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Repentant before Justice

The Sentencing Dilemma of the *Bralo* case

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Even by its own expeditious standards in recent times, the week of 2 April 2007 was a particularly prolific one for the International Criminal Tribunal for the former Yugoslavia (ICTY). On 2 April, the ICTY Appeals Chamber affirmed the sentence of 20 years' imprisonment of Miroslav Bralo; the following day, Radoslav Brđanin had his original 32-year sentence cut to 30 years' imprisonment by the Appeals Chamber; and, on 4 April, Trial Chamber I handed down a sentence of 15 years' imprisonment to Dragan Zelenović, concluding the notorious "Foča rape case" before the Tribunal.[2] Rather than analysing the judgements in all three cases or the significance of their timing in light of the Tribunal's Completion Strategy, this commentary instead looks at the first of these decisions, that of Miroslav Bralo. It discusses the profound dilemma which the case presented to the Trial Chamber in terms of assessing the sentence imposed upon Bralo, given the brutality of the crimes which took place and the uniquely compelling mitigating circumstances. This assessment of the Trial Chamber's conundrum is made in light of the recent decision of the Appeals Chamber which marks the completion of the *Bralo* case before the Tribunal.

On 7 December 2005, the ICTY sentenced former Croatian Defence Council (HVO) Military Police Battalion member, Miroslav Bralo, to 20 years' imprisonment for his role in the commission of crimes committed in the Lašva Valley region of central Bosnia and Herzegovina (BiH) in 1993. The crimes included multiple murder, rape, torture, and the unlawful confinement and inhumane treatment of civilians. In one particularly depraved incident, Bralo was responsible for aiding and abetting the summary killings of fourteen Bosnian Muslims, nine of whom were children.[3] In April 1993, Bralo participated in the attack of Ahmići, setting fire to numerous homes belonging to Muslim inhabitants of the village, destroying a mosque by detonating explosives and killing an unidentified adult male as well as a young Bosnian Muslim woman. In a separate incident in the weeks that followed, Bralo captured, interrogated and murdered three unarmed Muslim men suspected of gaining intelligence about the HVO military lines.[4] On yet

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[2] Zelenović has since filed a Notice for Leave to Appeal the Sentencing Judgement, 27 April 2007.
[3] Sentencing Judgement, paragraph 13, 2 April 2005.
[4] Judgement on Sentencing Appeal, para. 14, 2 April 2007.

another occasion, in mid-May 1993, participating in the so-called "Jokers" anti-terrorist platoon of the Military Police Battalion, Bralo repeatedly raped and sexually assaulted a Bosnian Muslim woman. Bralo committed a range of appalling crimes against her personal dignity, humiliating her in front of other soldiers and threatening to kill her. In short, the three counts of the indictment against Miroslav Bralo told the story of a man who had committed some of the most heinous crimes imaginable, even within the context of this brutal, bloody war.

What distinguishes the *Bralo* case from others of its nature is not the brutality of the crimes themselves though, but Bralo's subsequent conduct. Not only did Bralo plead guilty to all eight counts of the amended indictment of 19 July 2005, but in reaching a Plea Agreement with the Prosecution, Bralo furnished the Tribunal with a largely unprecedented "unilateral declaration", as opposed to a traditional "contract between parties", and provided a detailed 'Factual Basis' of the events.[5] This Factual Basis substantially increased the scope of the original indictment, not only reflecting the initial crimes of the 10 November 2005 indictment, but encompassing other crimes over a broader time-frame, including the abovementioned attack on Ahmići and Bralo's involvement in the execution of the Čeremić family. Indeed, according to evidence brought before the Trial Chamber, Bralo became "the first person charged by the Tribunal with crimes committed in [the Ahmići] area who has admitted his criminal conduct".[6]

The voluntary surrender to the Tribunal and Bralo's early guilty plea were substantial mitigating factors taken into account by the Trial Chamber. It noted the far-reaching implications that such a plea has, notably in abrogating the need for victims and witnesses to re-live their trauma by recounting their experiences in court. It also considered the consequence of the guilty plea in saving the "scarce legal, judicial and financial resources" of the Tribunal which could consequently be deployed elsewhere. Additionally, the Trial Chamber asserted that the profound acknowledgment of personal responsibility for such grave crimes "may demonstrate that an accused is genuinely remorseful".[7] And "genuine remorse" is exactly what the Trial Chamber established. In his initial, unsuccessful attempt to surrender himself to the Tribunal in 1997 (despite allegedly not knowing of the indictment against him), his assistance in the location and exhumation of the bodies of those killed during the attack on Ahmići, the positive effect that his contribution had had in the finding of remains of several of his victims on the local community, and the attempts made to atone for his crimes, the Trial Chamber appeared convinced by Bralo's repentance for his actions. Even the Prosecution accepted the personal transformation that Bralo had undergone and articulated that he had "embarked on a personal voyage of reconciliation and atonement".[8] The Trial Chamber found that the

[5] Judgement on Sentencing Appeal, para. 41.
[6] Sentencing Judgement, para. 71. Noted in Judgement on Sentencing Appeal, para. 46.
[7] Sentencing Judgement, paragraphs 64-65.
[8] Sentencing Hearing, 20 October 2005, in Sentencing Judgement para. 68.

surrender, guilty plea and steps taken to atone for his crimes, coupled with his genuine remorse and considerations of lesser weight, were significant mitigating factors.[9]

Despite this comprehensive consideration that the Trial Chamber gave to the mitigating circumstance in the *Bralo* case, the Appeals Chamber was at pains to point out that "substantial cooperation with the Prosecutor" is the only mitigating circumstance which the Trial Chamber is required to consider under Rule 101(B)(ii) of the Rules of Procedure and Evidence.[10] It noted, however, that Trial Chambers have exercised a relatively wide discretion in interpreting such cooperation as a mitigating factor, and that the term should not be "construed narrowly and singularly".[11] In its analysis of the provision, the Appeals Chamber does not appear to attach substantial weight to the exact wording of the rule. The text presents the considerations as a non-exhaustive list, stating that "any mitigating circumstances *including* the substantial co-operation with the Prosecutor" shall be taken into account.[12] In this respect therefore, the Trial Chamber was correct in assessing Bralo's attempts to atone for his crimes as a mitigating circumstance in the case. It is still significant though that the only explicitly expressed mitigating circumstances mentioned in the Rules is "substantial cooperation" and this was *not* deemed to be found in the *Bralo* case. The Trial Chamber had found evidence of "some co-operation" but assessed Bralo's willingness to provide documents and information as merely amounting to "moderate co-operation".[13] The Appeals Chamber ultimately decided that the provision of this material, which the Prosecution claimed it used in a "very limited scope",[14] did not warrant further appraisal. It found that the Trial Chamber did not commit a discernible error in considering that the evidence put forward by the Appellant only "deserved moderate weight in mitigation of sentence".[15] The Appeals Chamber gave short thrift to the arguments in Bralo's first ground of Appeal which claimed that the Trial Chamber had erred in not accepting the exogenous events of the deteriorating military situation in the region as a mitigating circumstance. Additionally, the Appellant relied on the fact that he had allegedly been acting under duress and superior orders when committing many of the crimes. Indeed, for his part, Bralo argued that he had initially been released from prison in 1993 on the condition that he participates in the attack on Ahmići. The Defence submitted that the Trial Chamber "acted perversely" by failing to ascribe any weight to the material.[16] The apparent enthusiasm and willingness with which the Appellant carried out the orders, and his gratuitous attempts to humiliate his victims

[9] Sentencing Judgement, para. 72.
[10] See Appeals Judgement, para. 37, 51. Rule 101(B) "In determining the sentence, the Trial Chamber shall take into account…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. "
http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf
[11] *Simić*, Sentencing Judgement, para. 111. Cited in Appeals Judgement, para. 37.
[12] Rule 101(B) (ii), Rules of procedure and Evidence. Emphasis added by author.
[13] Sentencing Judgement, para. 81. Cited in Appeals Judgement, para. 49.
[14] Cited in Appeals Judgement, para. 50.
[15] Appeals Judgement, para. 70.
[16] Appeals Judgement, para. 20.

grossly undermine such arguments. Once again, the Appeals Chamber found that the Defence had failed to show a discernible error by the Trial Chamber and categorically dismissed all grounds of appeal.

In assessing the gravity of the crimes committed and the aggravating circumstances of the case, the Trial Chamber declared that a sentence of "at least 25 years' imprisonment would be warranted". In considering the relevant mitigating circumstances of the case, it ultimately found that a sentence of 20 years in prison was a "proportionate and appropriate punishment".[17] What is significant here is the Trial Chamber's initial assertion that a sentence of *at least* 25 years would have, i.e. save for the mitigating circumstances, been handed down. In not being more precise or, at least, not articulating specifically the length of the prison sentence which Bralo's crimes warranted – subsequent conduct of the accused notwithstanding, the Trial Chamber appears to have left ambiguities in the final determination of the sentence it imposed. Had it devoted more attention in its judgement to the exact weight it attributed to Bralo's crimes *prima facie* then its determination of the sentence reduction which the mitigating circumstances gave rise to would also have been more clear-cut. As it stood, in appealing the sentence, the Defence attempted to exploit the ambiguities by arguing that the Trial Chamber had been too severe. Indeed, in its third ground of Appeal, the Defence submitted that the Trial Chamber had abused its discretion in reducing the sentence by "as little as 5 years, or as little as 20% of the sentence" having determined that the mitigating evidence of the case "warranted substantial modification of the sentence".[18] While the Defence's argument is *semantically* legitimate, the Trial Chamber's use of the wording "at least 25 years" indicates that a harsher sentence would probably have been imposed. What exactly it *would have* considered the appropriate sentence, in the absence of the mitigating factors, we shall never know. Sadly, in this author's opinion, this lack of precision is to the detriment of the case.

In response to the Defence's argument, the Prosecution rightly contended that the specification of 25 years' imprisonment merely constituted the *starting point* for the sentence envisaged by the Trial Chamber.[19] This "starting point" is not to be interpreted as the mark from which the sentence should have been reduced, but rather—in the context of the Trial Chamber's own wording—one should infer that it was the absolute minimum sentence that the Tribunal thought it right to impose. Perhaps, as said, the Trial Chamber should have stated more explicitly what term it *would have* imposed in a situation where the compelling mitigating circumstances had not been present. Had it indicated that a sentence, for the sake of argument, of 28 years or 34 years had been justified then the final sentence handed down could have been interpreted by both parties with greater clarity. Even if the Trial Chamber had asserted that 25 years' imprisonment was sufficient, again before the mitigating factors were considered, such a definitive statement would have given greater lucidity in the determination of the final sentence reduction. It would also have provided some certainty in the future calculus of other sentence reductions in light of

[17] Sentencing Judgement, para. 95.
[18] Cited in Appeals Judgement, para. 78.
[19] Sentencing Judgement, para. 80.

significant mitigating circumstances. Crucially, it may also have provided a greater basis for the Prosecution to appeal the sentence in this particular case. As it stands, it is lamentable that the Prosecution did not appeal the Trial Chamber's sentence. In the absence of such an appeal, the Appeals Chamber did not have the luxury of re-assessing the duration of the sentence.[20]

As it stands, Miroslav Bralo will be transferred to one of ten cooperating European states to serve his sentence in the coming weeks. He will be credited for the time he has spent in custody since his transfer to the Tribunal in November 2004, so he will be released from prison at the latest in 2024 at the age of 58 years old. In light of the multiple appalling crimes committed by Bralo in 1993, a 20-year sentence may seem like a profound miscarriage of justice for the surviving victims and the communities which his actions have irrevocably damaged. Notwithstanding the heinous nature of the crimes committed, the gravity of which can never truly be atoned for, in many respects Bralo has almost been a "model citizen" since his first attempt to hand himself over to the Tribunal and repent for his actions. Indeed, not only has his conduct been of considerable benefit to the communities which it affected, as discussed earlier, but it is significant in that his commitment to helping establish the truth behind the events of the Ahmići attack also contributes to the Tribunal's wider goal of establishing the historical record of the war. Undoubtedly, Bralo's recent conduct had been welcomed by the Tribunal which could deal with the case in an efficient, expeditious fashion. Remorseful and cooperative as Bralo may have been subsequently though, the 20-year sentence appears unduly lenient for a killer of such concerted rage and arbitrary, inhumane violence.

At the Appeals Hearing on 2 April 2007, a humbled figure appeared in Courtroom I of the ICTY. Like many of his predecessors, Bralo's disposition seemed a far cry from the monster his crimes would suggest he once was. His overly polite demeanour and his courteous conduct towards the court belied the horrific nature of his crimes and the state of mind which induced him to commit those atrocities some 14 years ago. Perhaps, in its wider attempts to promote truth and reconciliation in the region, the Trial Chamber was right to impose the relatively lenient sentence. But it is regrettable that it did not do so with greater clarity as to the true weight it attributed to the mitigating circumstances. The proposition of Bralo going free, possibly even within the next 15 years,[21] must be a chilling one for the surviving victims whose lives have been destroyed by his actions. At the very least, it is regrettable that the Prosecution did not attempt to lengthen the sentence through appealing the Trial Chamber's decision. Either way, Miroslav Bralo will be given the opportunity to restart his life in the not all too distant future – a luxury sadly not bestowed on so many of his victims.

[20] See Appeals Judgement, par. 85.
[21] See Article 28: Pardon or commutation of sentences, Updated Statute of the Tribunal, http://www.un.org/icty/legaldoc-e/basic/statut/stat02-2006.htm#28.