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TRIAL CHAMBER
CHAMBRE DE 1ÈRE
INSTANCE

The Hague, 18 December 2003
CT/P.I.S/ 812e

JUDGEMENT IN THE CASE
THE PROSECUTOR V. DRAGAN NIKOLIĆ

• **DRAGAN NIKOLIĆ SENTENCED TO 23 YEARS' IMPRISONMENT**

Please find below the summary of the Judgement delivered by Trial Chamber II, composed of Judges Schomburg(Presiding), Mumba and Agius, as read out by the Presiding Judge.

Summary of Judgement

The following is the summary of the Trial Chamber's Judgement, which will be made available in English, French and B/C/S at the end of this session. The only valid version of this summary is the one that will be read out right now. This summary, however, forms no part of the Judgement. The only authoritative account of the Trial Chamber's findings and of its reasons for those findings is to be found in the written Judgement, copies of which will also be made available to the Parties and the public immediately following the hearing.

The Accused, Dragan Nikolić, also known as "Jenki", a 46 year-old Bosnian Serb, was the first person indicted by this Tribunal on 4 November 1994. A First Amended Indictment was confirmed on 12 February 1999 and contained 80 counts of Crimes against Humanity, Grave Breaches of the Geneva Conventions, and Violations of the Laws or Customs of War. This case deals with his individual responsibility for particularly brutal crimes committed in the Sušica detention camp near the town of Vlasenica in the Municipality of the same name. Dragan Nikolić was a commander in this camp, established by Serb forces in June 1992.

Already on 4 November 1994, arrest warrants for Dragan Nikolić were issued. Following the failure to execute the arrest warrants, proceedings pursuant to Rule 61 of the Rules were initiated on 16 May 1995. On 20 October 1995, the Trial Chamber issued its decision determining that there were reasonable grounds for believing that Dragan Nikolić had committed all the crimes in the indictment. The Trial Chamber stated that the failure to effect service of the indictment and to execute the arrest warrant was due to the failure or refusal of the then Bosnian Serb administration in Pale to co-operate.

The Accused was finally apprehended on or about 20 April 2000 by SFOR in Bosnia and Herzegovina and immediately transferred to the Tribunal on 21 April 2000.

Dragan Nikolić pleaded guilty on 4 September 2003 to the Third Amended Indictment which charged him with, *inter alia*, individual criminal responsibility for committing Murder (Count 2), aiding and abetting Rape (Count 3) and committing Torture (Count 4) as crimes against humanity. The criminal conduct underlying these charges also forms the basis, in part, for the final charge of Persecutions as a crime against humanity in Count 1. It has to be recalled that at the time of the Accused's guilty plea the commencement of his trial was

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already scheduled and the first witnesses had arrived in The Hague to testify in the form of depositions to be taken during the week of 1 to 5 September 2003.

For a considerable period of time during the pre-trial proceedings, the Trial Chamber had to deal with jurisdictional matters.

On 17 May 2001 and 29 October 2001, the Defence filed motions challenging the jurisdiction of the Tribunal based upon the alleged illegality of the arrest of the Accused. The Defence submitted that the allegedly illegal arrest of the Accused by unknown individuals on the territory of what was at that time the Federal Republic of Yugoslavia should be attributable to SFOR and the Prosecution, thereby barring the Tribunal from exercising its jurisdiction over the Accused. SFOR had arrested him on the territory of Bosnia and Herzegovina after he had been handed over by these unknown individuals. The Defence further submitted that, irrespective of whether or not this conduct was attributable to the Prosecution, the illegal character of the arrest should in and of itself bar the Tribunal from exercising jurisdiction.

On 9 October 2002, the Trial Chamber dismissed the relief sought by the Defence. The Trial Chamber decided on whether the arrest of the Accused and his subsequent transfer to the Tribunal violated the principle of State sovereignty and/or international human rights and/or the rule of law.

The Trial Chamber held that there was no collusion or involvement by SFOR or the Prosecution in the alleged illegal acts. The Trial Chamber held that SFOR was, in accordance with Article 29 of the Statute and Rule 59 *bis* of the Rules, obliged to arrest Dragan Nikolić and to hand the Accused over to this Tribunal.

The Trial Chamber decided that there was no violation of State sovereignty in the current case and based its decision on three grounds: First, the Trial Chamber held that in the vertical relationship between the Tribunal and States, sovereignty cannot by definition play the same role as in the horizontal relationship between States. Second, the Trial Chamber recalled that neither SFOR nor the Prosecution were at any time prior to Dragan Nikolić's crossing the border between the then Federal Republic of Yugoslavia and Bosnia and Herzegovina involved in this transfer. Third, the Trial Chamber held that, in contrast to cases involving horizontal relationships between States, even if a violation of State sovereignty had occurred, the then Federal Republic of Yugoslavia would have been obliged, under to Article 29 of the Statute, to surrender the Accused after his return to the then Federal Republic of Yugoslavia. In this context, the Trial Chamber recalled the maxim "*dolo facit qui petit quod [statim] redditurus est*", which means that "a person acts with deceit who seeks what he will have to return immediately."

The Trial Chamber re-emphasised the close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. The Trial Chamber held, however, that the facts assumed by the Parties did not at all show that the treatment of the Accused by the unknown individuals was of such an egregious nature that it would constitute a legal impediment to the exercise of jurisdiction over the Accused.

The Defence filed an interlocutory appeal against this decision on 24 January 2003, following certification of the appeal by the Trial Chamber. The appeal was dismissed by the Appeals Chamber in its decision of 5 June 2003. First, the Appeals Chamber held that, even if the conduct of the unknown individuals could be attributed to SFOR, thus making SFOR responsible for a violation of State sovereignty, there was no basis upon which the Tribunal should not exercise its jurisdiction in the present case. In reaching this conclusion, the Appeals Chamber weighed the legitimate expectation that those accused of universally condemned

offences will be brought to justice against the principle of State sovereignty and the fundamental human rights of the accused.

Second, the Appeals Chamber held that certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. The Appeals Chamber concurred, however, with the Trial Chamber's evaluation on the gravity of the alleged violation of the Accused's human rights and found that the rights of the Accused were not egregiously violated in the process of his arrest.

On 2 September 2003 the Parties submitted a Plea Agreement, based on the factual basis of the new Third Amended Indictment, which was accepted by the Trial Chamber at the Plea Hearing of 4 September 2003.

A Sentencing Hearing was held between 3 and 6 November 2003, at which the Prosecution called three witnesses and submitted the written statements of two victims and one expert into evidence. The Defence called two witnesses and tendered into evidence written statements of three Defence witnesses.

Prior to the Sentencing Hearing, the Trial Chamber ordered, *proprio motu*, two expert reports, one on sentencing practices and the other on the socialisation of the Accused. During the Sentencing Hearing, Professor Dr. Ulrich Sieber of the Max Planck Institute for foreign and international criminal law in Freiburg, Germany, testified as an expert witness regarding the sentencing report and Dr. Nancy Grosselfinger testified regarding the socialisation report.

The Accused was given the final word. He made a statement expressing remorse and he accepted responsibility for his crimes.

The Trial Chamber will now turn to a brief summary of the factual background.

On or about 21 April 1992 the town of Vlasenica was taken over by Serb forces consisting of the JNA, paramilitary forces and armed locals. Many Muslims and other non-Serbs fled from the Vlasenica area, and beginning in May 1992 and continuing until September 1992, those who had remained were either deported or arrested.

In late May or early June 1992, Serb forces established a detention camp run by the military and the local police militia at Sušica. It was the main detention facility in the Vlasenica area and was located approximately one kilometre from the town.

From early June 1992 until about 30 September 1992, Dragan Nikolić was a commander in Sušica camp.

The detention camp comprised two main buildings and a small house. The detainees were housed in a hangar which measured approximately 50 by 30 meters. Between late May and October 1992, as many as 8,000 Muslim civilians and other non-Serbs from Vlasenica and the surrounding villages were successively detained in the hangar at Sušica camp. The number of detainees in the hangar at any one time was usually between 300 and 500. The building was severely overcrowded and living conditions were deplorable.

Men, women and children were detained at Sušica camp, some being detained as entire families. Women and children as young as eight years old, were usually detained for short periods of time and then forcibly transferred to nearby Muslim areas.

Many of the detained women were subjected to sexual assaults, including rape. Camp guards or other men who were allowed to enter the camp frequently took women out of the hangar at night. When the women returned, they were often in a traumatised state and distraught.

By September 1992, virtually no Muslims or other non-Serbs remained in Vlasenica.

The Trial Chamber recalls that the Accused admitted the veracity of each and every particular fact contained in the Third Amended Indictment that forms the factual basis of the Plea Agreement. The Trial Chamber also recalls that it is bound by the assessment contained in the Plea Agreement and the factual basis underlying that Agreement, in this instance the Third Amended Indictment.

Regarding murder, Dragan Nikolić admitted his individual criminal responsibility for the killing of nine human beings: Durmo Handžić; Asim Zildžić; Rašid Ferhatbegović; Muharem Kolarević; Dževad Sarić; Ismet Zekić; Ismet Dedić; Mevludin Hatunić and Galib Musić.

Concerning the charge of aiding and abetting rape, from early June until about 15 September 1992, Dragan Nikolić personally removed and otherwise facilitated the removal of female detainees from the hangar, which he knew was for purposes of rapes and other sexually abusive conduct. The sexual assaults were committed by camp guards, special forces, local soldiers and other men.

Female detainees were sexually assaulted at various locations, such as the guardhouse, the houses surrounding the camp, at the Panorama Hotel, a military headquarters, and at locations where these women were taken to perform forced labour. Dragan Nikolić allowed female detainees, including girls and elderly women, to be verbally subjected to humiliating sexual threats in the presence of other detainees in the hangar. Dragan Nikolić facilitated the removal of female detainees by allowing guards, soldiers and other males to have access to these women on a repeated basis and by otherwise encouraging the sexually abusive conduct.

Regarding torture, Dragan Nikolić admitted to his individual criminal responsibility stemming from his criminal conduct in the torture of five human beings: Fikret Arnaut; Sead Ambesković; Hajrudin Osmanović; Suad Mahmutović and Redo Čakisić. Dragan Nikolić admitted to saying to the tortured detainees words to the effect of: *“What? They did not beat you enough; if it had been me, you would not be able to walk. They are not as well trained to beat people as I am”* and

“I can’t believe how an animal like this can’t die; he must have two hearts.”

As part of the persecutions, Dragan Nikolić subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities. As a result of the atmosphere of terror and the conditions in the camp, detainees suffered psychological and physical trauma.

The Accused persecuted detained Muslims and other non-Serbs by assisting in their forcible transfer from the Vlasenica municipality. Most of the women and children detainees were transferred either to Kladanj or Cerska in Bosnian Muslim controlled territory.

The Trial Chamber will now turn to the sentencing law. A guilty plea indicates that an accused admits the veracity of the charges contained in an indictment and acknowledges responsibility for his acts. Undoubtedly this tends to further the process of reconciliation. A guilty plea protects victims from having to relive their experiences and re-open old wounds. As a side-effect, albeit not really as a significant mitigating factor, it also saves the Tribunal’s resources.

As opposed to a pure confession or guilty plea, a plea agreement, while having its own merits as an incentive to plead guilty, has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle *“do ut des”* (give and take). Therefore, the reason why an accused entered a

plea of guilt has to be analysed: were charges withdrawn, or was a sentence recommendation given? In any event, a plea agreement does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia. While treating plea agreements with appropriate caution, it should be recalled that this Tribunal is not the final arbiter of history. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done.

When considering the appropriate sentence to be imposed in each case, the Trial Chamber emphasises that the individual guilt of an accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits defined by individual guilt.

The Trial Chamber considers that the fundamental principles to be taken into consideration when imposing a sentence are deterrence and retribution. When combating serious international crimes, general deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be made aware that they have to respect the fundamental global norms of substantive criminal law or – otherwise – face not only prosecution but also sanctions imposed by international tribunals.

In the view of this Trial Chamber, retribution should not be understood as fulfilling a desire for vengeance, but solely as duly expressing the outrage of the international community at these crimes.

Another main purpose of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the victims, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody. “All persons shall be equal before the courts and tribunals.” This fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.

With regard to the applicable range of sentences, the Defence in this case has raised the question of the applicability of the principle of *lex mitior* meaning that if the law has been amended one or more times after the criminal act was committed, the law which is less severe in relation to the offender should be applied. The Trial Chamber notes that if the principle of *lex mitior* were to be applicable in the present case, the sentencing range would be restricted to a fixed term of imprisonment instead of a term up to and including the remainder of the convicted person’s life.

The Trial Chamber recalls that the principle of *lex mitior* is enshrined, *inter alia*, in Article 15 paragraph 1 sentence 3 of the International Covenant on Civil and Political Rights, which reads :

If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

The Trial Chamber holds, however, that this obligation does not apply in cases where the offence was committed in a jurisdiction different from the one under which the offender receives his punishment. In the event of concurrent jurisdictions, no state is generally bound under international law to apply the sentencing range or sentencing law of another state where the offence was committed. The Trial Chamber finds therefore that it is not bound to apply the more lenient sentencing range applicable under the law of the Republika Srpska entity of Bosnia and Herzegovina. According to the Statute, they have merely to be taken into consideration.

In addition to an analysis of the range of sentences for the crimes to which the Accused has pleaded guilty, applicable in the States on the territory of the former Yugoslavia, and of the sentencing practice in relation to these crimes, the Sentencing Report provided by Professor Dr. Sieber also focused on the relevant sentencing ranges in the national jurisdictions of 23 other countries from all over the world. This overview shows that in most of these countries a single act of murder committed by sustained beatings and motivated by ethnic bias attracts life imprisonment or even the death penalty, as either an optional or a mandatory sanction. Apparently based on this and on the United Nations' general policy, aiming at the abolition of the death-penalty on a global level, the Security Council provided for imprisonment as the only sanction without any limitation and gave primacy to this Tribunal also in relation to sentencing.

The Trial Chamber now turns first to the gravity of the offences and the aggravating circumstances only.

The Trial Chamber finds that Dragan Nikolić's abuse of his position as a commander in Sušica camp is a substantial aggravating factor. He abused the especially vulnerable detainees who lived and died by the hand and at the whim or will of Dragan Nikolić.

Furthermore, the immediate and the long term effects of the conditions in Sušica camp aggravate the crimes of the Accused. Not one single day and night at the camp passed by without Dragan Nikolić and others committing barbarous acts. The Accused brutally and sadistically beat the detainees. He would kick and punch them and use weapons such as iron bars, axe handles, rifle butts, metal knuckles, metal pipes, truncheons, rubber tubing with lead inside, lengths of wood and wooden bats to beat the detainees. One of the most chilling aspects of these acts was the enjoyment he derived from this criminal conduct.

The Accused personally removed women of all ages from the hangar, handing them over to men whom he knew would sexually abuse or rape them, and thereafter returned them to the hangar. As a result, women would have to agonize throughout the day, not knowing what was to be their personal fate in the coming night.

The effects of Sušica camp did not end once a detainee left the camp. Witnesses testified that they suffer psychologically from their memories to this very day.

Furthermore, the number of victims is a serious aggravating factor.

In conclusion, the Trial Chamber accepts the following factors as especially aggravating:

- (i) The acts of the Accused were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts, but an expression of systematic sadism.
- (ii) The Accused ignored the pleadings of his brother to stop. He apparently enjoyed his criminal acts.
- (iii) The Accused abused his power. He did so especially *vis à vis* the female detainees in subjecting them to humiliating conditions in which they were emotionally, verbally and physically assaulted and forced to fulfil the Accused's personal whims, *inter alia*, washing and putting cream on his feet for his personal refreshment or having to relieve themselves in front of everybody else in the hangar.
- (iv) Due to the seriousness and particular viciousness of the beatings, the Trial Chamber considers the conduct charged as torture as being at the

highest level of torture, which has all the making of *de facto* attempted murder.

(v) The detainees were treated rather as slaves than as inmates under the Accused's supervision.

(vi) Finally, the high number of victims in Sušica camp and the multitude of criminal acts have to be taken into account.

In conclusion, taking into consideration only the gravity of the crime and all the accepted aggravating circumstances, the Trial Chamber finds that no other punishment could be imposed except a sentence of imprisonment for a term up to and including the remainder of the Accused's life. There are, however, mitigating circumstances to which the Trial Chamber will now turn.

The Trial Chamber will focus on four factors of special importance, namely (i) the plea agreement and the guilty plea, (ii) remorse, (iii) reconciliation and (iv) substantial co-operation with the Prosecution.

In order to make an assessment of the mitigating effect of the guilty plea, the Trial Chamber considered the country reports submitted by the Max Planck Institute and the jurisprudence of the International Tribunals. In conclusion, the Trial Chamber accepts that a guilty plea should be taken into account for mitigation since it reflects the Accused's acceptance of responsibility for his crimes. The Trial Chamber notes that in most of the national jurisdictions surveyed, a guilty plea or confession mitigates the sentence.

The Trial Chamber finds that the rationale behind the mitigating effect of a guilty plea in this Tribunal includes the fact that the accused contributes to establishing the truth about the conflict in the former Yugoslavia and tends to foster reconciliation in the affected communities. The Trial Chamber recalls that the Tribunal, acting under Chapter VII of the Charter of the United Nations, has the task to contribute to the restoration and maintenance of peace and security in the former Yugoslavia, one prerequisite for this being to come as close as possible to truth and justice.

The Trial Chamber accepts that remorse was shown during the Sentencing Hearing. In this respect, the Trial Chamber recalls that the Accused declared in his final statement that he genuinely feels shame and disgrace.

The Trial Chamber also accepts that the Prosecution is satisfied that the Accused's co-operation with the Prosecution was substantial. The Trial Chamber considers this factor to be of some importance for mitigating the sentence, especially since the information about Sušica camp and Vlasenica municipality was heard for the first time before this Tribunal. Thus, the Accused contributed to the truth- and fact-finding mission of the Tribunal.

Considering all the above-mentioned mitigating circumstances together, the Trial Chamber is convinced that a substantial reduction of the sentence is warranted.

The Trial Chamber will now turn to the concrete determination of the sentence.

The Prosecution has recommended a term of imprisonment of fifteen years. The Trial Chamber is, however, under the Rules, explicitly not bound by a recommended sentence specified in a plea agreement. Balancing now the gravity of the crimes and the aggravating factors against the mitigating factors and taking into account the aforementioned goals of sentencing, the Trial Chamber is not able to follow the recommendation given by the Prosecution. The brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that which was recommended unjust.

The Trial Chamber believes that it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties.

The Trial Chamber is aware that from a human rights perspective each accused, having served the necessary part of his sentence, ought to have a chance to be reintegrated into society in the event that he no longer poses any danger to society and there is no risk that he will repeat his crimes. However, before release and reintegration, at least the term of imprisonment recommended by the Prosecutor has in fact to be served. In conclusion, the Trial Chamber finds that the sentence declared in the now following Disposition is adequate and proportional.

DISPOSITION

We, Judges of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by United Nations Security Council Resolution 827 of 25 May 1993, elected by the General Assembly and mandated to hear the case against you, Mr. Dragan Nikolić, and find the appropriate sentence,

HAVING HEARD your guilty plea and

HAVING ENTERED A FINDING OF GUILT for the crimes contained in Counts 1 through 4 of the Third Amended Indictment,

HEREBY ENTER A SINGLE CONVICTION against you, **Mr. Dragan Nikolić**, for

Count 1: Persecutions, a Crime against Humanity,

incorporating

Count 2: Murder, a Crime against Humanity,

Count 3: Rape, a Crime against Humanity, and

Count 4: Torture, a Crime against Humanity.

WE SENTENCE you, Mr. Dragan Nikolić, to 23 years of imprisonment and

STATE that you are entitled to credit for 3 years, 7 months and 29 days, as of the date of this Sentencing Judgement, calculated from the date of your deprivation of liberty, that is the twentieth of April 2000, together with such additional time as you may serve pending the determination of any appeal.

Pursuant to Rule 103 (C) of the Rules, you shall remain in the custody of the Tribunal pending the finalisation of arrangements for your transfer to the State where this sentence will be served.

The full text of the Judgement is available upon request at the Public Information Services and is also available on the Internet site of the Tribunal. www.un.org/icty
