; *Bralo* Sentencing Judgement, para. 42.

¹¹⁵ Prosecution's Sentencing Brief, para. 45; Defence Sentencing Brief, paras 26-31; T. 548.

¹¹⁶ *Dragan Nikolić* Sentencing Judgement, para. 237; *Jokić* Sentencing Judgement, para. 76; *Mrđa* Sentencing Judgement, para. 78.

contribute to reconciliation,¹¹⁷ and, as mentioned above, because of the guilty plea victims are relieved from giving evidence in court and thereby potentially re-living their trauma.¹¹⁸ The avoidance of a lengthy trial, and thereby the time and effort saved by the Tribunal, is also a factor to take into account in sentencing, although it should not be given undue weight.¹¹⁹

46. The timing of a guilty plea is among the aspects that determine the weight in mitigation that this factor should be given.¹²⁰ Mr. Zelenović did not voluntarily surrender to the Tribunal and he did not plead guilty at his initial appearance. His guilty plea therefore came late. However, it came before any trial proceedings in his case had commenced. The Trial Chamber therefore considers that the guilty plea can be given considerable weight in mitigation.

47. The fact that a perpetrator admits his guilt and steps forward to face the consequences of what he has done is the central aspect of a guilty plea, even if, as in the present case, it is done through a plea agreement with the Prosecution. The Trial Chamber is mindful of the fact that the agreement on the Prosecution's part in this case consisted of withdrawing cumulative counts of the violations of the laws or customs of war and some charges for which it considered that the evidence might have been insufficient.¹²¹ The Trial Chamber therefore considers that the totality of Mr. Zelenović's conduct is well reflected in the counts to which he has pleaded guilty. The Trial Chamber recognizes that Mr. Zelenović's admission of guilt is complete and unconditional and shows that he is ready to take responsibility for what he has done.

48. The parties have argued that a guilty plea contributes to one of the objectives of the Tribunal, that is the establishment of truth. According to the Prosecution, this is the first time in the history of the Tribunal that a perpetrator admits to and confirms what happened to the female non-Serb population in Foča in 1992.¹²² The Prosecution sees a possibility that Mr. Zelenović's guilty plea not only contributes to the establishment of the truth, but also to the reconciliation in the area.¹²³ Although neither party has presented any evidence concerning this, the Trial Chamber accepts that the admission of guilt, through a guilty plea, generally contributes to the establishment of truth and

¹¹⁷ *Sikirica et al.* Sentencing Judgement, para. 149; *Plavšić* Sentencing Judgement, para. 80; *Banović* Sentencing Judgement, para. 68; *Obrenović* Sentencing Judgement, para. 111; *Dragan Nikolić* Sentencing Judgement, para. 233; *Češić* Sentencing Judgement, para. 58; *Deronjić* Sentencing Judgement, para. 236.

¹¹⁸ *Todorović* Sentencing Judgement, para. 80; *Banović* Sentencing Judgement, para. 68; *Momir Nikolić* Sentencing Judgement, para. 150; *Češić* Sentencing Judgement, para. 58; *Deronjić* Sentencing Judgement, para. 134; *Mrđa* Sentencing Judgement, para. 78; *Bralo* Sentencing Judgement, para. 64.

¹¹⁹ *Dragan Nikolić* Appeal Sentencing Judgement, para. 51; *Bralo* Appeal Sentencing Judgement, para. 47.

¹²⁰ *Sikirica et al.* Sentencing Judgement, paras 150, 228; *Milan Simić* Sentencing Judgement, para. 87; *Dragan Nikolić* Sentencing Judgement, para. 234; *Češić* Sentencing Judgement, para. 59; *Deronjić* Sentencing Judgement, para. 231.

¹²¹ T. 464-465.

¹²² T. 513, 551-552.

¹²³ T. 513.

thereby to reconciliation in the region. The Trial Chamber takes this into account when determining the weight in mitigation the guilty plea should be given.

49. As mentioned, both parties have emphasized that the guilty plea relieves victims from giving evidence in court and that this should afford Mr. Zelenović considerable mitigation.¹²⁴ In cases such as the present, involving serious crimes such as torture and rape, with severe consequences for the victims, a guilty plea is likely to save the victims from reliving the trauma through testifying about the crimes committed against them. The Trial Chamber considers that this is an effect that must be considered when determining the weight in mitigation the guilty plea should be given.

50. The Defence argued that the remorse of Mr. Zelenović should be considered a mitigating circumstance in the present case.¹²⁵ During the sentencing hearing on 23 February 2007, as well as in a separate written statement attached to the Defence sentencing brief, Mr. Zelenović expressed his remorse.¹²⁶ In order to take the expression of remorse of an accused into account in mitigation, the Trial Chamber must be satisfied that the remorse is sincere.¹²⁷

51. Mr. Zelenović informed the Trial Chamber that he started to feel remorse when the indictment was issued against him in 1996.¹²⁸ However, he did not voluntarily surrender to the Tribunal at the time. In 2000 or 2001 he escaped from Foča to Russia, where he was arrested by Russian authorities in 2005. From there he was transferred to the Tribunal, via Bosnia-Herzegovina, on 10 June 2006. At the second further initial appearance on 14 July 2006 Mr. Zelenović pleaded not guilty. He then proceeded, as described in the procedural history above, to challenge the Indictment and to participate in the proceedings pursuant to the 11 *bis* motion.¹²⁹ Only on 14 December 2006, did the parties file the Plea Agreement, and on 17 January 2007, Mr. Zelenović formally pleaded guilty. Therefore, any expression of remorse by Mr. Zelenović came much later than the time which Mr. Zelenović himself identified as the moment when he began to feel remorse. Nevertheless, what is most important is that the remorse is sincere at the time it is expressed. The Trial Chamber accepts Mr. Zelenović's remorse as sincere and will therefore consider it as a mitigating circumstance.

52. Rule 101(B)(ii) of the Rules expressly provides that the Trial Chamber shall take into consideration the substantial cooperation with the Prosecutor by the convicted person before or after conviction. The Trial Chamber must assess the extent and nature of the cooperation, and therefore

¹²⁴ Prosecution's Sentencing Brief, para. 45; Defence Sentencing Brief, paras 26-31; T. 548.

¹²⁵ Defence Sentencing Brief, para. 25.

¹²⁶ T. 521.

¹²⁷ *Vasiljević* Appeal Judgement, para. 177; *Blaškić* Appeal Judgement, paras 705, 728; *Kvočka et al.* Appeal Judgement, para. 715; *Momir Nikolić* Appeal Sentencing Judgement, para. 117.

¹²⁸ T. 522.

the weight to be given to this mitigating circumstance.¹³⁰ Not only “substantial”, but also more modest cooperation can be taken into account and be given weight in mitigation.¹³¹ The Appeals Chamber has stressed that, when assessing a convicted person’s cooperation, “special regard must be had to the [person’s] willingness to cooperate as underlined by his actions and evidenced, in particular, by his earnestness when providing information to the Prosecution”.¹³² According to the Plea Agreement, Mr. Zelenović

agrees to accept responsibility for his actions and to co-operate with, and to provide truthful and complete information to the Office of the Prosecutor whenever requested. In accordance with such co-operation, Dragan Zelenović agrees to meet as often as necessary with members of the Office of the Prosecutor in order to provide them with full and complete information and evidence that is known to him. Mr. Zelenović agrees to be truthful and candid, and to freely answer all questions put to him by members of the Office of the Prosecutor. If applicable, Mr. Zelenović agrees to testify truthfully at any trials, hearings, or other proceedings before the International Criminal Tribunal for the Former Yugoslavia (ICTY) as requested by the Office of the Prosecutor.¹³³

During the sentencing hearing, the Defence noted that Mr. Zelenović had not had the opportunity to demonstrate his cooperation in practice, because of the short time period that had elapsed since the guilty plea. The Defence nevertheless asked the Trial Chamber to give full effect to this factor because of Mr. Zelenović’s expressed intention.¹³⁴ Subsequent to this, the Prosecution and the Defence informed the Trial Chamber about some initial cooperation provided by Mr. Zelenović.¹³⁵ The Trial Chamber considers that it is the commitment to cooperate as well as actual cooperation, even if due to the particular experiences of the convicted person his or her full and sincere assistance is judged to be of little or no value to ongoing investigations or trials,¹³⁶ that determines the weight that should be attached to this factor. The Trial Chamber therefore considers Mr. Zelenović’s commitment to cooperate with the Office of the Prosecutor, together with the cooperation he has provided so far, as a mitigating circumstance.

53. The Defence has also requested the Trial Chamber to take into account the personal circumstances of Mr. Zelenović, including his health and family situation, and the fact that he has

¹²⁹ T. 425, 533-534.

¹³⁰ *Jelisić* Appeal Judgement, paras 124, 126; *Momir Nikolić* Appeal Sentencing Judgement, para. 91; *Bralo* Appeal Sentencing Judgement, para. 51.

¹³¹ *Vasiljević* Appeal Judgement, para. 180; *Dragan Nikolić* Appeal Sentencing Judgement, para. 66; *Bralo* Appeal Sentencing Judgement, para. 51.

¹³² *Bralo* Appeal Sentencing Judgement, para. 63.

¹³³ Plea Agreement, para. 9.

¹³⁴ T. 520.

¹³⁵ Prosecution’s Notice to Trial Chamber of Co-operation Pursuant to Plea Agreement, 27 March 2007; Defence Response to Prosecution’s Notice to Trial Chamber of Co-operation Pursuant to Plea Agreement, 29 March 2007.

¹³⁶ See *Bralo* Appeal Sentencing Judgement, para. 52.

no criminal record to date.¹³⁷ Mr. Zelenović's medical conditions include diabetes mellitus type 2 and that he is disabled with 80% established disability.¹³⁸ Because of this, in the assessment of the medical officer at the UNDU, "it is important in the future that he receives adequate medical care".¹³⁹ Mr. Zelenović is married and has a 13-year-old son.¹⁴⁰ The Prosecution has conceded that this should be taken into account but, "in view of the number and severity of crimes committed by the accused", that this should only have a limited mitigating impact on the sentence.¹⁴¹

54. The Defence also argued that the behaviour of Mr. Zelenović in the UNDU should be considered in mitigation.¹⁴² According to the Deputy Chief of the UNDU, Mr. Zelenović "has at all times shown respect for the staff and management of the unit. He has integrated well into the routine pattern of life in custody and interacts positively with his fellow detainees whilst participating fully in the program".¹⁴³

55. The medical situation of a convicted person should be taken into account only "in exceptional or rare cases".¹⁴⁴ The family situation, the fact that the accused has no prior criminal record, and that a detainee behaves well in the UNDU are circumstances that have been accepted in mitigation in the case law of the Tribunal.¹⁴⁵ The Trial Chamber does not find that the fact that Mr. Zelenović has a wife and a son in itself constitutes a mitigating factor. The Trial Chamber will, however, take his family situation together with his health condition, the fact that he has no prior convictions and that he has behaved well in the UNDU and collectively assign to these factors some, although limited, weight in mitigation.

56. In conclusion, the Trial Chamber considers that the guilty plea of Mr. Zelenović, as well as the commitment that he has shown to cooperate with the Office of the Prosecutor, constitute the main mitigating circumstances in this case. The Trial Chamber has, however, also considered Mr. Zelenović's remorse, his family and health situation, the fact that he has no prior criminal record, and his good behaviour in the UNDU, in mitigation.

¹³⁷ Defence Sentencing Brief, Annex D (Certificate by Foča municipality, 26 September 2006) and F (Certificate of the Foča SJB, 6 February 2007).

¹³⁸ Defence Sentencing Brief, Annex D (Certificate by Foča municipality, 26 September 2006).

¹³⁹ Defence Sentencing Brief, Annex E (Memo by the Medical officer at the UNDU, 26 January 2007).

¹⁴⁰ T. 527.

¹⁴¹ T. 514.

¹⁴² Defence Sentencing Brief, para. 33.

¹⁴³ Defence Sentencing Brief, Annex E (Behaviour Report by Deputy Chief of Detention, 8 February 2007).

¹⁴⁴ *Blaškić* Appeal Judgement, para. 696; *Babić* Appeal Sentencing Judgement, para. 43; *Galić* Appeal Judgement, para. 436.

¹⁴⁵ *Kunarac et al.* Appeal Judgement, paras 362, 408; *Blaškić* Appeal Judgement, paras 696, 728; *Kordić and Čerkez* Appeal Judgement, paras 1090-1091; *Babić* Appeal Sentencing Judgement, para. 43; *Blagoje Simić et al.* Appeal Judgement, para. 266.

4.3 The general practice regarding prison sentences in the courts of the former Yugoslavia

57. The Trial Chamber is required to consider “the general practice regarding prison sentences in the courts of the former Yugoslavia” in determining the appropriate penalty. This does not mean that the Trial Chamber is obliged to conform to that practice.¹⁴⁶ The Tribunal may impose a sentence in excess of that which would be applicable under the relevant law in the former Yugoslavia, and the Appeals Chamber has held that this sentencing practice does not violate the principle of *nulla poena sine lege* because a defendant would have been aware that the crimes for which he or she is indicted constitute serious violations of international humanitarian law, punishable by the most severe of penalties.¹⁴⁷ Moreover, the Trial Chamber may diverge from the sentencing practice of the former Yugoslavia if this practice is inadequate in light of international law.¹⁴⁸

58. Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules refer to actual practice in courts of the former Yugoslavia. It is however settled practice within the Tribunal that the sources to be consulted pursuant to these provisions are not limited to case law from the former Yugoslavia, but also include statutory provisions in force there at the time of the commission of the crimes in question.¹⁴⁹

59. In 1991 and 1992, the sentencing law in Bosnia-Herzegovina was regulated by the Criminal Code of the SFRY, adopted by the Federal Assembly on 28 September 1976, and in force since 1 July 1977 (SFRY Criminal Code), and by the Criminal Code of the Socialist Republic of Bosnia-Herzegovina of 10 June 1977 (Bosnia-Herzegovina Criminal Code). The SFRY Criminal Code regulated the general aspects of criminal law and a few specific offences, such as crimes against the security of the SFRY, genocide, and war crimes, while the Bosnia-Herzegovina Criminal Code primarily regulated specific offences, and some general matters not addressed in the SFRY Criminal Code. Both criminal codes remained in force after Bosnia-Herzegovina declared independence in 1992.

60. Mr. Zelenović has pleaded guilty to torture and rape as crimes against humanity. Chapter 16 of the SFRY Criminal Code is entitled “Criminal acts against humanity and international law” and

¹⁴⁶ *Tadić* Appeal Sentencing Judgement, para. 21; *Čelebići* Appeal Judgement, paras 813, 816 and 820; *Jelisić* Appeal Judgement, para. 117; *Kupreškić et al.* Appeal Judgement, para. 418; *Kunarac et al.* Appeal Judgement, paras 347-349; *Krstić* Appeal Judgement, para. 260; *Blaškić* Appeal Judgement, paras 681-682; *Kordić and Čerkez* Appeal Judgement, para. 1085; *Dragan Nikolić* Appeal Sentencing Judgement, paras 17, 69; *Jokić* Appeal Sentencing Judgement, para. 38; *Galić* Appeal Judgement, para. 398.

¹⁴⁷ *Tadić* Appeal Sentencing Judgement, para. 21; *Čelebići* Appeal Judgement, para. 817; *Krstić* Appeal Judgement, para. 262; *Blaškić* Appeal Judgement, para. 681; *Stakić* Appeal Judgement, para. 398; *Blagoje Simić et al.* Appeal Judgement, para. 264.

¹⁴⁸ *Kunarac et al.* Appeal Judgement, para. 377.

¹⁴⁹ *Dragan Nikolić* Appeal Sentencing Judgement, para. 85.

covers crimes committed during armed conflict. It does not, however, codify crimes against humanity, with their specific actus reus and mens rea requirements. The punishment provided for specific crimes which do not require proof of these distinguishing elements does not take into account the seriousness of crimes against humanity. It is thus not an adequate basis for determining the punishment to be imposed for this category of crimes.¹⁵⁰

61. The general provisions of the SFRY Criminal Code regarding punishment provide that the maximum term of imprisonment is 15 years,¹⁵¹ but that for the most serious crimes the death penalty may be imposed,¹⁵² or, instead of the death penalty, a prison sentence of 20 years.¹⁵³

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

4.4 Credit to be given for time spent in detention pending transfer to the Tribunal and pending trial

63. According to Rule 101(C) credit shall be given to the convicted person for the period during which the convicted person was detained pending surrender to the Tribunal or pending trial. Mr. Zelenović was arrested on 22 August 2005, and formally detained the day after, by Russian authorities, pursuant to “the Decision of the [Tribunal]”.¹⁵⁴ He remained in detention in Russia until his transfer to Bosnia-Herzegovina on 8 June 2006, from where he was transferred to the Tribunal two days later. Since 10 June 2006, Mr. Zelenović has been detained at the UNDU. Any time Mr. Zelenović has spent in custody for the purpose of this case must be taken into account,¹⁵⁵ regardless of the fact that he was not transferred directly from Russia to the Tribunal. Mr. Zelenović is therefore entitled to the credit of 591 days.

5. Determination of sentence

64. The Prosecution has recommended a term of imprisonment within the range of 10 to 15 years, while the Defence has recommended a term within the range of 7 to 10 years.¹⁵⁶ According

¹⁵⁰ *Erdemović* First Sentencing Judgement, para. 32.

¹⁵¹ Article 38 (1) of the SFRY Criminal Code.

¹⁵² Article 37 of the SFRY Criminal Code.

¹⁵³ Article 38 (2) of the SFRY Criminal Code.

¹⁵⁴ Defence Sentencing Brief, Annex A (Detention Order by Acting Khanti-Mansiysk Inter-Municipal Public Prosecutor, 23 August 2005); T. 552-554.

¹⁵⁵ See *Tadić* Appeal Sentencing Judgement, paras 38, 75; *Blaškić* Appeal Judgement, para. 709.

¹⁵⁶ Plea Agreement, para. 3; Prosecution’s Sentencing Brief, para. 50; Defence Sentencing Brief, para. 37.

to Rule 62 *ter* (B) the Trial Chamber is not bound by these recommendations of the parties. The Prosecution has argued for a comparison with sentences in *Prosecutor v. Dragoljub Kunarac et al.*, while the Defence specifically referred to the cases of *Prosecutor v. Stevan Todorović* and *Prosecutor v. Biljana Plavšić*.¹⁵⁷

65. The difficulty with comparing sentences imposed by the Tribunal is due to the fact that “any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual”.¹⁵⁸ Moreover, a Trial Chamber must tailor the sentence to fit the individual circumstances of the convicted person and the gravity of the crime.¹⁵⁹ A previous judgement on sentence can nevertheless provide guidance “if it relates to the same offence and was committed in substantially similar circumstances”.¹⁶⁰ The Trial Chamber is mindful of the fact that sentences of like individuals in like cases should be comparable.¹⁶¹ The obvious case to compare the present case with is the *Kunarac et al.* case where the original indictment included Mr. Zelenović among the accused.

66. Dragoljub Kunarac was held responsible for committing seven instances of rape (some of them included multiple rapes) and aiding and abetting in three instances of rape. His conviction also included keeping two Muslim women in a house for several months, during which time he raped one of them several times. Kunarac was convicted of enslavement as a crime against humanity and of torture and rape as crimes against humanity and violations of the laws or customs of war. He was sentenced to 28 years of imprisonment.¹⁶² Radomir Kovač was convicted of keeping four young girls in his apartment where they were raped, humiliated, degraded, and treated as “property” by Kovač, among others. On one occasion, three girls were forced to dance naked in front of him. Kovač was convicted of enslavement as a crime against humanity, outrages upon personal dignity as a violation of the laws or customs of war, and rape as a crime against humanity and a violation of the laws or customs of war. Kovač was sentenced to 20 years of imprisonment.¹⁶³ Finally, Zoran Vuković was held responsible for taking a Muslim woman from a detention centre to an apartment and raping her. He was convicted of torture and rape as crimes against humanity and violations of the laws or customs of war and was sentenced to 12 years of imprisonment.¹⁶⁴

¹⁵⁷ T. 515, 520.

¹⁵⁸ *Kvočka et al.* Appeal Judgement, para. 681.

¹⁵⁹ *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Appeal Sentencing Judgement, para. 19; *Babić* Appeal Sentencing Judgement, para. 32; *Naletilić and Martinović* Appeal Judgement, para. 615; *Blagoje Simić et al.* Appeal Judgement, para. 157; *Bralo* Appeal Sentencing Judgement, para. 33.

¹⁶⁰ *Furundžija* Appeal Judgement, para. 250. See also *Čelebići* Appeal Judgement, paras 721, 756-757; *Jelisić* Appeal Judgement, paras 96, 101; *Kvočka et al.* Appeal Judgement, para. 681.

¹⁶¹ *Kvočka et al.* Appeal Judgement, para. 681; *Blagoje Simić et al.* Appeal Judgement, para. 238.

¹⁶² *Kunarac et al.* Trial Judgement, paras 630-745.

¹⁶³ *Kunarac et al.* Trial Judgement, paras 747-782.

¹⁶⁴ *Kunarac et al.* Trial Judgement, paras 784-822.

67. The similarities between the present case and the *Kunarac et al.* case extend to the type of crime, how the crime was carried out, the duration of the criminal behaviour, and the characterization of the victims. The crime base in the present case is not only similar, but to a large extent identical to the one in the *Kunarac et al.* case. The participation of Mr. Zelenović in the crimes committed is comparable with that of at least some of the perpetrators in the aforementioned case. As mentioned, Mr. Zelenović has been found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape. He has also been found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting.

68. Despite the similarities, the Trial Chamber emphasizes that there are important factors distinguishing the present case from the *Kunarac et al.* case. One such important distinction is that Mr. Zelenović pleaded guilty, which none of the accused persons in the aforementioned case did. A guilty plea is in the case law of the Tribunal, including in the *Plavšić* and *Todorović* cases referred to by the Defence, considered an important mitigating factor. The Trial Chamber has given considerable weight to Mr. Zelenović's guilty plea.

69. Both parties considered that the judgement in the *Stanković* case before the State Court of Bosnia-Herzegovina gave little or no guidance to the Trial Chamber, although for different reasons. The Prosecution submitted that that judgement is under appeal, and that one of the grounds of appeal by the State Prosecutor is the sentence.¹⁶⁵ The Defence, on the other hand, considered that the scope of the two cases and the level of responsibility of the perpetrators differed, and that there were important differences in aggravating and mitigating circumstances.¹⁶⁶ Considering the arguments submitted by the parties, in particular the fact that the judgement in the *Stanković* case is under appeal, the Trial Chamber has refrained from taking guidance from that case.

70. The Trial Chamber has considered the circumstances referred to above and the recommendations for terms of imprisonment by the Prosecution and the Defence and finds the appropriate sentence in the present case to be a single sentence of 15 years of imprisonment. As mentioned above, Mr. Zelenović is entitled to credit for the time spent in detention, which as of the date of this judgement amounts to 591 days.

¹⁶⁵ Prosecution's Submission Regarding Use of *Stanković* Judgement, 27 February 2007, paras 3, 5.

¹⁶⁶ Defence Submission Regarding Use of Prosecutor v. *Stanković* Judgement, 28 February 2007, paras 5-9.

6. Disposition

71. For the foregoing reasons, the **TRIAL CHAMBER**

having found Dragan Zelenović **GUILTY** of the following charges in the Indictment:

Count 5: torture as a crime against humanity;

Count 6: rape as a crime against humanity;

Count 13: torture as a crime against humanity;

Count 14: rape as a crime against humanity;

Count 41: torture as a crime against humanity;

Count 42: rape as a crime against humanity;

Count 49: rape as a crime against humanity.

hereby **SENTENCES** Dragan Zelenović to a single sentence of 15 years of imprisonment.

72. Dragan Zelenović has been detained since 22 August 2005. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for the time spent in detention, which as of the date of this judgement amounts to 591 days.

73. In accordance with Rule 103(C) of the Rules of Procedure, Mr. Zelenović is to remain in the custody of the Tribunal pending finalisation of arrangements for his transfer to the State where his sentence will be served.

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

Dated this 4th day of April 2007

At The Hague

The Netherlands

Christine Van den Wyngaert
Judge

Alphons Orié
Presiding Judge

Bakone Justice Moloto
Judge

[Seal of the Tribunal]

Appendix I: Table of ICTY cases with abbreviations

<i>Aleksovski</i>	Appeal Judgement: <i>Prosecutor v. Zlatko Aleksovski</i> , Judgement (on appeal), 24 March 2000
<i>Babić</i>	Sentencing Judgement: <i>Prosecutor v. Milan Babić</i> , Sentencing Judgement, 29 June 2004 Appeal Sentencing Judgement: <i>Prosecutor v. Milan Babić</i> , Judgement on Sentencing Appeal, 18 July 2005
<i>Banović</i>	Sentencing Judgement: <i>Prosecutor v. Predrag Banović</i> , Sentencing Judgement, 28 October 2003
<i>Blaškić</i>	Appeal Judgement: <i>Prosecutor v. Tihomir Blaškić</i> , Judgement (on appeal), 29 July 2004
<i>Bralo</i>	Sentencing Judgement: <i>Prosecutor v. Miroslav Bralo</i> , Sentencing Judgement, 7 December 2005 Appeal Sentencing Judgement: <i>Prosecutor v. Miroslav Bralo</i> , Judgement on Sentencing Appeal, 2 April 2007
<i>Čelebići</i>	Appeal Judgement: <i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo</i> , Judgement (on appeal), 20 February 2001
<i>Češić</i>	Sentencing Judgement: <i>Prosecutor v. Ranko Češić</i> , Sentencing Judgement, 11 March 2004
<i>Deronjić</i>	Sentencing Judgement: <i>Prosecutor v. Miroslav Deronjić</i> , Sentencing Judgement, 30 March 2004 Appeal Sentencing Judgement: <i>Prosecutor v. Miroslav Deronjić</i> , Judgement on Sentencing Appeal, 20 July 2005
<i>Erdemović</i>	First Sentencing Judgement: <i>Prosecutor v. Dražen Erdemović</i> , Sentencing Judgement, 29 November 1996 Second Sentencing Judgement: <i>Prosecutor v. Dražen Erdemović</i> , Sentencing Judgement, 5 March 1998
<i>Furundžija</i>	Trial Judgement: <i>Prosecutor v. Anto Furundžija</i> , Judgement, 10 December 1998 Appeal Judgement: <i>Prosecutor v. Anto Furundžija</i> , Judgement (on appeal), 21 July 2000
<i>Galić</i>	Trial Judgement: <i>Prosecutor v. Stanislav Galić</i> , Judgement, 5 December 2003 Appeal Judgement: <i>Prosecutor v. Stanislav Galić</i> , Judgement, 30 November 2006
<i>Jelisić</i>	Appeal Judgement: <i>Prosecutor v. Goran Jelisić</i> , Judgement, 5 July 2001
<i>Jokić</i>	Sentencing Judgement: <i>Prosecutor v. Miodrag Jokić</i> , Sentencing Judgement, 18 March 2004 Appeal Sentencing Judgement: <i>Prosecutor v. Miodrag Jokić</i> , Judgement, 30 August 2005

<i>Kordić and Čerkez</i>	Appeal Judgement: <i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , Judgement (on appeal), 17 December 2004
<i>Krajišnik</i>	Trial Judgement: <i>Prosecutor v. Momčilo Krajišnik</i> , Judgement, 27 September 2006
<i>Krstić</i>	Trial Judgement: <i>Prosecutor v. Radislav Krstić</i> , Judgement, 2 August 2001 Appeal Judgement: <i>Prosecutor v. Radislav Krstić</i> , Judgement, 19 April 2004
<i>Kunarac et al.</i>	Trial Judgement: <i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković</i> , Judgement, 22 February 2001 Appeal Judgement: <i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač, Zoran Vuković</i> , Judgement (on appeal), 12 June 2002
<i>Kupreškić et al.</i>	Appeal Judgement: <i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić</i> , Judgement (on appeal), 23 October 2001
<i>Kvočka et al.</i>	Appeal Judgement: <i>Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, and Dragoljub Prcać</i> , Judgement (on appeal), 28 February 2005
<i>Mrđa</i>	Sentencing Judgement: <i>Prosecutor v. Darko Mrđa</i> , Sentencing Judgement, 31 March 2004
<i>Naletilić and Martinović</i>	Appeal Judgement: <i>Prosecutor v. Mladen Naletilić and Vinko Martinović</i> , 3 May 2006
<i>Dragan Nikolić</i>	Sentencing Judgement: <i>Prosecutor v. Dragan Nikolić</i> , Sentencing Judgement, 18 December 2003 Appeal Sentencing Judgement: <i>Prosecutor v. Dragan Nikolić</i> , Judgement, 4 February 2005
<i>Momir Nikolić</i>	Sentencing Judgement: <i>Prosecutor v. Momir Nikolić</i> , Sentencing Judgement, 2 December 2003 Appeal Sentencing Judgement: <i>Prosecutor v. Momir Nikolić</i> , Judgement of Sentencing Appeal, 8 March 2006
<i>Obrenović</i>	Sentencing Judgement: <i>Prosecutor v. Dragan Obrenović</i> , Sentencing Judgement, 10 December 2003
<i>Plavšić</i>	Sentencing Judgement: <i>Prosecutor v. Biljana Plavšić</i> , Sentencing Judgement, 27 February 2003
<i>Sikirica et al.</i>	Sentencing Judgement: <i>Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundžija</i> , Sentencing Judgement, 13 November 2001
<i>Blagoje Simić et al.</i>	Appeal Judgement: <i>Prosecutor v. Blagoje Simić et al.</i> , Judgement, 28 November 2006
<i>Milan Simić</i>	Sentencing Judgement: <i>Prosecutor v. Milan Simić</i> , Sentencing Judgement, 17 October 2002
<i>Stakić</i>	Appeal Judgement: <i>Prosecutor v. Milomir Stakić</i> , Judgement (on appeal), 22 March 2006

<i>Tadić</i>	Appeal Sentencing Judgement: <i>Prosecutor v. Duško Tadić</i> , Judgement in Sentencing Appeals, 26 January 2000
<i>Todorović</i>	Sentencing Judgement: <i>Prosecutor v. Stevan Todorović</i> , Sentencing Judgement, 31 July 2001
<i>Vasiljević</i>	Appeal Judgement: <i>Prosecutor v. Mitar Vasiljević</i> , Judgement (on appeal), 25 February 2004