UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-02-59-S
		Date:	31 March 2004
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Amin El Mahdi
Judge Joaquín Martín Canivell

Registrar: **Mr. Hans Hothuis**

Judgement of: **31 March 2004**

PROSECUTOR

v.

DARKO MRĐA

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Timothy J. Resch

Counsel for Darko Mrđa:

Mr.Vojislav Dimitrijević
Mr. Otmar Wachenheim

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I. PROCEDURAL HISTORY

1. On 26 April 2002, Judge Liu confirmed the Indictment against Darko Mrđa. In counts 1 (Extermination as a Crime Against Humanity), 2 (Murder as a Violation of the Laws or Customs of War), and 3 (Inhumane Acts as a Crime Against Humanity) of the Indictment, the Prosecution alleged that, on 21 August 1992, at Mt. Vlašić in the Municipality of Skender Vakuf, Bosnia and Herzegovina, Darko Mrđa, acting in concert with others who shared his intent, planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of the killing of over two hundred men in a convoy originating from Trnopolje camp and Tukovi and heading for Travnik. Twelve men, among those who Darko Mrđa and his accomplices set out to kill, fell or jumped from a cliff and survived the massacre.

2. On 13 June 2002, Darko Mrđa was arrested in Prijedor, and transferred to 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 "Tribunal").

3. At his initial appearance, on 17 June 2002, Darko Mrđa pleaded not guilty to all charges set forth in the Indictment.

4. On 24 July 2003, Darko Mrđa entered into a plea agreement with the Prosecution (the "Plea Agreement"). The Plea Agreement stated that "Darko Mrđa agrees that he is pleading guilty to counts 2 and 3 of the Indictment because he is in fact guilty and acknowledges full responsibility for his actions."[1] Moreover, "Darko Mrđa acknowledges that he has entered the [Plea] Agreement freely and voluntarily, that no threats were made to induce him to enter this guilty plea and that the only promises are those set forth in the agreement."[2] He also understood that, by entering into the Plea Agreement, he gave up the rights listed therein, including: the right to plead not guilty and require the Prosecution to prove charges in the Indictment beyond a reasonable doubt at a fair and impartial public trial; the right to prepare and put forward a defence to the charges at a public trial; the right to be tried without undue delay; the right to be tried in his presence and to defend himself in person at trial or through legal assistance of his own choosing; the right to examine at trial, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf at trial under the same conditions as witnesses against him; the right not to be compelled

[1] *Prosecutor v. Darko Mrđa*, Case No. IT-02-59, Plea Agreement, 24 July 2003 ("Plea Agreement"), para. 3.
[2] *Ibid*., para. 20.

to testify against himself or to confess guilt; 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.[3]

5. At the hearing on 24 July 2003, after the Trial Chamber summarised the Plea Agreement and ensured that Darko Mrđa had understood it, he pleaded guilty to counts 2 and 3 of the Indictment.[4] The Trial Chamber entered a finding of guilt for those two counts[5] after being satisfied that the plea was voluntary, informed and unequivocal; that there was a sufficient factual basis for the crimes; and that Darko Mrđa had participated in them.[6] During the hearing, the Prosecution made an oral motion seeking leave to dismiss count 1 of the Indictment, which was granted.[7] On 4 August 2003, the Prosecution filed an Indictment amended accordingly.[8]

6. On 28 August 2003, the Defence sought leave of the Trial Chamber to appoint an expert to examine Darko Mrđa and thereafter prepare a report for the purpose of presenting mitigating evidence relevant to sentencing. On 15 September 2003, the Trial Chamber ordered the appointment of an expert to prepare a psychological opinion on Darko Mrđa. The appointed expert, Professor Gallwitz, filed his report on 13 October 2003 ("Professor Gallwitz's Report").

7. On 13 October 2003, the Trial Chamber received the "Prosecution's Brief on the Sentencing of Darko Mrđa" (the "Prosecution's Sentencing Brief") and "Darko Mrđa's Sentencing Brief" (the "Defence's Sentencing Brief").

8. At the Sentencing Hearing, on 22 October 2003, the Prosecution called two witnesses, Mr. Midhet Mujkanović and Ms. Seida Karabasić. At the end of the hearing, the Trial Chamber adjourned the case to consider the sentence.

II. THE FACTS

9. Darko Mrđa was born on 28 June 1967 in Zagreb, Croatia. He grew up in Tukovi, in the municipality of Prijedor, Bosnia and Herzegovina, and worked at the nearby mine in Omarska.

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[3] *Ibid.*, para. 18.
[4] Hearing of 24 July 2003, T. 87.
[5] *Ibid.*, T. 91.
[6] *Ibid.*, T. 87.
[7] *Ibid.*, T. 91-92.
[8] *Prosecutor v. Darko Mrđa*, Case No. IT-02-59, Amended Indictment, 4 August 2003 ("Amended Indictment"), para. 17.

10. The Plea Agreement contains the factual basis for the crimes described above and for Darko Mrđa's participation in them.[9] The factual basis was agreed to by Darko Mrđa and forms the basis upon which the Trial Chamber now passes sentence. It is reproduced in the following paragraphs:

- In August 1992, an armed conflict was taking place in Bosnia and Herzegovina. This armed conflict involved a widespread or systematic attack, within the meaning of Article 5 of the Statute, upon the non-Serb civilian population of the municipality of Prijedor. Darko Mrđa acknowledges that the crimes to which he is pleading guilty were part of this widespread and systematic attack.

- On 21 August 1992, Darko Mrđa was a member of the Prijedor Police "Intervention Squad". On this day, Darko Mrđa, in his official capacity as a police officer, participated in escorting of an organized convoy of Muslim or non-Serb civilians from Tukovi and the Trnopolje camp in Prijedor towards the municipality of Travnik. The convoy consisted of buses and trucks loaded with civilians.

- At a location on the road along the Ilomska River, between Skender Vakuf and Mt. Vlašić, the convoy stopped. At this location, Darko Mrđa and other members of the Intervention Squad actively implemented orders to separate military-aged men from the rest of the convoy, including the personal selection of men by Darko Mrđa with the awareness and expectation that these men would be murdered. A large number of men, estimated in excess of 200, were loaded into two buses.

- Darko Mrđa and the other members of the Intervention Squad took the separated men in the two buses to Koričanske Stijene. The men from one bus were ordered off the bus, escorted to the side of the road above a deep ravine, ordered to kneel, and then shot and killed. The men from the other bus were taken off in smaller groups of two or three and then shot and killed. Together with the other members of the Intervention Squad, Darko Mrđa personally and directly participated in the unloading, guarding, escorting, shooting, and killing of the unarmed men at Koričanske Stijene. Except for twelve men who survived the massacre, all of the men from the two buses were murdered.

[9] Plea Agreement, paras. 6-9.

III. THE LAW

A. Statute and Rules

11. The relevant provisions of the Tribunal's Statute (the "Statute") and Rules of Procedure and Evidence (the "Rules") which relate to sentencing are set forth below:

> Article 24 of the Statute
>
> 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.
>
> […]
>
> 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 practise regarding prison sentences in the courts of the former Yugoslavia;
>
> […]
>
> (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.

12. Thus in determining sentence the Trial Chamber must take into account the following factors:

- the gravity of the crime;
- any aggravating circumstances;
- any mitigating circumstances; and
- the general practice regarding prison sentences in the courts of the former Yugoslavia.

B. General Principles of Sentencing

13. Punishments imposed by the Tribunal are limited to sentences of imprisonment.[10] In the jurisprudence of the Tribunal, retribution, deterrence and rehabilitation have been acknowledged as purposes of punishment.[11]

14. As a form of retribution, punishment expresses the society's condemnation of the criminal act and of the person who committed it and should be proportional to the seriousness of the crimes. The Tribunal's punishment thus conveys the indignation of humanity for the serious violations of international humanitarian law for which an accused was found guilty.[12] In its retributive aspect, punishment may reduce the anger and sense of injustice caused by the commission of the crimes among victims and in their wider community.

15. In considering retribution as an important object of punishment, the Trial Chamber focuses on the seriousness of the crimes to which Darko Mrđa has pleaded guilty, in light of their specific circumstances.

16. The deterrent effect aimed at through punishment consists in discouraging the commission of similar crimes.[13] The main effect sought is to turn the perpetrator away from future wrongdoing (special deterrence), but it is assumed that punishment will also have the effect of discouraging others from committing the same kind of crime, which is, for the Tribunal, a crime described in the Statute (general deterrence).

17. In the instant case, the Trial Chamber considers the chance that the convicted person will commit the same kind of crime in the future to be small, which considerably reduces the relevance of special deterrence. With regard to general deterrence, imposing a punishment serves to strengthen the legal order, in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions. Nonetheless, it would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, as cautioned in the

[10] Article 24(1) of the Statute.
[11] *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 806.
[12] *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 185.
[13] *Prosecutor v. Stevan Todorović,* Sentencing Judgement, Case No. IT-95-9/1-S, 31 July 2001 ("*Todorović* Sentencing Judgement"), para. 30.

Tadić Sentencing Appeal Judgement,[14] the Trial Chamber has taken care to ensure that, in determining the appropriate sentence, deterrence is not accorded undue prominence.

18. Punishment is also understood as having a rehabilitative purpose, for it underscores for the convicted person the seriousness with which society regards his or her criminal acts. The loss of freedom, which is the form of punishment imposed by the Tribunal, provides the context for the convicted person's reflections on the wrongfulness of his or her acts and may provoke his or her awareness about the harm and suffering these acts have caused to others. This process is of assistance for the reintegration of the convicted person into the society.

19. The Trial Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in these processes.[15] This acknowledgement forms, among other things, an indication of the determination of an accused to accept his or her responsibility towards the aggrieved party and society at large.

IV. SENTENCING FACTORS

A. Gravity of the Crimes

20. The Statute provides that the Trial Chamber should take into account the gravity of the offence when imposing sentence.[16] The Trial Chamber notes that the jurisprudence, in applying this criterion, has held that it is the most important consideration when determining the appropriate sentence.[17] In this respect, the *Kupreškić* Judgment stated that "[t]he 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."[18]

21. In determining the gravity of the crimes, the Trial Chamber will give consideration to the legal nature of the offences committed, their scale, the role Darko Mrđa played in their commission, and the impact upon the victims and their families.

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[14] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A & IT-941-A *bis*, Sentencing Appeal Judgement, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement"), para. 48.
[15] *Prosecutor v. Momir Nikolić*, Sentencing Judgement, Case No. IT-02-60/1-S, 2 December 2003 ("*Nikolić* Sentencing Judgement"), para. 93.
[16] Article 24 (2) of the Statute.
[17] *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement"), para. 1225 and approved by the *Čelebići* Appeal Judgement, para.731.
[18] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 852.

1. Nature of the Crimes (War Crimes and Crimes against Humanity)

(a) Arguments of the Parties

22. In its Sentencing Brief, the Prosecution submits that the crimes committed by the Accused were particularly serious because they were crimes against humanity, which entail a widespread and systematic attack against a civilian population.[19] According to the Prosecution, such crimes have an impact beyond the immediate victims as the "humanity comes under attack and is negated."[20] However, at the Sentencing Hearing, the Prosecution conceded that crimes against humanity are inherently no more serious than war crimes.[21]

23. The Defence argues that crimes against humanity should not be given greater weight than war crimes, because both crimes arose from the same events and because there is no legal distinction between the seriousness of a war crime and a crime against humanity.[22]

(b) Discussion

24. The Trial Chamber fully concurs with the jurisprudence of the Tribunal according to which "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime."[23] Gravity should therefore be assessed in view of the particular circumstances of each individual case.

2. Scale and Mode of Commission of the Crimes

(a) Arguments of the Parties

25. In its Sentencing Brief, the Prosecution underlines that "[a]lthough the precise number of murdered victims is difficult to determine with precision, the parties have agreed that the number is fairly estimated to be in excess of 200 men."[24] Moreover, the Prosecution states that: "[t]he scale of Darko Mrđa's crime is thus enormous, of a magnitude that outstrips the human capacity to consider each victim individually."[25]

[19] Prosecution's Sentencing Brief, para. 8.
[20] *Ibid.*
[21] Sentencing Hearing, T.147-148.
[22] Defence's Sentencing Brief, para 18.
[23] *Tadić* Sentencing Appeal Judgement, para. 69; *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/A, Judgement, 21 July 2000, para. 243; *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement"), para. 851 and *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement ("*Kronjelac* Trial Judgement"), 15 March 2002, para. 511.
[24] Prosecution's Sentencing Brief, para. 13.
[25] *Ibid.*

26. Mr. Mujkanović, a survivor of the massacre, gave evidence at the Sentencing Hearing about the circumstances in which these crimes were committed.[26] On 21 August 1992, he boarded a bus departing from Trnopolje Camp towards Travnik with other men, women and children who were mainly Muslim. On route the passengers were robbed by the guards. The guards separated the men from the women and transferred the men to another bus. The guards told them that they would be exchanged for prisoners. The buses stopped close to a cliff. Upon alighting, the men were lined up along the edge of the cliff, facing its edge. The men were crying out. Mr. Mujkanović said he leapt into the chasm or was pushed. When he hit the ground he was not injured. At the bottom of the cliff, he heard crying, shooting, and exploding hand grenades. The guards shot at anyone who called out for help and one guard shouted, "you Turks got what you deserved." Mr. Mujkanović sought shelter under a dead body to avoid being shot at and later he crawled away from the base of the cliff. He was frightened and tried to commit suicide. He took refuge in a forest for two nights and then was captured and interrogated at Skender Vakuf where he met other survivors of the massacre. He was transferred with the other survivors to a hospital where, he said, they were treated worse than livestock.

27. In its Sentencing Brief, the Defence concedes that the crimes which resulted in the death of around 200 persons, "must be considered as being grave."[27]

(b) Discussion

28. The Trial Chamber reiterates that, according to the Plea Agreement, Darko Mrđa personally and directly participated in the unloading, guarding, escorting, shooting, and killing of around 200 civilians at Koricanske Stijene.[28] It has not been possible to determine the precise number of civilians killed by Mrđa himself. However, his participation in a large-scale massacre, in which around 200 civilians were killed, is uncontested.

3. Role of Darko Mrđa

(a) Arguments of the Parties

29. Although the Prosecution concedes that Darko Mrđa was not an "architect"[29] of the massacre, it nevertheless submits that he was a willing and enthusiastic participant in the process of

[26] Testimony of Midhet Mujkanović, Sentencing Hearing, T. 108-120.
[27] Defence's Sentencing Brief, para 18.
[28] Plea Agreement, paras. 7-9.
[29] Prosecution's Sentencing Brief, para 16.

separating the men of military age from the remaining civilians, in the removal of the men from the buses and in their subsequent murder.[30]

30. The Defence avers that Darko Mrđa was implementing orders issued by his superiors.[31] He was only one member of the Prijedor Police Intervention Squad who implemented orders.[32]

(b) Discussion

31. The Trial Chamber accepts that Darko Mrđa was not the "architect" of the massacre and that he was acting pursuant to orders along with other members of the Intervention Squad. Nevertheless, the fact that he personally participated in the selection of the civilians who were going to be killed and in their subsequent murder and attempted murder, knowing that a widespread and systematic attack against civilians was underway, makes the crimes charged especially serious.

4. Impact of the Crimes upon the Victims and Victims' Families

(a) Arguments of the Prosecution

32. The Prosecution submits that the Trial Chamber should assess the gravity of the crimes in the light of their impact upon the victims and their families.

33. In relation to the suffering of the victims, the Prosecution submits that the men suffered because they were separated from their families; whilst waiting to die they would have felt terror as they watched their companions fall over the cliff; and some of the men perished slowly after their fall due to their injuries or exposure, which added to their suffering.[33] The Prosecution also contends that the survivors experienced suffering because they were injured in their fall, some of the survivors were beaten upon capture, forced to drink their own urine in one case, and were administered deficient medical care.[34]

34. The Prosecution attached to its Sentencing Brief, in confidential Annex B, witness statements, records of interviews and testimonies of witnesses in other cases brought before the Tribunal to demonstrate the impact of the crimes upon the victims. These are summarised in the following paragraph.

35. One survivor of the massacre concluded at a stage during the journey that something bad was going to happen because a policeman told the passengers that they would only have a fifty-fifty

[30] *Ibid.*, para. 15.
[31] Defence's Sentencing Brief, para. 84.
[32] *Ibid.*, para. 84.
[33] Prosecution's Sentencing Brief, para 14.

chance of survival. Some of the other survivors, however, did not realize their fate until the last moment. Upon arrival at Koričanske Stijene one of the guards told the passengers that they were going to be exchanged; the living for the living and the dead for the dead. Some of the victims tried to escape. Two of them decided it would be better to die running than be shot, and after alighting the bus they ran over the edge of the cliff and survived. Some of those who were lined up on the edge of the cliff tried to save themselves or their relatives by jumping or by pushing them over the edge of the cliff. Some survived the fall without injury, whilst others sustained cuts, bruises or severe injuries. The policemen at the top of the cliff threw hand grenades and fired their guns at the wounded men when they saw any movement or heard any cries. Some of the survivors saw men being killed at the top of the cliff and their bodies being thrown down. The dying men were heard moaning for a long time.

36. At the Sentencing Hearing, the witness Mujkanović said that, as a result of the events that occurred on 21 August 1992, he suffers from poor sleep, he has difficulty concentrating, and these symptoms affect his ability to work.[35]

37. The Prosecution also asks the Trial Chamber to give consideration to the impact of the massacre on the victims' families when assessing the seriousness of the crimes. It argues that the Trial Chamber should take into account the impact on the victims' families even if no family ties were established, because it should assume that the victims did not live alone.[36]

38. The Prosecution called Ms. Karabasić, the President of the Izvor Association of Prijedor Women, to describe the impact on the families. Ms. Karabasić said that, whilst compiling a book about 2700 missing people from Prijedor, she met families who had lost relatives at Koričanske Stijene on 21 August 1992. Those families had no information about their lost relatives and, as a consequence, many families believed that their relatives were still alive. The Association organized and filmed a memorial service, which was held on the 10th Anniversary of the massacre, which was the first day the families had been able to visit the site of the massacre. Over 500 people attended the service. During the service, the names of the victims were read out and the families seemed to accept the truth about the fate of their relatives. Ms. Karabasić identified some of the relatives in the video film: a man who had lost three brothers; a woman who had lost her husband and son; and a man whose son had died and whose body had been exhumed from a mass grave only a few days before Ms. Karabasić's testimony.

[34] *Ibid.*
[35] Sentencing Hearing, T. 117.
[36] The Prosecution cited *Krnojelac* Appeal Judgement at the Sentencing Hearing, T. 192.

(b) Discussion

39. The Trial Chamber considers that the impact of the murders on the victims and their families should be taken into consideration when evaluating the inherent gravity of the crimes for which Darko Mrđa has pleaded guilty. The Appeals Chamber's Judgment in *Krnojelac* held that "the case law of some domestic courts shows that a trial chamber may still take into account the impact of a crime on a victim's relatives when determining the appropriate punishment"[37] and that "even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others."[38] Furthermore, the Judgement in *Delalić et al.* said that "[t]he gravity of the offences of the kind charged has always been determined by the effect on the victims or, at the most, on persons associated with the crime and nearest relations."[39]

40. The Trial Chamber is convinced that, on the basis of the evidence presented by the Prosecution, the families of the victims suffered severe pain from the lost of their relatives. This factor should be taken into consideration when determining the seriousness of the crimes.

41. The Trial Chamber is also of the view that, if the evidence adduced by the Prosecution shows a level of suffering which significantly exceeds what is usually suffered by the victims or their families (and already included in the general appreciation of murder or inhumane acts as serious crimes), it may be considered as an aggravating factor.[40] The impact of the crimes upon the victims will be dealt with in the next section on aggravating circumstances.

5. Conclusions

42. In conclusion, the Trial Chamber considers that the sentence should reflect all of the cruelty and inhumanity of Darko Mrđa's direct participation in the shooting of around 200 civilians, of which all but 12 were killed, at Koričanske Stijene.

B. Aggravating Circumstances

43. In addition to the two aggravating circumstances put forth by the Prosecution, namely the vulnerability of the victims and Darko Mrđa's position of authority, the Trial Chamber will examine whether the impact of the crimes upon the victims constitutes an aggravating factor in this case.

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[37] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 260.
[38] *Ibid.*
[39] *Čelebići* Trial Judgement, para 1226.
[40] *Prosecutor v. Ranko Češić*, Case No IT-95-10/1-S, 11 March 2004 (*Češić* Trial Judgement), para. 39

1. Vulnerability of the Victims

(a) Arguments of the Parties

44. The Prosecution submits that the vulnerability of the victims is an aggravating factor in this case, but it also acknowledges that, on occasions, the vulnerability of the victims may be subsumed within the overall gravity of the offence.[41] The victims, according to the Prosecution, were displaced persons deprived of all rights; they were helpless and vulnerable.[42] The guards were armed, whilst the victims were unarmed and weakened from months of persecution in confinement camps.[43] The Prosecution alleges that their helplessness was exemplified by the open robbery of their last possessions in the convoy.[44]

45. The Defence avers that the crimes involve violations of international humanitarian law, the purpose of which is to protect vulnerable victims, and it further contends that the status of the victims is already an element of the crimes committed. Therefore, the vulnerability of these victims should not be treated as an aggravating factor.

(b) Discussion

46. The Trial Chamber deems that the status of civilian of the victims cannot as such be taken into account as an aggravating factor since the status of civilian (or person taking no active part in the hostilities) is already an element of the crimes charged, namely inhumane acts as a crime against humanity and murder as a violation of the laws or customs of war. However, it accepts that the special vulnerability of the victims may, in particular circumstances, be considered as an aggravating factor.[45]

47. In the present case, a considerable number of victims were former detainees. The evidence adduced by the Prosecution, which was not challenged by the Defence, gave the Trial Chamber an insight into the particularly poor condition of some of the victims. For instance, Mr. Mujkanović, who testified at the Sentencing Hearing, said that he was a "broken man" physically and mentally. Another victim was so weak that he had to be carried off the bus.[46]

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[41] Prosecution's Sentencing Brief, para. 17; see *Prosecutor v. Zlatko Aleksovski*, Case No IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 227.
[42] Prosecution's Sentencing Brief, para. 17.
[43] *Ibid.*
[44] *Ibid.*
[45] See *Prosecution v. Dragan Nikolić*, Case No IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 184; *Prosecution v. Banović*, Case No IT-02-65/1-S, Sentencing Judgement, 28 October 2003 (*Banović* Sentencing Judgement), para. 50.
[46] Prosecution's Sentencing Brief, para. 17.

48. The Trial Chamber accepts that a considerable number of victims were in a situation of special vulnerability and finds this to be an aggravating factor in sentencing.

2. Authority as a Policeman

(a) Arguments of the Parties

49. The Prosecution submits that Darko Mrđa abused his position of trust as a policeman and that his position gave him a heightened opportunity for inflicting harm.[47]

50. The Defence argues that Darko Mrđa was not a professional policeman, that he had received very little training and that he did not hold a position of authority.

(b) Discussion

51. The Trial Chamber deems that committing a crime while exercising a public function – such as that of a policeman – may be considered as an aggravating factor. A policeman is vested with authority and a duty to uphold law and order. Civilians subjected to his authority are entitled to expect that a person of his role will abide by this duty. If the policeman commits a crime in the exercise of his function, the breach of public duty and legitimate expectations attaching to his function should be considered as an aggravating factor.

52. The Trial Chamber is aware that the police force to which Darko Mrđa belonged probably did not enjoy the trust and confidence of the non-Serb citizens in Northern Bosnia and Herzegovina during the summer of 1992. No evidence has been adduced to show that the victims had joined the convoy on the basis of their trust in the presence of policemen or, more specifically, of Darko Mrđa. The Trial Chamber deems it likely that public trust in police officers had diminished during the ongoing armed conflict. However, the commission of this kind of crimes by a policeman undoubtedly violated the public authority invested in police officers.

53. The Trial Chamber accepts that Darko Mrđa was a low ranking police officer and was not in a position of command.

54. In the light of the above, the Trial Chamber finds that the position of Darko Mrđa as a policeman is an aggravating factor, but it does attach limited weight to it.

[47] *Ibid*., para. 18.

3. Impact of the Crimes upon the Victims

55. The Trial Chamber is convinced beyond a reasonable doubt that some of the victims, if not all, were subjected to a level of suffering that went beyond what is usually suffered by victims of murder or inhumane acts. Once separated from the other persons in the convoy, the men must have feared for their lives, and must have felt desperate when they were ordered to kneel down by the edge of the cliff or when they witnessed the execution of others. Those who survived only did so by desperately seeking to escape what must have seemed to be a certain death and subsequently faced suffering of an extreme nature.

56. The Trial Chamber takes this extraordinary suffering into account as an aggravating factor.

C. Mitigating Circumstances

57. 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."

58. The Prosecution accepts that the cooperation of Darko Mrđa, his guilty plea, and his acceptance of responsibility may be considered in mitigation of sentence.[48] The Defence argues that the relevant mitigating circumstances include: duress and orders from superiors; conduct during detention; cooperation with the Prosecution; guilty plea; remorse; personal circumstances of Darko Mrđa; length of time between criminal act and trial; and serving sentence in a foreign country. These factors are discussed below.

1. Duress and Orders from Superiors

(a) Arguments of the Parties

59. The Defence submits that Darko Mrđa acted under the duress of his superiors' orders and that, if he had not carried them out, he would have suffered "serious consequences."[49] In addition, it emphasizes that Darko Mrđa was a "low-ranking member of the Intervention Platoon and subject … to the constant anti-Muslim brainwashing and hate propaganda of his superiors."[50] The Defence accordingly submits that, "[a]lthough, without any doubt, he had the legal and moral obligation to

[48] Prosecution's Sentencing Brief, paras. 19-22.
[49] Defence's Sentencing Brief, para. 84.
[50] *Ibid*., para. 85.

oppose the order given to him and the other members of the Platoon, [Darko Mrđa] had neither the intellectual nor personal ability to do so."[51]

60. In support of its submissions, the Defence refers to the *Erdemović* Sentencing Judgment and the case law of the German Supreme Court, which acknowledges that duress could, in some circumstances, be a mitigating factor.[52]

61. The Defence relies upon Darko Mrđa's oral statements. At the hearing, Darko Mrđa said that he would have been killed if he had not carried out his superiors' orders.[53] The Defence also referred to Professor Gallwitz's Report, which concluded that "Darko Mrđa acted in a way of reduced self-control caused by acute stress or in a normal emotional reaction, with age, indoctrination, increased brutality, obedience, group-conforming conduct reducing the ability of independent thinking."[54]

62. The Defence argues that the fact that Darko Mrđa acted pursuant to his superiors' orders is a reason, in addition to the duress he experienced, to mitigate punishment in accordance with Article 7(4) of the Statute.

63. The Prosecution submits that a distinction should be drawn between duress and following a superior's order.[55] It claims that, pursuant to the case law of the Tribunal, duress requires "imminent threats to the life of an accused if he refuses to commit a crime."[56] The Prosecution draws the attention of the Trial Chamber to the circumstances of the *Erdemović* case, which were different from the present case because Erdemović expressly refused to comply with his superior's orders, was threatened with execution, and only then committed the crimes.[57] Nevertheless, the Prosecution agrees that Article 7(4) of the Statute is relevant[58] and does not dispute the fact that Darko Mrđa acted pursuant to his superiors' orders.[59] The Prosecution states that the purpose of Article 7(4) of the Statute is to make a distinction between the "leaders and the persons they use as tools to implement their illegal objectives."[60]

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[51] *Ibid.*
[52] *Ibid.*
[53] Sentencing Hearing, T. 137.
[54] Professor Gallwitz's Report, p. 1380.
[55] Sentencing Hearing, T. 163.
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*, T. 164.

64. The Prosecution describes Professor Gallwitz's Report as "superficial" and as "showing a lack of understanding of the circumstances of the conflict or of the offence"[61] because the influences on Darko Mrđa as described in the Report applies to many others in the conflict.

(b) Discussion

65. The Trial Chamber will deal with the issues of duress and superior orders in turn. Admittedly, in the present instance, the two matters are intimately linked since, as the Defence argues, the orders issued by Darko Mrđa's superiors were accompanied by duress, namely, a threat of death.[62] Notwithstanding, from a legal standpoint and as the Prosecution has stated,[63] superior orders may be pleaded in mitigation independently of duress, and vice versa.[64] Thus, a subordinate may be granted mitigation where he has executed an order without having been directly threatened, such as when the order was not manifestly illegal. Conversely, a person with no superior authority over another may compel him to commit a crime by means of threats.

66. With respect to duress, the Defence argues that Darko Mrđa would have been killed[65] or, at the very least, suffered serious consequences,[66] had he not carried out the orders of his superiors.[67] In support of this argument, the Defence relies only upon the oral statement made by Darko Mrđa during the sentencing hearing. The Trial Chamber is not persuaded on the basis of this evidence that Darko Mrđa indeed acted under threat. The Defence also asserts that, in the light of Professor Gallwitz's Report and against the backdrop of hatred prevailing at the material time, a person as young and of such low rank as Darko Mrđa could not have opposed the orders he received.[68] The Trial Chamber does not rule out that those circumstances may have had some influence on the criminal behaviour of Darko Mrđa, although it does not accept that they were such that Darko Mrđa, even taking account of his age and low rank, would have had no alternative but to participate in the massacre of around 200 civilians. The absence of any convincing evidence of any meaningful sign that Darko Mrđa wanted to dissociate himself from the massacre at the time of its commission prevents the Trial Chamber from accepting duress as a mitigating circumstance.

67. As to the related issue of superior orders, Article 7(4) of the Statute states that "[t]he fact that an accused person acted pursuant to an order of a government or of a superior […] may be

[61] *Ibid*.
[62] Defence's Sentencing Brief, para. 84.
[63] Sentencing Hearing, T. 163.
[64] *Prosecutor v. Dražen Erdemović*, Joint Separate Opinion of Judge McDonald and Vohrah, Case No. IT-96-22-A, Judgement, 7 October 1997, para. 34 "Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations."
[65] Sentencing Hearing, T. 137.
[66] Defence's Sentencing Brief, para. 84.
[67] Sentencing Hearing, T. 137.

considered in mitigation of punishment if the Tribunal determines that justice so requires." The Trial Chamber notes that the Prosecution does not contest the fact that Darko Mrđa acted in furtherance of his superiors' orders.[69] The Trial Chamber has already stated that there is no evidence that the orders were accompanied by threats causing duress. Moreover, the orders were so manifestly unlawful that Darko Mrđa must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.

68. In conclusion, the Trial Chamber dismisses the Defence's submissions with respect to duress and superior orders.

2. Cooperation with the Prosecution

(a) Arguments of the Parties

69. The Defence submits that Darko Mrđa has fulfilled his obligation to cooperate set forth in the Plea Agreement, and that his cooperation should be qualified as substantial.[70] In this regard, the Defence relies on the *Todorović* and *Sikirica* Sentencing Judgments, according to which the determination of whether the cooperation has been substantial depends upon the extent and quality of the information he or she furnished.[71]

70. The Prosecution agrees that Darko Mrđa's cooperation has been substantial.[72]

(b) Discussion

71. The Trial Chamber, pursuant to Rule 101 (B) (ii) of the Rules, is required to consider "[t]he substantial cooperation with the Prosecutor by the convicted person before or after conviction" in mitigation of sentence.

72. In this regard, the Trial Chamber notes the Plea Agreement, pursuant to which Darko Mrđa agreed to cooperate with the Prosecution.[73]

73. The Trial Chamber takes also note of the fact that the Prosecution has acknowledged that Darko Mrđa has met his obligation of cooperation as set forth in the Plea Agreement.[74]

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[68] Defence's Sentencing Brief, para. 85.
[69] Sentencing Hearing, T. 163.
[70] Defence's Sentencing Brief, para. 30.
[71] *Ibid.*, para. 26.
[72] Prosecution's Sentencing Brief, Confidential Annex A, para. 6; Sentencing Hearing, T. 167.
[73] Plea Agreement, para. 10.

74. Based on the above, the Trial Chamber accepts the conclusions of the Prosecution that Darko Mrđa's cooperation has been substantial. It will therefore be considered as a mitigating circumstance in the determination of the sentence.

3. Guilty Plea

(a) Arguments of the Parties

75. The Defence submits that Darko Mrđa's guilty plea before the commencement of trial is an important factor in mitigation of his sentence.[75] The Defence also points out that, although Darko Mrđa was arrested on 13 June 2002, he could not have pleaded guilty before 24 July 2003 because a certain period of time was necessary for the Prosecution and Darko Mrđa to agree upon his exact role in the commission of the crimes.[76] The Defence submits that, in other circumstances, Darko Mrđa would have entered a guilty plea earlier.[77]

76. In support of these arguments, the Defence refers to the *Todorović* Sentencing Judgement,[78] which expressly recognized that a guilty plea "is always important for the purpose of establishing the truth in relation to that crime."[79] According to the Defence, the guilty plea demonstrates Darko Mrđa's honesty, contributes to the establishment of the truth and facilitates peace and reconciliation.[80]

77. Even though the plea was delayed,[81] the Prosecution accepts that Darko Mrđa's guilty plea is an important factor in mitigation of sentence.[82] The Prosecution considers that Darko Mrđa's guilty plea saved time and resources, avoided a large number of victims and witnesses coming to The Hague, and contributed to the establishment of truth.[83]

(b) Discussion

78. The Trial Chamber notes that the case law of the Tribunal has commonly accepted a guilty plea as a circumstance in mitigation of sentence for the following reasons: a guilty plea may demonstrate honesty, helps to establish the truth, may contribute to peace-building and

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[74] Prosecution's Sentencing Brief, Confidential Annex A, para. 6 and Prosecution's Notification dated 27 January 2004.
[75] Defence's Sentencing Brief, para. 40.
[76] *Ibid*., paras. 41-43.
[77] *Ibid*., para. 41.
[78] *Todorović* Sentencing Judgement, para. 81.
[79] Defence's Sentencing Brief, para. 45.
[80] *Ibid*., para. 47.
[81] Sentencing Hearing, T. 162.
[82] Prosecution's Sentencing Brief, para. 20.
[83] *Ibid*.

reconciliation, and saves the Tribunal the time and resources of a lengthy trial.[84] Moreover, victims and witnesses are relieved from the possible stress of testifying at trial.[85]

79. The Trial Chamber accepts that Darko Mrđa's guilty plea helps to establish the truth surrounding the crimes committed on 21 August 1992 at Koričanske Stijene, and thus, in the long term, it may encourage reconciliation among the people of Bosnia and Herzegovina. The Trial Chamber therefore considers the guilty plea to be a mitigating factor.

4. Remorse

(a) Arguments of the Parties

80. The Defence contends that the sincere remorse of an accused is, according to the Tribunal's case law, a mitigating factor.[86] It cites, as examples, the *Erdemović, Todorović* and *Sikirica* Judgements, which held that remorse could be a factor in mitigation of sentence.[87]

81. The Defence states, moreover, that Darko Mrđa has shown his remorse through his acts.[88] For instance, the day after the massacres, he personally requested to be transferred from the Intervention Squad of Prijedor Police to a regular military unit.[89]

82. The Defence also observes that Darko Mrđa publicly expressed his remorse at the sentencing hearing.[90] He stated at the hearing: "I participated in separating and killing these innocent people. I have sincere remorse with respect to that, and I wish to offer my sincere apology to all the victims and their families."[91] He later said that:

> I know that all of those families who lost their loved ones on the 21st of August 1992 can see me only as a murderer and perhaps will think that my apologies are insincere. I can understand them for believing so, and I am prepared to serve time in order to pay for this. I hope that my confession will aid in ensuring that such things are never repeated in our territory.[92]

83. Darko Mrđa reiterated his apology to the victims at the end of his oral statement.[93]

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[84] *Prosecutor v. Dražen Erdemović*, Case No IT-96-22-*bis*, Sentencing Judgement, 5 March 1998 (Second Sentencing Judgement), para. 16 (ii); *Plavšić* Sentencing Judgement, para. 65; *Banović* Sentencing Judgement, para. 68.
[85] *Ibid.*
[86] Defence's Sentencing Brief, para. 48.
[87] *Ibid.*, footnote 48.
[88] *Ibid.*, paras. 51-52.
[89] *Ibid.*, para. 51.
[90] Sentencing Hearing, T. 180.
[91] *Ibid.*, T. 137.
[92] *Ibid.*, T. 138.
[93] *Ibid.*

84. The Prosecution does not challenge the claim that an accused's remorse is a potential factor in mitigation and that it is independent of other circumstances, such as a guilty plea.[94] It notes that an accused's remorse must be measured in light of his specific actions.[95] The Prosecution observes in this regard that Darko Mrđa left the Prijedor police unit after the crimes were committed and did not subsequently rejoin the unit.[96]

(b) Discussion

85. The Trial Chamber considers, as is reflected in the prevailing case law of the Tribunal,[97] that an accused's remorse may be a mitigating circumstance, provided that it is sincere.

86. Following the discussions at the Sentencing Hearing,[98] the Trial Chamber is not persuaded that the transfer of Darko Mrđa to the regular army on 9 September 1992 was pursuant to his request. Therefore, this will not be taken into consideration when assessing his remorse.

87. However, the Trial Chamber finds that Darko Mrđa's public apologies to the victims and their families[99] and his demeanour during the Sentencing Hearing, reflect his sincere remorse. Darko Mrđa has expressed the wish that his gesture will contribute to peace[100] and has cooperated in a substantial manner with the Prosecution. This also constitutes evidence of his remorse which the Trial Chamber accepts as a mitigating factor.

5. Personal Circumstances

(a) Arguments of the Parties

88. In its Sentencing Brief, the Defence submits that the Trial Chamber should consider the following six factors in mitigation of sentence:

- Darko Mrđa had a difficult childhood;[101]

- he was young at the material time;[102]

[94] *Ibid*., T. 148.
[95] *Ibid*., T. 148-149.
[96] *Ibid*., T. 149.
[97] *Banović* Sentencing Judgement, paras. 89-92; *Plavšić* Sentencing Judgement, para. 81; *Todorović* Sentencing Judgement, paras. 89-92 ; *Erdemović* Second Sentencing Judgement, para. 16 (iii).
[98] *Ibid.*, T. 149-155.
[99] *Ibid*., T. 137-138.
[100] *Ibid*., T. 138.
[101] Defence's Sentencing Brief, paras. 33-34.
[102] *Ibid.*, para. 34.

- he is of a good character and was never driven by any racial hatred of persons from other ethnic backgrounds;[103]

- he does not have any prior criminal record;[104]

- he is married with two young children, one of whom is seriously ill,[105] and has always worked hard to meet their needs;[106] and

- his conduct whilst in detention was good.[107]

89. At the Sentencing Hearing, the Defence concluded that "from the point of view of rehabilitation, he deserves another chance in life."[108]

90. In its Sentencing Brief, the Prosecution argues that although it is true that the case law of the Tribunal has often held that the young age of an accused could constitute a mitigating circumstance, it attaches only limited importance to this factor.[109] In this connection, the Prosecution refers to the *Furundžija* Judgment[110] which states that "this may be said of many accused persons and cannot be given any significant weight in a case of this gravity."[111]

(b) Discussion

91. The Trial Chamber observes that the jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors in sentencing, such as the young age of an accused,[112] his good behaviour whilst at the United Nations Detention Unit ("UNDU"),[113] his family situation,[114] his efforts to reintegrate into society[115] and the fact that he has no criminal record.[116]

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[103] *Ibid*., para. 35.
[104] *Ibid.*, para. 36.
[105] *Ibid*., paras. 37-39.
[106] *Ibid*.
[107] *Ibid*., paras. 60-63.
[108] Sentencing Hearing, T. 180.
[109] Prosecution's Sentencing Brief, para. 21.
[110] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement"), para. 284.
[111] Prosecution's Sentencing Brief, para. 21.
[112] *Banović* Sentencing Judgement, para. 74; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement"), para. 778; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1998 ("*Jelisić* Judgement"), para. 124; *Furundžija* Trial Judgement, para. 284; *Erdemović* Second Sentencing Judgement, para. 16(1).
[113] *Prosecutor v. Radislav Krstić,* Case No IT-98-33-T, Judgement, (*Krstić* Trial Judgement), para. 715; *Krnojelac* Trial Judgement, para. 520.
[114] *Jelisić* Judgement, para. 124.
[115] *Krnojelac* Trial Judgement, para. 519.
[116] *Jelisić* Judgement, para. 124.

92. The Trial Chamber also notes that the Tribunal has generally attached only limited importance to these personal factors.[117] For instance, the *Banović* Judgment states that "many accused share these personal factors and … the weight to be accorded to them is limited."[118]

93. In the present case, the Trial Chamber does not find the age of the accused, being 25 years old when he committed the crimes, to be such a young age that it would justify mitigation.[119]

94. The Trial Chamber accepts that Darko Mrđa was raised under difficult circumstances; that he is now married with two children, one of whom is chronically ill;[120] that he has no "prior criminal record;"[121] and that he has conducted himself well whilst in detention.[122] The Trial Chamber considers that while each of these factors, by itself, does not support any lessening of the sentence, taken together they do amount to personal circumstances of a kind which may be accorded some, although very limited, weight in mitigation.

6. Length of Time between Criminal Act and Trial

(a) Arguments of the Parties

95. The Defence points out that almost ten years have elapsed since the commission of Darko Mrđa's crimes.[123] It also indicates that this lapse of time was not the fault of Darko Mrđa.[124]

96. The Defence avers that the long lapse of time has caused severe prejudice to Darko Mrđa[125] because in that period, he married, had two children, found employment, and was able to meet the needs of his family and his parents.[126]

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[117] *Banović* Sentencing Judgement, para. 75.
[118] *Ibid*.
[119] According to *Češić* Judgement, "[t]he Trial Chamber is not aware of any domestic system where 27 years is treated as a young age and may be considered a mitigating factor" (*Češić* Trial Judgement, para. 91). The Chamber further notes instruments in the international legal forum defining young age: the Convention on the Rights of the Child, adopted by the General Assembly in Resolution 44/25 on 20 November 1989 (entered into force 2 September 1990) states, in Article 1, that for "the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier;" Article 26 of the Rome Statute of the International Criminal Court, adopted on 17 July 1998, excludes persons under eighteen from its jurisdiction, stating that the "Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime;" the Protocol I, additional to the Geneva Conventions, second paragraph of Article 77 states that the "Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces;" and also in Additional Protocol II's third paragraph of Article 4 prescribes that "children who have not attained the age of fifteen years shall neither be recruited in the armed forced or groups nor allowed to take part in hostilities."
[120] Birth Certificate of Jovana Mrđa, Municipality of Prijedor, No. 273-1998, 8 October 2003, Defence's Sentencing Brief, p. 776; Birth Certificate of Nikola Mrđa, Municipality of Prijedor, No. 661-2001, 8 October 2003, Defence's Sentencing Brief, p. 777.
[121] Certificate issued by the District Court of Banja Luka, Bosnia and Herzegovina, No. 7080/03, 2 October 2003, Defence's Sentencing Brief, p. 592.
[122] Report on the Behaviour of Darko Mrđa whilst in Custody, 22 September 2003, Defence's Sentencing Brief, p. 778.

97. The Defence goes on to state that the Tribunal has never taken this factor into account in determining sentence.[127] It points out that, in *Barker v. Wingo*,[128] the United States Supreme Court held that "the violation of the right to a speedy trial even leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived."[129] The Defence notes that the United States Supreme Court cited the following words of Jeremy Bentham:[130] "[i]t is desirable that punishment should follow offence as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape".[131]

98. In support of its submissions, the Defence also relies upon the case law of the German Supreme Court which held that a long lapse of time between the commission of a crime and the commencement of the perpetrator's trial could be considered to be a mitigating factor, provided that the perpetrator had not re-offended in the meantime.[132] The Defence underscores that this case law was founded on the fact that the punishment of an offence was no longer warranted after a certain period of time and did not help the perpetrator reintegrate into society.[133]

99. The Prosecution argues that *Barker v. Wingo* cannot be applied in this case as it dealt with an entirely different set of problems than those raised by the Defence.[134] The Prosecution submits that the above case involved a "Prosecution [which] affirmatively sought procedural advantage by repeatedly requesting delays in the case".[135]

100. The Prosecution states that the case law of the German Supreme Court is based on the notion that a criminal who has not re-offended for some time no longer represents a true danger to society.[136] It maintains that such reasoning cannot be applied in an international setting[137] because the deterrent effect of a sentence passed by the Tribunal is not so much aimed at the perpetrator of the crime himself but at any other person who might, in other circumstances, commit similar

[123] Defence's Sentencing Brief, para. 64.
[124] *Ibid.,* para. 65.
[125] *Ibid.,* para. 66.
[126] *Ibid.,* para. 64.
[127] *Ibid.,* para. 67.
[128] *Barker v. Wingo*, 407 US 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972).
[129] Defence's Sentencing Brief, para. 68.
[130] J. Bentham, The Theory of Legislation, p. 326 (Ogden ed. 1931).
[131] Defence's Sentencing Brief, para. 68.
[132] *Ibid*., para. 69.
[133] *Ibid*.
[134] Sentencing Hearing, T. 156.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*., T. 156-157.

crimes. In the Prosecution's view, the deterrent effect of a sentence is not diminished where there is a long lapse of time between the crime and the trial.[138]

(b) Discussion

101. The Trial Chamber observes that it seems that the Defence confuses the argument of the passage of a long time between the commission of the offence and the start of the trial with another issue involving a time element: the right to be tried expeditiously that is without undue delay.

102. The Trial Chamber notes that the violation of the right to a speedy trial cannot be disputed here, because this right attaches at the time the "situation of the accused has been substantially affected"[139] by investigatory or prosecutorial activities (for instance the time of arrest or formal charge).[140] In the present case, Darko Mrđa was indicted on 26 April 2002 and arrested on 13 June 2002, that is to say less than two years ago.

103. As for the issue of the lapse of time between the commission of the crime and the trial, the Trial Chamber recalls that the crimes against humanity and war crimes over which the Tribunal exercises jurisdiction belong to the most serious category of crimes. The importance of international prosecution of the perpetrators of such serious crimes diminishes only slightly over the years, if at all. On this point, it is important to recall Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (ratified by the former Yugoslavia on 9 June 1970 and currently in force in Bosnia and Herzegovina[141]), which stipulates that such crimes are not subject to statutory limitation. The Trial Chamber also notes that the German case law relied upon by the Defence relates to ordinary crimes and is, in that respect, inapplicable in the present case. Finally, the Trial Chamber observes that the German Supreme Court accepted the disregard of a delay of almost 60 years between the commission of an offence and the conviction for crimes committed during the Second World War.[142]

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[138] *Ibid*., T. 157.
[139] See the jurisprudence of the European Court of Human Rights in *Deweer v. Belgium,* 2 E.H.R.R. 439, para. 46 and in *Eckle v. Federal Republic of Germany*, 5 E.H.R.R. 1, para. 73. In *Eckle v. Federal Republic of Germany*, the Court stated that "[i]n criminal matters, the "reasonable time" referred to in Article 6(1) begins to run as soon as a person is "charged" […]." Charged, for the purpose of Article 6(1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected."
[140] See *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L.Ed.2d 468 (1971).
[141] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, United Nations, *Treaty Series*, vol. 754, p. 73.
[142] 1 StR 538/01, 21 February 2002.

104. For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation.

7. Serving a Sentence in a Foreign Country

(a) Arguments of the Parties

105. The Defence submits that Darko Mrđa will suffer particular hardship if he serves his sentence in a foreign country because he will not speak the local language and will not receive as many visits from friends and family.[143] It further submits that the latter point is exacerbated by the fact that Darko Mrđa and his family have limited financial resources.[144] In support of its arguments, the Defence relies upon German case law that provides that susceptibility to punishment is usually greater for foreigners serving time in a foreign country.[145]

106. The Prosecution argues that the German case cited by the Defence implies that particular hardships depend upon the personal circumstances of the convicted person and not upon general considerations.[146] Further, the Prosecution submits that the German case cited by the Defence in fact asserts that language difficulties are of reduced significance if a long-term prison sentence is imposed because the language problem is relatively easy to overcome and serving a sentence in a foreign country is, by itself, not evidence of particular hardship.[147]

(b) Discussion

107. The Trial Chamber recognizes that the fact that a convicted person must serve his or her sentence in a state different from the one his or her family resides in and whose language he or she does not speak may constitute an additional hardship.

108. The Trial Chamber notes that, when deciding the state where a convicted person shall serve his or her sentence, the International Tribunal does take into consideration his or her personal circumstances. The "Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment" provides that "the President of the International Tribunal will, on the basis of the submitted information and on any other inquiries he/she chooses to make, determine the state in which

[143] Defence's Sentencing Brief, para 70.
[144] *Ibid.*
[145] See BGH St 43 at 233-34 cited in Defence's Sentencing Brief, footnote 66.
[146] *Ibid*, T. 159.
[147] Sentencing Hearing, T. 157-159.

imprisonment is to be served" and that "particular consideration shall be given to the proximity to the convicted person's relations."

109. Nevertheless, the fact remains that Darko Mrđa will serve his sentence in a state different from his country of origin and at some distance from his wife and children. This is however a common aspect of the prison sentences imposed by the Tribunal. The Trial Chamber takes into account this factor in determining the length of imprisonment, but it does not consider it to be a mitigating circumstance.

8. Conclusions

110. In light of the above, the Trial Chamber finds that the following are relevant mitigating circumstances to which appropriate weight must be attached:

- Cooperation with the Prosecution;
- Guilty Plea;
- Remorse; and
- Personal circumstances of Darko Mrđa.

111. The Trial Chamber rejects the submissions of the Defence concerning duress, compliance with superior orders and the length of time between the commission of the crimes and the trial. However, the Trial Chamber takes into consideration the fact that Darko Mrđa must serve his sentence in a foreign country in determining his sentence.

D. The General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia

112. Article 24 of the Statute and Rule 101 of the Rules require the Trial Chamber, when determining sentence, to take into account the general practice regarding prison sentences in the former Yugoslavia.[148]

1. Arguments of the Parties

113. The Prosecution submits that the Trial Chamber should consider the factors set out in Article 41(1) of the SFRY Criminal Code[149] (the "Code") in determining sentence and that these are equivalent to aggravating and mitigating factors, evaluated by the Tribunal.[150]

[148] Rule 101 (B) (iii) of the Rules.

114. In addition, the Prosecution submits that the Trial Chamber should avail itself of actual sentencing decisions or a range of penalties that courts of the former Yugoslavia would give for comparable crimes.[151] The Prosecution does not cite any Yugoslav cases. Instead, it refers to Article 142 of the Code, entitled "Criminal Offences against Humanity and International Law"[152] which permitted Yugoslav courts to impose a sentence of imprisonment of not less than five years up to a sentence of death for the crimes of torture, rape, enslavement and outrages upon personal dignity committed during wartime.[153] However, the Prosecution has not indicated the minimum term for war-related killing or inhumane treatment as a crime against humanity.[154]

115. The Prosecution further submits that life imprisonment, as prescribed in the Statute, could have been imposed in respect of crimes that could have attracted the death penalty in the former Yugoslavia.[155]

116. The Defence agrees with the Prosecution's submissions regarding the Statute, the Rules and Article 41 (1) of the Code. In addition, the Defence refers the Trial Chamber to Articles 38 and 42 (2) of the Code.[156] The latter Article permits judges to take into account mitigating factors, and Article 38 of the Code provides:

> (1) The term of imprisonment cannot be shorter than 15 days, nor longer than 15 years.
> (2) For offences for which is prescribed the death penalty, the court may sentence to 20 years of imprisonment.[157]

117. The Defence notes that the death penalty was abolished in Bosnia and Herzegovina in 1995 by the direct application of the European Convention for the Protection of Human Rights and

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[149] Adopted by the SFRY Assembly at the session of the Federal Council held on 28 September 1976; declared by decree of the President of the Republic on 28 September 1976; published in the Official Gazette SFRY No. 44 of 8 October 1976; took effect on 1 July 1977. Article 41 of the Codes provides, "The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of punishment for that offence, keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator."
[150] Prosecution's Sentencing Brief, para. 24.
[151] *Ibid*.
[152] Article 142 of the Code provides "[w]hoever in violation of the international law in time of war, armed conflict, or occupation, orders an attack against the civilian population […] or […] tortures, or inhumane treatment of the civilian population […] shall be punished by no less that five years in prison or by the death penalty"; see *Furundžija* Trial Judgement, para. 285 cited in the Prosecution's Sentencing Brief, para. 25.
[153] The death penalty was abolished in 1998 and substituted by long-term imprisonment of 20 to 40 years. See *Tadić*, Sentencing Judgement, paras. 8-9.
[154] No Article of the Code is cited by the Prosecution Sentencing Brief, para. 26.
[155] See *Tadić* Sentencing Judgement, para. 12; *Čelebići* Trial Judgement, para. 1208 cited in the Prosecution's Sentencing Brief, para. 26; and Sentencing Hearing, T. 165.
[156] Defence's Sentencing Brief, para. 73, 75.

Fundamental Freedoms (the "ECHR") and its Protocols[158] pursuant to the General Framework Agreement for Peace in Bosnia and Herzegovina.[159] The consequence of this, according to the Defence, is that a court of the former Yugoslavia would not be able to substitute the death penalty with a term of imprisonment of 20 years under Article 38 (2) of the Code because that provision would also be ineffective. Therefore, Article 38 (1) of the Code would be the only sub-paragraph relevant to the deliberations of this Trial Chamber.[160] According to the Defence, courts of the former Yugoslavia would therefore not have imposed a term of imprisonment of between 15 and 20 years for the offences committed.[161]

118. Further, the Defence submits that following the changes in the law, with the adoption of the Criminal Code of Republika Srpska and subsequently with the adoption of the Criminal Code of Bosnia and Herzegovina, the courts could impose longer terms of imprisonment than those permitted under the Code.[162] Nevertheless, the Defence refers to Article 4 of the Code of Bosnia and Herzegovina, which provides that if the law has become more lenient since the commission of the offence, then the more lenient law should apply. Article 38 (1) of the Code is more lenient and therefore the maximum term of imprisonment that could be imposed is 15 years.

2. Discussion

119. The Trial Chamber notes that it is settled practice that, although a Trial Chamber should "have recourse to"[163] and should "take into account"[164] the general practice regarding prison sentences in the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chamber to take account of that practice."[165]

120. The Trial Chamber accepts the submissions of the Prosecution and the Defence that the factors referred to in Articles 38 and 41(1) of the Code are relevant to the Trial Chamber's deliberations about aggravating and mitigating factors, which have been considered above. Furthermore, the Trial Chamber notes that Article 142 of the Code applies to killing as well as other offences[166] and that this corresponds to the war crime for which Darko Mrđa has been convicted.

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[157] *Ibid*., para. 75.
[158] Protocol 6, Article 1.
[159] Article II (2) of the Constitution in Annex IV of the Dayton Peace Agreement states, "[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("EHR") shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law." See Defence's Sentencing Brief, paras. 76 -78.
[160] Defence's Sentencing Brief, para. 79.
[161] *Ibid.*, para. 75, footnote 69.
[162] *Ibid,* para 80.
[163] Article 24 of the Statute.
[164] Rule 101 (B) (iii) of the Rules.
[165] *Čelebići* Appeals Judgement, para. 813.
[166] Article 142 of the Code.

There does not, however, appear to be any specific provision in the Code giving effect to crimes against humanity,[167] although genocide (a specific crime against humanity) is dealt with in Article 141 of the Code which prescribes the same range of penalties as Article 142, namely five years of imprisonment to a penalty of death.[168] Therefore, the Code provides useful guidance to the Trial Chamber in determining sentence.

121. The Trial Chamber is not persuaded that courts in the former Yugoslavia would not have been able to impose a term of imprisonment of 20 years because of the direct application of Protocols 6 and 13 to the ECHR. Although Article 1 of Protocol 6 to the ECHR abolishes the death penalty, it cannot be considered completely abolished, as Article 2 of that same Protocol provides that the death penalty may be applied in accordance with the law in respect of acts committed in time of war. Moreover, the Trial Chamber is of the opinion that where the death penalty has been completely abolished by Protocol 13 to the ECHR,[169] the term of imprisonment of 20 years could still be imposed under Article 38 of the Code. The prohibition of the death penalty requires the imposition of a lesser, substitute penalty. The Trial Chamber does not accept that the abolition of the death penalty should have the effect that the maximum term of imprisonment, 20 years under Article 38(2) if it can serve as a substitute to the death penalty, should also be reduced to the level appropriate for less serious crimes for which the death penalty was not provided. The abolition of the death penalty is not the result of a change in the perception of the seriousness of the crimes for which it could be imposed and there exists no logical or legal reason to accept that the maximum term of imprisonment substituting the death penalty would be affected by it. Finally, it should be stressed upon that these provisions are purely indicative and that the Trial Chamber is not bound by them. The maximum penalty available to the Tribunal is life imprisonment and the Trial Chamber retains discretion to impose a term of imprisonment of more than 20 years.

V. DETERMINATION OF THE SENTENCE

A. Conclusions

122. In order to determine the applicable sentence, in keeping with the case law of the Tribunal, the Trial Chamber assessed those factors relevant to an appraisal of the gravity of the crimes of murder (as a violation of the laws or customs of war) and inhumane acts (as a crime against

[167] *Tadić* Sentencing Judgement, para. 8; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement"), para. 274; *Prosecutor v. Simić*, Case No. IT-95-9, Judgement, 29 October 2003, para. 1070; *Prosecutor v. Milomir Stakić*, Case, No. IT-97-24-T, Judgement, 31 July 2003, para. 889; and for a contrary view see *Jelisić* Trial Judgement, para. 113.
[168] *Vasiljević* Trial Judgement, para. 274.
[169] Article 1 of Protocol 13 to the ECHR provides that "[t]he death penalty shall be abolished" and that "[n]o one shall be condemned to such penalty or executed."

humanity) of which Darko Mrđa was convicted further to his plea of guilty. It then examined the aggravating and mitigating circumstances. Finally, in accordance with the Statute and the Rules, the Trial Chamber took into account of the general sentencing practice of the courts of the former Yugoslavia.

123. In determining the seriousness of the crimes, the Trial Chamber examined the nature of the offences committed, their scale, the role played by Darko Mrđa, and the impact of the crimes upon the victims and their families. It concluded that the sentence should reflect all of the cruelty and inhumanity which characterizes Darko Mrđa's direct participation in the shooting of around 200 civilians, of which all but 12 were killed.

124. Moreover, the Trial Chamber deemed that the civilian status of the victims could not be taken into account as an aggravating factor, as it is already an element of the crimes charged. However, it accepted that a considerable number of victims were in a situation of special vulnerability and found this to be an aggravating factor. Furthermore, the Trial Chamber considered that Darko Mrđa's position of authority was a relevant aggravating circumstance, but did not attach much weight to it. Finally, the Trial Chamber admitted that most of the victims were subjected to such a level of suffering that it should be qualified as an aggravating circumstance.

125. The Trial Chamber gave consideration to a number of mitigating circumstances. It observed that, since his arrest, Darko Mrđa entered a plea of guilty, made a public expression of remorse and actively cooperated with the Prosecution. Moreover, it accorded limited weight in the mitigation of sentence to Darko Mrđa's personal circumstances.

126. The Trial Chamber also took into consideration the fact that Darko Mrđa must serve his sentence in a foreign country in determining the appropriate sentence, but it did not consider it to be a mitigating circumstance.

127. Finally, the Trial Chamber rejected the submissions of the Defence concerning duress, compliance with superior orders and the lapse of time since the commission of the crimes.

B. Credit for Time Served

128. Darko Mrđa has been detained in the UNDU since his arrest and transfer on 13 June 2002. Pursuant to Rule 101 (C) of the Rules, he is entitled to credit for the time spent in detention, which amounts to 658 days.

VI. DISPOSITION

129. For the foregoing reasons, having considered the arguments and the evidence presented by the parties, the **TRIAL CHAMBER**

PURSUANT TO the Statute and the Rules,

SENTENCES Darko Mrđa to 17 (seventeen) years of imprisonment;

STATES that, pursuant to Rule 101 (C) of the Rules, Darko Mrđa is entitled to credit for 658 days for time spent in custody up to and including the date of this Judgement;

ORDERS that, pursuant to Rule 103 (C) of the Rules, Darko Mrđa remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where he shall serve his sentence.

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

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Alphons Orie, Presiding

_____ _____

Amin El Mahdi Joaquín Martín Canivell

Dated this 31st March 2004
At the Hague
The Netherlands

[Seal of the Tribunal]