

IN THE TRIAL CHAMBER

Before:

Judge Patrick Robinson, Presiding

Judge Richard May

Judge Mohamed Fassi Fihri

Registrar:

Mr. Hans Holthuis

Judgement of: 31 July 2001

PROSECUTOR

v.

STEVAN TODOROVIC

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Ms. Nancy Paterson

Mr. Gramsci Di Fazio

Counsel for the Accused:

Mr. Deyan Brashich

Mr. Nikola Kostich

I. INTRODUCTION AND PROCEDURAL HISTORY

A. Introduction

1. The accused Stevan Todorovic came into the custody of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“the International Tribunal”), on 27 September 1998. A warrant for the arrest of the accused had been issued on 21 July 1995, following the confirmation of an indictment against Stevan Todorovic and five other accused by Judge Vohrah on the same day. The accused Stevan Todorovic was indicted on 15 charges of grave breaches of the Geneva Conventions of 1949¹, violations of the laws or customs of war, and crimes against humanity under Articles 2, 3 and 5 of the Statute of the International Tribunal (“the Statute”), respectively, all relating to events said to have taken place in the area of Bosanski Samac, in the north-eastern part of Bosnia and Herzegovina, during the summer of 1992.

2. In 1998, the accused was living in the Federal Republic of Yugoslavia (Serbia and Montenegro) (“FRY”) when allegedly he was abducted and taken against his will to Bosnia and Herzegovina. It is not disputed that the accused was handed over to the Stabilisation Force (SFOR) at the Air Base at Tuzla, Bosnia and Herzegovina, where he was arrested and transferred to the custody of the International Tribunal. At his initial appearance on 30 September 1998 the

accused pleaded not guilty to all charges. The accused subsequently challenged the legality of his arrest and detention and initiated a variety of proceedings seeking his release and return to the FRY.

3. The indictment against the accused was further² amended in December 1998 (the Second Amended Indictment, hereinafter “the Indictment ”³) so that Stevan Todorovic was charged with: persecutions on political, racial and religious grounds, deportation, murder , inhumane acts, rape and torture (crimes against humanity); unlawful deportation or transfer, wilful killing, wilfully causing great suffering and torture or inhuman treatment (grave breaches of the Geneva Conventions); and murder, cruel treatment , humiliating and degrading treatment and torture (violations of the laws or customs of war). All of the offences charged in the Indictment were alleged to have been committed in the period from April 1992 to December 1993.

4. At a further appearance to enter a plea on the Indictment, held on 21 January 1999, the accused again pleaded not guilty to all charges. He maintained this position until 29 November 2000 at which time a joint motion was filed on his behalf with the Office of the Prosecutor (“Prosecution”) informing the Trial Chamber of an agreement reached between them as to the entry of a guilty plea by the accused to Count 1 of the Indictment (persecution)⁴ and the withdrawal of all other counts against him. It was also a condition of the agreement that all pending motions including the various challenges to the legality of the arrest would be withdrawn by the Defence.

5. The accused appeared before Judge Robinson on 13 December 2000 and entered a plea of guilty to Count 1 of the Indictment. Judge Robinson considered the guilty plea and referred the matter to the full Trial Chamber pursuant to Rule 62 (vi)(b) of the Rules of Procedure and Evidence of the International Tribunal (“the Rules”). At the same hearing the Prosecution confirmed its intention formally to withdraw the remaining counts against the accused and the Defence confirmed its intention to withdraw three outstanding motions relating to the legality of the arrest of the accused. The Prosecution further clarified that it was only pursuing liability under Article 7, paragraph 3, of the Statute for Stevan Todorovic in relation to the allegation of torture of Omer Nalic underlying the charge of persecution in Count 1 of the Indictment.⁵ On 24 January 2001 the accused confirmed his guilty plea before the full Trial Chamber , which entered a finding of guilt on that date.

6. A motion from the Prosecution to withdraw the remaining counts of the Indictment was filed on 23 January 2001 and a formal application by the Defence to withdraw the motions relating to the legality of the arrest was filed on 24 January 2001. The proceedings against Stevan Todorovic were formally separated from those against the other accused named in the Indictment by Order dated 24 January 2001 . The Trial Chamber⁶ received written submissions on sentencing in April 2001 and heard oral argument on 4 May 2001.

B. The Plea Agreement

7. The terms of the agreement between the accused and the Prosecution are set out in the confidential *ex parte* “Joint Motion for consideration of plea agreement between Stevan Todorovic and the Office of the Prosecutor” filed on 29 November 2000, as amended by a

joint corrigendum filed on 26 January 2001 (“the Plea Agreement”). The detailed factual basis of the allegations and the accused’s participation in those events is set out in a further confidential document entitled “Factual basis for the charges to which Stevan Todorovic has pleaded guilty”, filed jointly on 5 January 2001 (“Factual Basis”) pursuant to Judge Robinson’s instruction .

8. On 26 February 2001 the Trial Chamber issued a Decision accepting the withdrawal, without prejudice, of Counts 2 to 27 of the Indictment, reserving the right of the Prosecution to apply to reinstate those Counts should the accused fail to comply fully with the Plea Agreement, and similarly accepting the withdrawal of all defence motions pending before the Trial Chamber without prejudice. The Decision also reserved the right for the Defence to reinstate such motions should the Prosecution deem the accused not to have complied fully with the terms of the Plea Agreement and reinstate the counts accordingly.

9. In the Plea Agreement the Prosecution and Stevan Todorovic agree on certain facts as being true and constituting the factual basis for the guilty plea. These include the beating and murder of Anto Brandic on 29 July 1992; ordering six men to perform fellatio on each other at the police station in Bosanski Samac on three different occasions in May and June 1992; the beatings of Enver Ibralic , Hasan Jasarevic, Omer Nalic and Father Jozo Puskaric on about 29 July 1992; the beating of Silvestar⁷Antunovic on about 15 July 1992; and the repeated beatings on Hasan Bicic, Kemal Bobic, Hasan Ceribasic, Abdulah Drljacic, Zlatko Dubric, Roko Jelavic and Hasan Subasic between 17 April and 21 November 1992. In addition, it is acknowledged that Stevan Todorovic ordered and participated in the unlawful detention and cruel and inhumane treatment of Bosnian Croats, Bosnian Muslims and other non-Serb civilians, ordered three others over whom he had superior responsibility to torture Omer Nalic on or about 19 June 1992, ordered and participated in the interrogation of detained persons and forced them to sign false and coerced statements, ordered and participated in deportation and forcible transfers, and issued orders and directives that violated the right of non-Serb civilians to equal treatment under the law and infringed their basic rights.

10. Stevan Todorovic acknowledged that by entering a plea of guilty he voluntarily waived certain procedural rights⁸ and undertook to provide full cooperation with the Prosecution in relation to information and evidence known to him regarding the events surrounding the armed conflict in the former Yugoslavia from 1990 to the present.

11. Finally, the Prosecution and the Defence agreed that the Prosecution would recommend to the Trial Chamber a sentence of not less than five years’ and not more than twelve years’ imprisonment, and that neither party would appeal any sentence imposed by the Trial Chamber within that range.

12. The Factual Basis sets out in more detail the agreed facts by which the crime of persecution as charged in the Indictment was perpetrated, namely: (a) the forcible take-over by Serb forces of cities, towns and villages inhabited by non-Serb civilians; (b) the murder,⁹ sexual assaults and repeated beatings of non-Serb civilians detained in various detention camps in the region; (c) the unlawful detention and confinement of non -Serb civilians under inhumane conditions on political, racial or religious grounds ; (d) the cruel and inhumane treatment of non-Serb civilians

including beatings, torture, forced labour and confinement under inhumane conditions; (e) the interrogation of non-Serb civilians who had been arrested and detained and forcing them to sign false and coerced statements; (f) the deportation, forced transfer and expulsion of non-Serb civilians from their homes and villages; and (g) the issuance of orders and directives which violated the rights of non-Serb civilians to equal treatment under the law and which infringed their enjoyment of basic and fundamental rights .[10](#)

13. The Factual Basis supports the agreed facts by way of statements of five witnesses who would have been called at trial and attaches 17 documents.

14. In the Factual Basis Stevan Todorovic acknowledges that as Chief of Police he occupied a position of superior authority to all other police officers in Bosanski Samac, thus acknowledging his responsibility for the acts of his subordinates under Article 7, paragraph 3, of the Statute.[11](#)

15. On 4 May 2001 the Prosecution and the Defence filed a Joint Stipulation confirming that Stevan Todorovic had complied with the Plea Agreement and had provided the level of cooperation with the Prosecution envisaged by that agreement.

C. The Guilty Plea

16. At the hearings on 13 December 2000 and 24 January 2001, the accused confirmed that he understood the Indictment against him, that the terms of the Plea Agreement had been explained to him and discussed with his counsel, that he understood them, and that he understood the consequences of any plea that would be made by him. He also confirmed that he understood that sentence was ultimately a matter for the Trial Chamber to determine, irrespective of the terms of the Plea Agreement . The accused confirmed that he had not been threatened or coerced in any way to enter into the Plea Agreement, and that he was entering his plea voluntarily.

17. The accused having entered a plea of guilty to Count 1 of the Indictment , namely persecution, the Trial Chamber considered whether the plea was valid and acceptable pursuant to Rule 62 *bis* of the Rules. Having satisfied itself as to the factual basis of the allegations and having considered the circumstances surrounding the entering of the plea, the Trial Chamber accepted the guilty plea and entered a finding of guilt accordingly.

D. The Sentencing Proceedings

18. Following the establishment of a schedule for the filing of briefs relating to sentencing, the Defence sought to obtain expert medical reports to support a possible showing of “diminished or lack of mental capacity” not as a defence to the charges against him, but rather as a factor to be taken into account in mitigation of sentence.[12](#) The Trial Chamber authorised medical examinations to be carried out both by a psychiatrist appointed by the International Tribunal and by a psychiatrist selected by the Defence.

19. The Prosecution Brief on Sentencing (“Prosecution Sentencing Brief”) was filed on 17 April 2001 and the Defence Brief on Sentencing (“Todorovic Sentencing Brief”) was filed on 26 April 2001. In its filing, the Defence indicated that it wished to call eight witnesses at the hearing, and to call one of the medical experts to testify in person. On 27 April 2001 the Defence submitted various documents in support of this application, including certificates to show that Stevan Todorovic had no prior criminal record, letters of future employment and statements from

20 fact and character witnesses. The expert report of Dr. Lecic-Tosevski, the psychiatrist selected by the Defence, was also filed at this time (“Lecic-Tosevski report”).¹³ The report of Dr. Soyka, the psychiatrist appointed by the International Tribunal, was filed on 3 May 2001 (“Soyka report”).¹⁴

20. On 1 May 2001 the Prosecution filed a statement indicating its intent to cross-examine any witnesses called by the Defence and seeking leave to call a witness of its own. The Defence objected to the calling of this witness on the basis that the proposed evidence was not “relevant information” within the scope of Rule 100 of the Rules and further sought leave to call evidence in rebuttal if the witness were permitted to testify.

21. The sentencing hearing was held on 4 May 2001. The Trial Chamber first addressed the issue of the witnesses to be heard, noting that it would be wrong “to allow evidence in the sentence proceedings which in any way puts in issue the agreed facts”.¹⁵ The statements submitted by the Defence as to lack of prior criminal convictions and future employment were admitted without any cross-examination. The statements submitted by the Defence of six factual witnesses in mitigation were admitted without cross-examination,¹⁶ but the statements of four potential witnesses were rejected because they addressed the agreed facts and the question of the accused’s responsibility. The Prosecution motion to call a witness was denied on similar grounds.

22. Of the character witnesses, the Defence was permitted to call the mother and sister of the accused, with all other statements being admitted without cross-examination. The Trial Chamber permitted the Defence to call Dr. Lecic-Tosevski and then heard closing arguments. During its presentation the Prosecution requested the Trial Chamber to impose a sentence of 12 years, the upper limit of the range agreed in the Plea Agreement. Before the Defence presented its closing arguments, the accused made a statement expressing his remorse. The Defence asked the Trial Chamber to discount the sentence to reflect both the saving of resources and the substantial cooperation of the accused. The Defence had already, in the Todorovic Sentencing Brief, requested that the Trial Chamber impose a sentence of five years’ imprisonment.¹⁷ The Trial Chamber reserved its Judgement to a later date.

II. GUILTY PLEA AS BASIS FOR CONVICTION

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

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

24. Rule 62 *bis* of the Rules, which governs the taking of a guilty plea, sets out the criteria to be applied¹⁸ by specifying that a Trial Chamber may only accept a plea of guilty where it is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and

(iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case.

25. The Trial Chamber observes that, under this Rule, a guilty plea cannot form the sole basis for the conviction of an accused; the Trial Chamber must also be satisfied that "there is a sufficient factual basis for the crime and the accused's participation in it". In this regard, the Trial Chamber may rely on either independent indicia or on the lack of "any material disagreement between the parties about the facts of the case".

26. This Sentencing Judgement is based upon the Trial Chamber's acceptance of Stevan Todorovic's guilty plea, its satisfaction as to the factual basis for the crimes alleged, and the consequent conviction of the accused on Count 1 of the Indictment for persecution as a crime against humanity under Article 5 of the Statute .[19](#)

III. SENTENCING

A. Applicable Law

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

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia .

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

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

Rule 101

Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as :

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

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

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

B. Sentencing Factors

1. General considerations

28. At the outset, the Chamber observes that, while the Appeals Chamber of the International Tribunal has held that retribution and deterrence are the main principles in sentencing for international crimes,²⁰ in the Chamber's opinion these purposive considerations merely form the backdrop against which an individual accused's sentence must be determined.

29. The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words, that the punishment be made to fit the crime. The Chamber is of the view that this principle is reflected in the account, which the Chamber is obliged by the Statute and the Rules to take, of the gravity of the crime.

30. The Appeals Chamber has held that deterrence "is a consideration that may legitimately be considered in sentencing"²¹ and has further recognised the "general importance of deterrence as a consideration in sentencing for international crimes".²² The Chamber understands this to mean that deterrence is one of the principles underlying the determination of sentences, in that the penalties imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so. Accordingly, while the Chamber recognises the importance of deterrence as a general consideration in sentencing, it will not treat deterrence as a distinct factor in determining sentence in this case.

2. The gravity of the crime

(a) Preliminary matters

31. Article 24 of the Statute requires a Trial Chamber, in determining an appropriate sentence, to take into account, *inter alia*, the gravity of the offence. Chambers of the International Tribunal have consistently held that the gravity of the criminal conduct is the most important factor to consider in determining sentence.²³ The Appeals Chamber, in the *Celebici* case, confirmed its "acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence."²⁴ More specifically it reiterated its endorsement of the following statement by the Trial Chamber in *Kupreskic* :

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.²⁵

This involves a consideration of both the criminal conduct forming the basis for the conviction and any aggravating circumstances.

32. The accused has been convicted of the crime of persecution, a crime against humanity, which, in the Chamber's opinion, is inherently very serious. This crime, like other crimes against humanity, requires that the acts of the accused be related to a widespread and systematic attack on a civilian population of which the accused had knowledge.²⁶ However, persecution is the

only crime enumerated in Article 5 of the Statute which requires a discriminatory intent, and which, by its nature, may incorporate other crimes. The *Blaskic* Trial Chamber stated that the crime of persecution, on account of these distinctive features, justifies a more severe penalty.²⁷ 33. In order to be in a position to evaluate the gravity of Stevan Todorovic's offence and in light of the fact that the accused's conviction rests upon his plea of guilt, it behoves the Trial Chamber to set forth the details of the criminal conduct underlying this conviction,²⁸ and to consider the aggravating factors.

(b) Criminal conduct forming basis for conviction

34. While Stevan Todorovic has pleaded guilty to the single crime of persecution as a crime against humanity, the various means through which this crime was perpetrated are listed under Count 1 of the Indictment. The criminal conduct underlying each of these means will be addressed in turn.

(i) The forcible take-over of the municipality of Bosanski Samac

35. Stevan Todorovic has admitted to his participation in the forcible take-over of Bosanski Samac.

(ii) The murder, sexual assaults and repeated beatings

36. Stevan Todorovic has admitted that on 29 July 1992²⁹ he, along with several other men, repeatedly beat and kicked Anto Brandic, also known as Antesa, in the hallway of the police station in Bosanski Samac, and that Anto Brandic died as a result of this mistreatment. A statement given by an eye-witness corroborated this account. The beating lasted for approximately one hour and Stevan Todorovic was seen to kick Anto Brandic repeatedly and to hit him on the head.³⁰

37. In relation to the allegations of sexual assault, Stevan Todorovic has accepted the following account of his conduct.

38. Witness A described how he was taken to the police station in Bosanski Samac, where Stevan Todorovic began to beat him and kick him in the genital area. Witness A was then taken over to another man and ordered by Stevan Todorovic to "bit into his penis". After that he was beaten again and endured further mistreatment.³¹

39. Witness C stated that Todorovic had telephoned and had required him to come to the police station in Bosanski Samac. There, Witness C was beaten for about half an hour. In Witness C's words: "Only Todorovic and me were present at the office and the beating lasted for about half an hour. After that Witness D was brought to the office and he continued beating both of us. The beating lasted for another hour. After that he ordered us to perform oral sex on each other."³²

40. Witness E described how he was arrested on 9 or 10 May 1992 and taken to the police station in Bosanski Samac. There he was beaten by Stevan Todorovic, among others, for several hours. Witness E stated that: "After the beating Todorovic ordered us (Witness E and Witness F) to do a blow job on each other. He was laughing when we was doing it."³³

41. In relation to the allegations of beatings,³⁴ Stevan Todorovic has admitted to beating Father Jozo Puskaric at the Bosanski Samac police station on 29 July 1992. He also admits to beating

Silvestar Antunovic in the gymnasium of the Bosanski Samac primary school on about 15 July 1992. He admits to beating Hasan Bicic, Kemal Bobic, Hasan Ceribasic, Abdulah Drljadic, Zlatko Dubric, Roko Jelavic and Hasan Subasic on several occasions between 17 April and 21 November 1992 in the primary school, the secondary school and the Territorial Defence building in Bosanski Samac. Stevan Todorovic further admits to ordering three men to beat Omer Nalic on about 19 June 1992 at the Bosanski Samac primary school.³⁵ He admits that the victims suffered serious physical and mental injury as a result of the beatings.³⁶

(iii) The unlawful arrest, detention and confinement of Bosnian Croats, Bosnian Muslims and other non-Serb civilians under inhumane conditions

42. Stevan Todorovic has admitted to participating in the unlawful arrest and detention of non-Serb civilians in the Bosanski Samac region.

(iv) The cruel and inhumane treatment of Bosnian Croats, Bosnian Muslims and other non-Serb civilians including beatings, torture, forced labour assignments and confinement under inhumane conditions

43. Stevan Todorovic has admitted to participating in the cruel and inhumane treatment of non-Serb civilians in Bosanski Samac through forced labour assignments, including digging trenches and constructing bunkers.

(v) The interrogation of Bosnian Croats, Bosnian Muslims and other non-Serb civilians who had been arrested and detained and forcing them to sign false and coerced statements

44. Stevan Todorovic has admitted to interrogating certain individuals, several of whom have provided statements to that effect.

(vi) The deportation, forcible transfer and expulsion of Bosnian Croats, Bosnian Muslims and other non-Serb civilians, including women, children and the elderly, from their homes and villages by force, intimidation and coercion

45. Stevan Todorovic has admitted to participating in the deportation of non-Serb civilians. He was responsible for implementing a decision of the Crisis Staff of the Serbian Municipality of Bosanski Samac dated 15 May 1992 requiring all people of Croatian nationality in the area to be “isolated and taken to vital facilities in the town and in villages”.³⁷

(vii) The issuance of orders and directives which violated the rights of the non-Serb civilians to equal treatment under the law and infringed upon their enjoyment of basic and fundamental rights

46. Stevan Todorovic, in his role as Chief of Police and through his membership of the Serb Crisis Staff, participated in the issuance of orders violating the basic rights of non-Serb civilians in Bosanski Samac. An order signed by him, dated 4 August 1992, prohibited three or more Muslims or Croats from gathering in a public place.³⁸ The Municipal Crisis Staff issued an order, dated 21 May 1992, prohibiting the free movement of individuals in the area and requiring those who wish to leave the territory of the Serbian Municipality of Bosanski Samac to acquire a special permit.³⁹ Official checkpoints were established in Bosanski Samac to prevent the free passage of individuals from the town.⁴⁰

(viii) The wanton and extensive destruction, plundering and looting of the property of non-Serb civilians, including dwellings, businesses, personal property and livestock

47. Stevan Todorovic has admitted to his participation in the plunder and looting that occurred in Bosanski Samac. An order dated 24 April 1992 and signed by the Municipal Crisis Staff states that goods and equipment from the zone of combat must be handed over to the local crisis committees, and that “appropriate measures ” shall be taken against anyone failing to comply with the order.⁴¹

48. It is the foregoing criminal conduct which, when considered together with the aggravating circumstances set forth below, will form the basis for the Trial Chamber’s determination as to the gravity of the offence.

(c) Aggravating circumstances

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

(i) Arguments of the Parties

50. The Prosecution submits that the Trial Chamber should consider the following factors in aggravation of the offence: (i) the gravity of the offence ; (ii) how the crime was committed; (iii) the effect of the crime on the victims ; and (iv) the position of the defendant as a superior officer.⁴²

51. In relation to the first criterion, the Prosecution submits that persecution, the crime to which Stevan Todorovic has pleaded guilty, is one of the most serious crimes and that the penalty assessed should reflect this.⁴³

52. In the Prosecution’s submission, the cruelty of the criminal conduct of Stevan Todorovic, who personally inflicted beatings and humiliating treatment upon his victims, should be a significant consideration in determining sentence.⁴⁴ The Prosecution cites the findings of the Trial Chamber in the *Blaskic* case to support its contention that the discriminatory nature of Stevan Todorovic’s crime justifies a more severe penalty.⁴⁵

53. The Prosecution contends that the effect of Stevan Todorovic’s crimes should be taken into account as an aggravating factor in determining sentence. A declaration of an investigator from the Office of the Prosecutor detailing the impact of the crimes upon the victims is attached to the Prosecution Sentencing Brief as Annex 1.⁴⁶ The Prosecution maintains that the fact that many of Stevan Todorovic’s victims were civilians, including women and children, should also be considered.⁴⁷

54. The Prosecution argues that Stevan Todorovic’s position of superiority , as the Chief of Police in Bosanski Samac, should be taken into account as an aggravating circumstance in determining sentence.⁴⁸ The Prosecution relies for this proposition upon the *Celebici*,⁴⁹ *Kordic*,⁵⁰ and *Blaskic* ⁵¹ Trial Judgements. The Prosecution further observes that in the *Aleksovski* case, the Appeals Chamber held that the accused’s position as warden of the camp seriously aggravated his offences.⁵²

55. The Defence argues that only those circumstances which are directly related to the commission of the offence, and to the offender himself when he committed the offence, may be considered in aggravation.⁵³ Further, it is submitted, the Prosecution bears the burden of proof in

relation to aggravating factors and the standard of proof is that of beyond a reasonable doubt.⁵⁴ 56. The Defence distinguishes the *Aleksovski* case from the current case on the basis that, while Zlatko Aleksovski was appointed as warden of an illegal camp designed to inflict inhuman treatment on the detainees, Stevan Todorovic acted as the chief of an existing government institution, lawfully established and subject to regulation.⁵⁵

Discussion

57. As discussed above, the crime of persecution, on account of its distinctive features, is a particularly serious crime, a fact that has been taken into account in the determination of sentence. The Prosecution has urged the Chamber to treat the discriminatory intent with which Stevan Todorovic committed his crimes as a factor in aggravation of sentence. However, in the Chamber's opinion, since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic's criminal conduct is already encompassed in a consideration of the offence. Therefore, it should not be treated separately as an aggravating factor. For the same reason, the fact that the crime was committed against civilians will not generally be accepted as an aggravating circumstance.

58. With regard to the burden of proof, the Appeals Chamber in the *Celebici* case established that "only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence."⁵⁶ As described above, the Trial Chamber, in accordance with Rule 62 *bis*, has accepted the factual basis for the crime and the accused's participation in it. Thus, the factual basis for any aggravating circumstances has already been accepted by the Trial Chamber and needs no further proof.

59. The Trial Chamber considers Stevan Todorovic's superior position as Chief of Police in Bosanski Samac and the manner in which several of the offences were carried out to be aggravating factors in this case.

a. The accused's superior position

60. From 28 March 1992 until at least 31 December 1993, Stevan Todorovic was the Chief of Police in Bosanski Šamac. As such, he occupied a position of superior authority to all other police officers in Bosanski Šamac.⁵⁷ While serving as Chief of Police, Stevan Todorovic was also a member of the Serb Crisis Staff.

61. As submitted by the Prosecution, Stevan Todorovic, as Chief of Police, had a responsibility to protect and defend all citizens of the municipality of Bosanski Samac.⁵⁸ Instead, in his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offences which he should have been working to prevent or punish. As discussed above, on one occasion, Stevan Todorovic also ordered three men to beat Omer Nalic.⁵⁹ His direct participation in the crimes, as well as his abuse of his position of authority and of people's trust in the institution, clearly constitute an aggravating factor.⁶⁰

62. The fact that Stevan Todorovic might, initially, have been reluctant to take on the position as Chief of Police⁶¹ does not negate the significance of his abuse of such a superior position. However, the Trial Chamber also recognises that, while the position of Chief of Police is a

relatively senior one, Stevan Todorovic was not in the very highest levels of the overall hierarchy in the conflict in the former Yugoslavia, nor was he one of its architects.⁶²

b. The manner in which several of the crimes were committed

63. The Trial Chamber finds that several of the above outlined offences committed by Stevan Todorovic demonstrated particular cruelty. The fatal beating of Anto Brandic lasted for over an hour. Given the duration of this beating, Stevan Todorovic had every opportunity to repent of his actions and cease the beating. Instead, he carried on beating and kicking Anto Brandic, who later died as a result of his injuries.⁶³

64. The beatings of Witnesses C and E, in which Todorovic participated, also lasted for hours and both individuals were forced to perform fellatio on other prisoners.⁶⁴

65. The Trial Chamber considers the particular cruelty shown in connection with these beatings, and their lengthy duration, to be an aggravating factor.

(d) Conclusion

66. The Trial Chamber has now considered the offence as such, the underlying criminal conduct which forms the basis for Stevan Todorovic's conviction and the aggravating circumstances. The Trial Chamber notes the extent of, and variation in, the criminal conduct underlying this conviction. In particular, the Trial Chamber finds the murder and the sexual assaults perpetrated by the accused to be serious offences. As discussed in more detail above, certain of the criminal acts underlying the conviction of the accused were aggravated by their cruelty and by the fact that, as Chief of Police, the accused held a superior position. Consequently, the Trial Chamber concludes that Stevan Todorovic's crime was particularly grave.

3. Mitigating circumstances

67. Rule 101 (B)(ii) of the Rules provides that the Trial Chamber, in determining sentence, shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction".

(a) Arguments of the Parties

68. The Prosecution observes that the Trial Chamber in the *Blaskic* case stated that an accused's "cooperation with the Prosecutor" will be considered as a "significant mitigating factor", in circumstances where both the quality and the quantity of the information provided by the accused is substantial, and where the cooperation is given without hope of reward.⁶⁵ The Prosecution argues that in this case Stevan Todorovic, in return for his cooperation and information, has already benefited from the Prosecution's agreement to recommend a maximum sentence of 12 years, a term of imprisonment significantly lower, it is submitted, than he would have received had he been convicted after trial.⁶⁶ The Prosecution states that the quality and the extent of Stevan Todorovic's cooperation to date has satisfied the expectations on the basis of which the Prosecution agreed to enter into the Plea Agreement, and that while Stevan Todorovic should receive a reduction in his sentence based upon his cooperation, such reduction should not result in a sentence of less than 12 years' imprisonment, as recommended by the Prosecution.⁶⁷

69. The Defence argues that Trial Chambers have taken account of various factors in mitigation of sentence, including a showing of remorse, acceptance of responsibility and cooperation with

the Prosecution.⁶⁸ It is submitted that the Defence need only prove the existence of a mitigating factor by a preponderance of the evidence or on the balance of the probabilities.⁶⁹

70. The Defence contends that the effect of Todorovic's decision to enter into a plea agreement with the Prosecution and to plead guilty to the charge of persecution as a crime against humanity is to relieve the Prosecution and the International Tribunal of the burden of conducting a trial. In this regard, the Defence submits that the Trial Chamber should give due consideration to the fact that the victims of Todorovic's crimes were spared the emotional burden of having to testify at trial.⁷⁰

71. The Defence argues that the circumstances of Todorovic's decision to plead guilty should be taken into account. The Plea Agreement, upon which the guilty plea is based, was entered into just after the Trial Chamber had granted Todorovic's request to direct SFOR to furnish information relating to his arrest. It is argued that Todorovic's decision to abandon his rights in respect of the motion alleging the illegality of his arrest demonstrates his acceptance of responsibility for his crimes, and that a reduction in his sentence would reflect the significant rights he willingly relinquished in this regard.⁷¹

72. The Defence observes that the Rules state that an accused's cooperation with the Prosecution shall be taken into account as a mitigating factor in sentencing.⁷² The Defence submits that one of the objectives of the International Tribunal, that is, the restoration of peace in the former Yugoslavia, is furthered where criminal conduct "that might otherwise be unknown to investigators" is revealed by an accused.⁷³ The Defence observes that the Prosecution has recognised the quality of information supplied by Todorovic to date and recalls that the Plea Agreement contemplates future cooperation.⁷⁴

73. The Defence argues that it is within the sole purview of the Trial Chamber to determine the appropriate reduction in sentence based upon Todorovic's cooperation with the Prosecution, and that the Chamber is in no way bound by the Prosecution's assessment of that contribution, as reflected in the Plea Agreement.⁷⁵ The Defence submits that, since the mandate of the International Tribunal is furthered by the cooperation of an accused, such cooperation should be encouraged.⁷⁶

(b) Discussion

74. The Trial Chamber considers that, in relation to the accused, Stevan Todorovic, the following factors may be taken into account in mitigation of his sentence: the accused's guilty plea, his substantial cooperation with the Prosecution, his expressed remorse for his crime, and the question of his diminished mental capacity.

(i) Plea of guilt

75. The Trial Chamber observes that Todorovic is only the third accused before this International Tribunal to have been convicted on the basis of a guilty plea. In the *Erdemovic* case, the accused pleaded guilty to murder as a violation of the laws or customs of war and received a sentence of five years' imprisonment.⁷⁷ In the *Jelusic* case, the accused pleaded guilty to violations of the laws or customs of war and crimes against humanity; he was convicted on one count of plunder,

three counts of cruel treatment and inhumane acts, as well as twelve counts of murder.⁷⁸ The Trial Chamber imposed a sentence of 40 years' imprisonment.⁷⁹

76. In the *Erdemovic* case, the Trial Chamber considered the accused's decision to enter a guilty plea as a mitigating factor in sentencing. It stated that:

An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators.

Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.⁸⁰

77. While the Trial Chamber in the *Jelusic* case also took the accused's plea of guilt into account as a mitigating factor, it was only accorded relative weight, due to the fact that the accused had demonstrated no remorse for his crimes.⁸¹

78. The principle that a guilty plea should be considered as a factor in mitigation of sentence has also been acknowledged in several cases before the International Criminal Tribunal for Rwanda. In the *Kambanda* case, the Appeals Chamber affirmed the Trial Chamber's decision to impose a life sentence on the accused, who had pleaded guilty to six counts, including genocide. It stated that:

[t]he Judgement illustrates that the Trial Chamber clearly considered the mitigating factors put forward by both the Appellant and the Prosecutor, *the principle that a guilty plea as part of this mitigation carries with it a reduction in sentence* and the general practice regarding prison sentences in the courts of Rwanda.⁸²

79. In this case, Stevan Todorovic entered into an agreement with the Prosecution and pleaded guilty to Count 1 of the Indictment on that basis. Although the Plea Agreement does indicate a range within which the parties have agreed Todorovic's sentence should fall, the Trial Chamber reiterates that it is in no way bound by this agreement. It is the Chamber's responsibility to determine an appropriate sentence in this case.

80. The Trial Chamber considers that a guilty plea should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received. In this regard, it concurs with the opinion expressed by Judge Cassese in the *Erdemovic* case, recognising the contribution a guilty plea makes to the work of the International Tribunal.

It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties – it bears stressing – are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly

contributes to public advantage .⁸³

To this the Trial Chamber would add the important factor that by pleading guilty , an accused relieves victims and witnesses of the necessity of giving evidence with the attendant stress which this may incur.

81. A guilty plea is always important for the purpose of establishing the truth in relation to a crime. Generally, however, a plea of guilt will only contribute to the above-described public advantage if it is pleaded before the commencement of the trial against the accused. Needless to say, if pleaded at a later stage of the proceedings, or even after the conclusion of the trial, a voluntary admission of guilt will not save the International Tribunal the time and effort of a lengthy investigation and trial.

82. Stevan Todorovic made the Plea Agreement and entered his plea of guilt on 13 December 2000. While this was over 26 months after his initial appearance before the International Tribunal, Stevan Todorovic's trial had not yet commenced . The Trial Chamber recognises the considerable contribution of this guilty plea to the efficiency of the work of the International Tribunal and to its search for the truth, and has taken it into account in determining sentence.

(ii) Substantial cooperation

83. The Trial Chamber, pursuant to Rule 101 (B)(ii), is required to consider “the substantial cooperation with the Prosecutor by the convicted person before or after conviction”, in mitigation of sentence.

84. In this regard, the Trial Chamber takes note of Stevan Todorovic's Plea Agreement with the Prosecution, pursuant to which he has agreed to cooperate with the Prosecution by providing “truthful and complete information” and by testifying in the case against his former co-accused, and, as requested by the Prosecution, in any other proceedings.⁸⁴

85. The Trial Chamber in the *Blaskic* case set out the conditions under which an accused's cooperation with the Prosecution may qualify as a mitigating factor:

Co-operation with the Prosecutor is the only circumstance explicitly provided for within the terms of the Rules. By this simple fact, it takes on a special importance . The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Providing that the co-operation lent respects the aforesaid requirements , the Trial Chamber classes such co-operation as a “significant mitigating factor ”.⁸⁵

Adopting the *Blaskic* approach, the Prosecution submits that, in light of the substantial benefits gained by Stevan Todorovic as a result of the Plea Agreement , it is not possible to characterise his cooperation as “spontaneous and selfless ” and that his cooperation was not “lent without asking for something in return.”⁸⁶

86. This Chamber agrees with the finding in the *Blaskic* case that the accused's earnestness and the degree of his cooperation with the Prosecution should determine whether there is reason to

reduce the sentence on this ground. Indeed, an evaluation of the accused's cooperation depends on the extent and quality of the information he provides. However, it is this Chamber's view that the fact that an accused has gained or may gain something pursuant to an agreement with the Prosecution does not preclude the Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing. It bears repeating that the Trial Chamber is not in any way bound by the Plea Agreement between Stevan Todorovic and the Prosecution in its determination of the sentence.

87. The Prosecution has acknowledged that Stevan Todorovic has cooperated with the Office of the Prosecutor in an open and forthright manner, and that, to date, the quantity and quality of the information provided by Stevan Todorovic has met its expectations when entering into the Plea Agreement.⁸⁷ The Prosecution is satisfied that Stevan Todorovic takes his obligations in this regard very seriously and that he will follow through on his commitments to continue to cooperate.⁸⁸ The Prosecution has acknowledged that some of the information that Stevan Todorovic has provided might not otherwise have been available.⁸⁹

88. Based on the above, the Trial Chamber concludes that to date, Stevan Todorovic's cooperation with the Prosecution has been substantial. This cooperation will be considered as a mitigating circumstance in the Trial Chamber's determination of the sentence.

(iii) Remorse

89. Remorse has been considered as a mitigating factor in a number of cases before this International Tribunal. In order to accept remorse as a mitigating circumstance in its determination of the sentence, the Trial Chamber must be satisfied that the expressed remorse is sincere.⁹⁰

90. During the Sentencing Hearing, Stevan Todorovic gave a statement in which he expressed remorse for the crimes to which he has admitted. He said that Bosanski Samac was on the front line during the conflict and that deaths of soldiers, civilians, children, including relatives and friends of his, were frequent . He stated that:

events followed one another at great speed, and at times, it was very difficult to act wisely. A great deal of fear, panic, fatigue, stress and at times alcohol , too, influenced my actions. Under those circumstances, I made erroneous decisions and I committed erroneous acts. At the time, I didn't have sufficient courage or determination to prevent volunteers and local criminals from committing evil and plundering the non-Serb population, and for this I feel great remorse. ⁹¹ He went on to say that during the year of 1992, I became aware that Croats and Muslims had suffered a great deal , to my great regret. That is why I feel very profound repentance and remorse. I pray to God every day for forgiveness for my sins. [...] I am ready to testify, to cooperate, and to say everything I know in the interests of truth and justice . My wish and hope is, and that depends on you, Your Honours, to go back to the wonderful prewar times that we had when all the people of Bosnia lived in unity and happily together. Unfortunately, I cannot change history. I would wish and am ready, if you give me such a chance, to try and improve the future. [...] I will dedicate myself to my family and my children. I'm also ready to invest every effort in the new multi-ethnic Bosnia, to have a

positive effect on the surroundings so that the inter-ethnic wounds should heal as soon as possible and that peoples and nations should live in mutual respect and harmony and thereby to atone for my sins up to a point, my sins towards men and to God.⁹²

91. The Trial Chamber observes that Stevan Todorovic has expressed the desire to channel his remorse into positive action by contributing to reconciliation in Bosnia and Herzegovina. This is a commendable aspiration which, in the Trial Chamber's view, further demonstrates Stevan Todorovic's remorse.

92. The Trial Chamber finds that Stevan Todorovic's statement and demeanour during the Sentencing Hearing reflect his remorse. This conclusion is supported by the fact that he has pleaded guilty and has cooperated with the Prosecution.⁹³ Accordingly, the Trial Chamber finds that Stevan Todorovic's remorse is genuine and treats it as a mitigating circumstance in determining sentence.

(iv) Diminished mental capacity

93. Pursuant to Rule 67 (A)(ii)(b) of the Rules, the Defence shall notify the Prosecution of its intent to offer any special defence, including that of diminished mental responsibility. In the *Celebici* case, the Appeals Chamber established that this provision must be interpreted as referring to diminished mental responsibility where it is raised by the accused as a matter in mitigation of sentence. It stated that, where the accused relies on this in mitigation, he must establish the condition on the balance of probabilities, in other words, he must show that, more probably than not, such a condition existed at the relevant time.⁹⁴

94. Following the Defence's notice of its intent to raise the question of diminished responsibility (in mitigation of sentence only) and its request for a medical examination of Stevan Todorovic,⁹⁵ the Trial Chamber ordered such an examination to be performed by two experts.⁹⁶ The conclusion of Dr. Soyka's examination of Stevan Todorovic was that there was no evidence of a major mental disorder or any other psychiatric disorder for the relevant period and that there was no evidence of diminished capacity or responsibility.⁹⁷ The conclusion of Dr. Lecic-Tosevski's examination was that Stevan Todorovic has no personality disorder as such, but that he had a post-traumatic stress disorder and abused alcohol during the war.⁹⁸ During her testimony at the Sentencing Hearing, Dr. Lecic-Tosevski said that in her opinion the onset of the post-traumatic stress disorder occurred in April 1992, but that Stevan Todorovic manifested acute stress reaction before that period, due to the heavy bombardment of the area, witnessing killings and the deaths of relatives and friends.⁹⁹

95. The Trial Chamber observes that, while both experts concluded that Stevan Todorovic was not suffering from a personality disorder during the relevant period, they differed in their conclusions with respect to the post-traumatic stress disorder. In the Trial Chamber's opinion, Stevan Todorovic's condition at the time the crimes were committed was not one which would give rise to mitigation of sentence. Accordingly, this consideration will not be taken into account in mitigation of sentence.

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

96. Article 24, paragraph 1, of the Statute and Rule 101(B)(iii) of the Rules require the Trial

Chamber, in determining sentence, to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia .

(a) Arguments of the Parties

97. In this regard, the Prosecution refers the Trial Chamber to certain provisions of the Criminal Code of the Socialist Republic of Yugoslavia (“SFRY Criminal Code”). In particular, the Prosecution submits that Article 142, prescribing sentences of not less than five years on conviction for War Crimes Against Civilians, should be taken into account,¹⁰⁰ as should Article 154 which deals with various forms of discrimination and prescribes a sentence ranging from six months to five years imprisonment, in light of the fact that Todorovic has pleaded guilty to persecuting Bosnian Muslim, Bosnian Croat and other non-Serb civilians on political, racial and religious grounds.¹⁰¹ Moreover, the Prosecution notes that Article 189 proscribes the unlawful deprivation of freedom and sets the penalty at between one and eight years’ imprisonment.¹⁰²

98. The Prosecution submits that under Article 36 of the 1998 Bosnia and Herzegovina Criminal Code, murder attracted a sentence of not less than five years, with a maximum penalty of death.¹⁰³ Under this Code, the minimum penalty for crimes of assault, including sexual assault , ranged from six months (for acts inflicting grievous bodily harm) to 10 years (for rape and unnatural sexual acts).¹⁰⁴

99. It is the Prosecution’s submission that, while a term of imprisonment under the SFRY Criminal Code¹⁰⁵ was limited to 15 years, or 20 years for crimes attracting a penalty of death, upon the abolition of the death penalty in Bosnia and Herzegovina on 28 November 1998 , it became possible to impose longer sentences, ranging from 20 to 40 years’ imprisonment .¹⁰⁶

100. The Prosecution further refers the Trial Chamber to Articles 33 and 41(1) of the SFRY Criminal Code which articulate the general purpose of sentencing and additional factors to be taken into account in the determination of an appropriate sentence, respectively.¹⁰⁷ Also relevant, in the Prosecution’s submission, is Article 48 which deals with sentencing practices in the event of cumulative convictions.¹⁰⁸ The Prosecution further lists the mitigating and aggravating factors recognised in relation to sentencing in the courts of the former Yugoslavia.¹⁰⁹

101. The Defence concurs with the Prosecution as to the applicable provisions of the SFRY Criminal Code, but disputes the application of the 1998 Bosnia and Herzegovina Criminal Code to this case, arguing that the application of that legislation would violate the principle of *nullem crimen sine lege*.¹¹⁰

102. Both parties agree that, while the Chamber may have recourse to the sentencing practices in the former Yugoslavia, such practices do not bind the Chamber.¹¹¹

(b) Discussion

103. Article 34 of the SFRY Criminal Code, which was in force at the time of the commission of the offences, provides for the following means of punishing criminal conduct:

1. Capital punishment;
2. Imprisonment;
3. Fine;

4. Confiscation of property.

104. While there is no provision in the SFRY Criminal Code relating to crimes against humanity as such, Article 142, which gives effect to the provisions of Geneva Convention IV,¹¹² prohibits criminal conduct which corresponds directly to the offences of which the accused stands convicted, and sets forth the appropriate punishment. It provides that:

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings , torture, inhuman treatment [...], immense suffering or violation of bodily integrity or health; dislocation or displacement [...], unlawful bringing in concentration camps and other illegal arrests and detention [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

Article 141 of the SFRY Criminal Code, which proscribes the crime against humanity of genocide, provides for a similar range of imprisonment.

105. Article 38 is a provision of general application, setting out the terms of imprisonment that may be imposed under the SFRY Criminal Code. While it provides that, in principle, the length of a prison sentence may not exceed 15 years , where criminal acts are eligible for the death penalty a court is permitted to impose a 20 year term of imprisonment.

106. Pursuant to Article 24 of the Statute, “the penalty imposed by the Trial Chamber shall be limited to imprisonment”. In this regard, the Chamber observes that the laws in effect in the former Yugoslavia at the time of the commission of the crimes for which the accused stands convicted, allow for a maximum sentence of 20 years’ imprisonment, in lieu of the death penalty.

107. The question whether the Trial Chamber’s discretion to impose a sentence of greater than 20 years is thus curtailed has been conclusively resolved by the Appeals Chamber, which has interpreted the relevant provisions of the Statute and Rules to mean that, while a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion in imposing sentence is not bound by such practice.¹¹³

IV. TRIAL CHAMBER’S DETERMINATION OF SENTENCE

A. Conclusions

108. Having identified the relevant matters to be taken into consideration in determining sentence in this case, the Trial Chamber must consider the relative weight to be accorded to each factor in that determination.

109. The Defence has urged a comparison between this case and that of *Erdemovic*, in which the accused was sentenced to five years’ imprisonment for his conviction on a count of murder as a violation of the laws or customs of war. The case is similar in certain respects, in that Erdemovic also elected to enter a guilty plea, and he provided substantial cooperation to the Prosecution. Moreover, it is submitted that while Erdemovic was convicted of murdering upwards of 70 Bosnian Muslim civilians, Stevan Todorovic has been convicted of the crime of persecution for the murder of Anto Brandic, as well as the mistreatment of numerous other individuals. Accordingly, it was argued, the five-year sentence imposed upon Erdemovic should serve as a

benchmark in this case.

110. In this regard, the Trial Chamber recalls the statement of the Appeals Chamber in the *Celebici* case that the overriding obligation of the Trial Chamber is to “individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.”¹¹⁴ The Appeals Chamber in that case also observed that, as a general principle, comparisons with other cases which have already been the subject of final determination for the purpose of assessing an appropriate sentence in a specific case are often “of limited assistance”.¹¹⁵ In particular, the Chamber stated that:

While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.¹¹⁶

111. In the opinion of this Chamber, the *Erdemovic* case is readily distinguishable. The Trial Chamber in the *Erdemovic* case found that the accused had committed the murders under duress and that “there was a real risk that the accused would have been killed had he disobeyed the order [to execute Bosnian Muslim civilians]”.¹¹⁷ It was held on appeal that, while duress could not provide a complete defence to the accused’s crime, it could be taken into account as a factor in mitigation of his sentence. The Trial Chamber, accordingly, treated duress as a mitigating factor for the purposes of determining sentence.

112. While this case and that of *Erdemovic* do share common elements, in that each of the accused has pleaded guilty and, in each case, was found to have provided substantial cooperation to the Prosecution, the Trial Chamber cannot ignore the critical distinction between the two cases: that is, that the Trial Chamber in *Erdemovic* took duress into account as a mitigating factor, an element that is absent in this case. For that reason it finds the *Erdemovic* case is not helpful in providing a “benchmark” for the sentence in this case.

113. As discussed above, the crime of persecution is inherently very serious. It is the only crime against humanity which requires that the perpetrator act with a discriminatory intent and, by its nature, it incorporates other crimes. On account of its distinctive features, the crime of persecution justifies a more severe penalty.¹¹⁸ The gravity of Stevan Todorovic’s criminal conduct was aggravated by his superior position and by the manner in which the crimes were committed. Thus, in the Chamber’s opinion, his crime was particularly grave.

114. While mitigating factors have been given considerable weight in the determination of the sentence in this case, the Chamber wishes to emphasise that this in no way detracts from the gravity of Stevan Todorovic’s crime. The Chamber considers that Stevan Todorovic’s timely plea of guilt and his substantial cooperation with the Prosecutor are of primary importance as mitigating factors in this case. Indeed, had it not been for these factors, he would have received a much longer sentence. The Chamber has also taken into consideration in mitigation of sentence Stevan Todorovic’s expression of remorse, which it has accepted as sincere.

115. Accordingly, the Trial Chamber sentences Stevan Todorovic to ten years’ imprisonment.

B. Credit for time served

116. Stevan Todorovic has been detained in the United Nations Detention Unit since his arrest, on 27 September 1998. Pursuant to Rule 101 (C), he is entitled to credit for the time he has spent in detention, which amounts to two years, ten months and three days. In accordance with Rule 102 (A), the sentence shall begin to run as of today.

V. DISPOSITION

117. For the foregoing reasons, having considered the arguments of the parties, the evidence presented at the Sentencing Hearing, and the Statute and the Rules, the **TRIAL CHAMBER SENTENCES** Stevan Todorovic to ten years' imprisonment and **STATES** that he is entitled to credit for two years, ten months and three days in relation to the sentence imposed by the Trial Chamber, as of the date of this Sentencing Judgement, together with such additional time as he may serve pending the determination of any appeal. Pursuant to Rule 103 (C), Stevan Todorovic shall remain in the custody of the International Tribunal pending the 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.

Patrick Robinson, Presiding

Richard May

Mohamed Fassi Fihri

Dated this thirty-first day of July 2001

At The Hague

The Netherlands

[Seal of the Tribunal]

1 - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 ("Geneva Convention II"); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV") ("the Geneva Conventions").

2 - The indictment was first amended in August 1998 for procedural reasons.

3 - The Indictment was further corrected on 25 March 1999 pursuant to an Order of the Trial Chamber issued on 19 March 1999 to remove references to aliases.

4 - Article 5 of the Statute provides as follows: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes ... (h) persecutions on political, racial and religious grounds".

5 - Further appearance, 13 Dec. 2000 ("Further Appearance"), transcript page ("T.") 786.

6 - At the time the guilty plea was entered, the Trial Chamber comprised Judge Robinson, presiding, with Judge Hunt and Judge Bennouna. Following the resignation of Judge Bennouna as a Judge of the International Tribunal, effective 28 February 2001, and pursuant to an Order of the President assigning Judges to a Trial Chamber, issued on

20 March 2001, the Trial Chamber for the sentencing hearing was composed of Judge Robinson, presiding, Judge May and Judge Fassi Fihri.

7 - Also spelled “Silvester”, Plea Agreement, Annex A, para. 3c.

8 - These include the right to plead not guilty, the right to be presumed innocent until guilt has been established at trial beyond a reasonable doubt, the right to a trial before the International Tribunal, the right to confront and cross-examine witnesses against the accused, the right to compel or subpoena witnesses to appear on the accused’s behalf, the right to testify or to remain silent at trial and the right to appeal a finding of guilty or to appeal any pre-trial rulings. See Plea Agreement, para. 4.

9 - The Indictment charges the accused with participation in “murders” in the plural (para. 34). At the hearing before Judge Robinson held on 13 December 2000, the Prosecution confirmed that it was relying on only one murder.

Further Appearance, T. 785.

10 - Indictment, para. 34.

11 - In this regard, however, note that the Prosecution is only seeking to fix Todorovic with liability under Article 7 (3) for the allegation in relation to the torture of Omer Nalic. *Supra*, para. 5.

12 - “Todorovic Defense Motion for Appointment of Expert Witnesses, Medical Examination, Notice of Diminished Mental Capacity as to Mitigation of Sentence only and for a change in Scheduling Order so as to allow Compliance with Time Constraints”, filed 20 February 2001 (“Todorovic Defence Notice of Diminished Mental Capacity”).

13 - “Report of the medical psychiatric assessment of Stevan Todorovic” by Dusica Lecic–Tosevski, M.D., Ph.D., Asst Prof., written report filed on 27 April 2001 (“Lecic-Tosevski Report”).

14 - “Psychiatric examination of Stevan Todorovic, born 29.12.1957” by Prof. Dr. Michael Soyka, written report filed on 3 May 2001 (“Soyka Report”).

15 - Sentencing hearing, 4 May 2001 (“Sentencing Hearing”), T. 2.

16 - Witness statements nos. 6, 7, 9, 10, 12 and 15, as identified in the Annexes to the Todorovic Sentencing Brief.

17 - Todorovic Sentencing Brief, para. 29.

18 - These criteria were first established by the Appeals Chamber in *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997 (“*Erdemovic Appeals Judgement*”).

19 - *Supra*, para. 17.

20 - *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000 (“*Aleksovski Appeals Judgement*”), para. 185; *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgement, 20 Feb. 2001 (“*Celebici Appeals Judgement*”), para. 806.

21 - *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 Jan. 2000 (“*Tadic Judgement in Sentencing Appeals*”), para. 48.

22 - *Aleksovski Appeals Judgement*, para. 185. Most recently in the *Celebici* case the Appeals Chamber recognised deterrence as a factor to be taken into account in sentencing. See *Celebici Appeals Judgement*, para. 803.

23 - *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 Nov. 1998 (“*Celebici Trial Judgement*”), para. 1225; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000 (“*Kupreskic Trial Judgement*”), para. 852; *Aleksovski Appeals Judgement*, para. 182. See also Prosecution Sentencing Brief, para. 25.

24 - *Celebici Appeals Judgement*, para. 731.

25 - *Ibid.*, (citing *Kupreskic Trial Judgement*, para. 852).

26 - *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 271; *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, Judgement, 26 Feb. 2001 (“*Kordic Trial Judgement*”), paras 178, 248 and 271.

27 - *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement, 3 Mar. 2000 (“*Blaskic Trial Judgement*”), para. 785.

28 - As set out in the Factual Basis, p. 5.

29 - Although the date identified for this incident in the Factual Basis is 27 July 1992, the Indictment alleges that it took place on 29 July 1992 and this later date is also reflected in the Plea Agreement.

30 - Statement by Father Jozo Puskaric, see Factual Basis, p. 7.

31 - Statement of Witness A, see Factual Basis, p. 9. The use of pseudonyms for certain witnesses was granted by the

Trial Chamber in its Order for Protective Measures of 26 May 1999.

32 - Statement of Witness C, *see* Factual Basis, p. 8.

33 - Statement of Witness E, *see* Factual Basis, p. 9.

34 - The Trial Chamber observes that no factual basis was provided as to Stevan Todorovic's participation in the beatings, as alleged in the Indictment, of the individuals Enver Ibralic and Hasan Jasarevic.

35 - As explained *supra*, para. 5, this is the only incident for which the accused was charged with Article 7 (3) responsibility.

36 - Factual Basis, p. 10.

37 - Document identified as ERN 0061-5788 in the Factual Basis.

38 - Document identified as ERN 6025-7775 in the Factual Basis.

39 - Document identified as ERN 0052-4790 in the Factual Basis.

40 - Document identified as ERN 0061-5786 in the Factual Basis.

41 - Document identified as ERN 0061-5785 in the Factual Basis.

42 - Prosecution Sentencing Brief, para. 35.

43 - *Ibid.*, para. 36.

44 - *Ibid.*, para. 37.

45 - *Ibid.*, para. 37 (citing *Blaskic* Trial Judgement, para. 777).

46 - *Ibid.*, para. 38.

47 - *Ibid.*, para. 38 (citing *Blaskic* Trial Judgement, para. 778).

48 - *Ibid.*, paras 39-42.

49 - *Celebici* Trial Judgement, para. 1223.

50 - *Kordic* Trial Judgement, para. 849.

51 - *Blaskic* Trial Judgement, para. 789.

52 - *Aleksovski* Appeals Judgement, para. 183.

53 - *Todorovic* Sentencing Brief, para. 7.

54 - *Ibid.*, para. 7 (citing *Celebici* Appeals Judgement, para. 763).

55 - *Ibid.*, paras 9-10.

56 - *Celebici* Appeals Judgement, para. 763.

57 - Factual Basis, pp. 4-6.

58 - Prosecution Sentencing Brief, para. 42.

59 - *Supra*, paras 5 and 9. In the *Celebici* case the Appeals Chamber stated that where criminal responsibility for one offence is alleged under one count pursuant to both Article 7 (1) and 7 (3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved (even though only one conviction is entered) the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentences. *Celebici* Appeals Judgement, para. 745. While the Trial Chamber takes this into account, it is also mindful that the beating of Omer Nalic only forms one part of the crime of persecution of which Stevan Todorovic has been convicted.

60 - *Aleksovski* Appeals Judgement, para. 183; *Celebici* Appeals Judgement, para. 745.

61 - Sentencing Hearing, T. 59; *Todorovic* Sentencing Brief, Personal and Family Information Attachment, para. 17.

62 - The Appeals Chamber in the *Tadic* case recognised the "need for sentences to reflect the relative significance of the role of the [accused] in the broader context of the conflict in the former Yugoslavia." *Tadic* Judgement in Sentencing Appeals, para. 55. At the same time, the Trial Chamber is aware that, as stated by the Appeals Chamber in the *Celebici* case, in certain circumstances the gravity of the crime may be so great that a severe penalty is justified even in cases where the accused is not senior in the overall command structure. *Celebici* Appeals Judgement, para. 847; *Tadic* Judgement in Sentencing Appeals, para. 56; *Aleksovski* Appeals Judgement, para. 184.

63 - *See supra*, para. 36. Statement by Father Jozo Puskaric. *See* Factual Basis, pp. 7-8.

64 - *See supra*, paras 39-40.

65 - Prosecution Sentencing Brief, para. 44 (citing *Blaskic* Trial Judgement, para. 774).

- 66 - *Ibid.*, para. 45.
- 67 - *Ibid.*, paras 47-48.
- 68 - Todorovic Sentencing Brief, para. 11.
- 69 - *Ibid.*, para. 11.
- 70 - *Ibid.*, para. 14.
- 71 - *Ibid.*, paras 15-18.
- 72 - *Ibid.*, para. 19.
- 73 - *Ibid.*, para. 20.
- 74 - *Ibid.*, paras 21-22.
- 75 - *Ibid.*, para. 23.
- 76 - *Ibid.*, para. 24.
- 77 - *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-Tbis, Sentencing Judgement, 5 Mar. 1998 (“*Erdemovic Sentencing Judgement*”).
- 78 - One of the murder convictions was quashed on appeal. *See Prosecutor v. Goran Jelusic*, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelusic Appeals Judgement*”), para. 95.
- 79 - *Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Judgement, 14 Dec. 1999 (“*Jelusic Trial Judgement*”). Goran Jelusic’s sentence of 40 years’ imprisonment was recently affirmed on appeal. *See Jelusic Appeals Judgement*, p. 41.
- 80 - *Erdemovic Sentencing Judgement*, p. 16.
- 81 - *Jelusic Trial Judgement*, para. 127. Jelusic appealed on this point, arguing that the Trial Chamber had failed to give him any credit for his guilty plea. The Appeals Chamber dismissed the ground of appeal, noting that “the Trial Chamber did consider the guilty plea in mitigation” and that the appellant had failed to demonstrate that the Trial Chamber had erred in its discretion as to how much weight to accord the guilty plea in mitigation of sentence. *See Jelusic Appeals Judgement*, paras 119-123.
- 82 - *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, Judgement, 19 Oct. 2000 (“*Kambanda Appeals Judgement*”), para. 120 (emphasis added). *See also Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, para. 24.
- 83 - Separate and Dissenting Opinion of Judge Cassese to *Erdemovic Appeals Judgement*, para. 8. Judge Cassese did not dissent on this point; the discussion is merely *obiter*.
- 84 - Plea Agreement, para. 5.
- 85 - *Blaskic Trial Judgement*, para. 774 (footnotes omitted).
- 86 - Prosecution Sentencing Brief, para. 45.
- 87 - *Ibid.*, para. 47; Sentencing hearing, T. 54 –55.
- 88 - Prosecution Sentencing Brief, para. 46. Thus far, Stevan Todorovic has been interviewed five times by representatives of the Office of the Prosecutor (*see* Joint Stipulation of 4 May 2001).
- 89 - Sentencing Hearing, T. 54.
- 90 - *Erdemovic Sentencing Judgement*, p. 16; *Jelusic Trial Judgement*, para. 127 (Jelusic’s sincerity of remorse not accepted); *Blaskic Trial Judgement*, para. 775 (*Blaskic*’s sincerity of remorse not accepted); *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 Feb. 1999, paras 40-41; *Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000, paras 69-72.
- 91 - Sentencing Hearing, T. 59.
- 92 - *Ibid.*, T. 60-62.
- 93 - Stevan Todorovic also expressed remorse to the two medical experts who examined him. *See Soyka Report and Lecic-Tosevski Report*.
- 94 - *Celebici Appeals Judgement*, para. 590.
- 95 - *Todorovic Defence Notice of Diminished Mental Capacity*.
- 96 - Order on Defence Motion for Medical Examination and Variation of Scheduling Order, 26 Feb. 2001. The Trial Chamber noted that it was in the interests of justice to treat the Todorovic Defence Notice of Diminished Mental Capacity as timely served.

97 - Soyka Report.

98 - Lecic-Tosevski Report. As pointed out by the Trial Chamber during the Sentencing Hearing, the fact that Stevan Todorovic was drinking at the time of the offences will not be accepted as a mitigating factor. *See* Sentencing Hearing, T. 45.

99 - Sentencing Hearing, T. 47-48.

100 - Prosecution Sentencing Brief, para. 9.

101 - *Ibid.*, para. 10.

102 - *Ibid.*, para. 11.

103 - *Ibid.*, para. 12. The Prosecution further notes that where the deprivation of life took place in a cruel or deceitful manner or where the act was conducted in a wanton and aggressive manner or was committed out of low motives, the minimum penalty prescribed was ten years' imprisonment.

104 - *Ibid.*, para. 12.

105 - *See* Article 38 of the SFRY Criminal Code.

106 - Prosecution Sentencing Brief, para. 7.

107 - *Ibid.*, paras 15-16.

108 - *Ibid.*, para. 17.

109 - *Ibid.*, paras 18-19.

110 - Todorovic Sentencing Brief, para. 5.

111 - *Ibid.*, para. 6; Prosecution Sentencing Brief, paras 20-22.

112 - *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997, para. 8.

113 - *Tadic* Judgement in Sentencing Appeals, para. 20.

114 - *Celebici* Appeals Judgement, para. 717.

115 - *Ibid.*, para. 719.

116 - *Ibid.*, (emphasis in the original).

117 - *Erdemovic* Sentencing Judgement, p. 17. Note that the Trial Chamber was applying the ruling of the Appeals Chamber 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." *Erdemovic* Appeals Judgement, para. 19.

118 - *Blaskic* Trial Judgement, para. 785.