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TRIAL CHAMBER
CHAMBRES DE TIÈRE INSTANCE

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THE INTERNATIONAL CRIMINAL TRIBUNAL
HANDS DOWN ITS FIRST SENTENCE:
10 YEARS OF IMPRISONMENT FOR DRAŽEN ERDEMOVIĆ

Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia handed down, on Friday 29 November 1996, the first sentence for a crime against humanity by an international court since the trials in Nuremberg and Tokyo.

Presided over by Judge Claude JORDA and consisting of Judges Elizabeth ODIO BENITO and Fouad RIAD, the Chamber has sentenced the accused Dražen ERDEMOVIĆ to imprisonment for a term of ten years.

At the hearing, which was held in public and in presence of the accused, the Presiding-Judge read a summary of the Decision. This summary is attached.

SUMMARY OF TRIAL CHAMBER JUDGMENT

The Prosecutor v. Drazen Erdemovic 29 November 1996

In determining the appropriate sentence for Drazen Erdemovic, the Trial Chamber has based its judgement on a line of reasoning in law and in fact which it will now summarise in broad terms, recalling that the judgement in its entirety will be available to the public, in the authentic version (i.e. in French), immediately after this hearing.

The operative provisions of the judgement, including the sentence pronounced, will be read at the end of this summary, the accused being present in accordance with Rule 101(D) of the Rules of Procedure and Evidence.

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The Judgement delivered by the Trial Chamber is structured as follows.

After setting out the historical background of the procedure, but before entering into its reasoning, the Trial Chamber believed it necessary in this case to consider the validity of the accused's plea of guilty.

It then outlined the legal framework of its jurisdiction, identifying the law and principles it deems applicable regarding crimes against humanity.

Lastly, it analyses the acts with which the accused is charged, in particular from the angle of the mitigating circumstances he invoked in his defence.

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Given the circumstances surrounding the guilty plea by Drazen Erdemovic, the Trial Chamber felt it incumbent for it, before proceeding to any consideration of substance, to review the validity of that plea.

It first ensured that, as of his initial appearance before the Trial Chamber, Drazen Erdemovic pleaded guilty voluntarily and fully cognisant of the nature of the charge and its implications. The Trial Chamber considered in particular the psychological examinations it had itself ordered carried out.

As justification for his conduct, however, the accused invoked the urgent necessity for him to obey his military superior and the physical and moral duress stemming from threats to his own life and the lives of his wife and child.

The Trial Chamber could legitimately consider whether the elements put forward, which in themselves are such as to mitigate the penalty, might also, in the light of the probative value attributed to them, be regarded as factors justifying the criminal conduct and thereby affecting the very existence of the crime itself.

The Trial Chamber would point out first that for an accused the choice of pleading guilty is part of a defence strategy he is formally recognised as having within the procedure in force at the International Tribunal. That strategy has been fully and consciously adopted by the defence.

In respect of superior orders, the only case envisaged in the Statute, it does not relieve the accused of his criminal responsibility. At most, it may justify a mitigation of sentence if the Tribunal deems it consistent with justice.

As regards the physical and moral duress resulting from the superior order, and in the absence of any reference in the Statute, the Trial Chamber has examined how the International Military Tribunal at Nuremberg and the international military courts delivering judgements after the Second World War had distinguished between exculpatory duress which justified the crime, and duress as a grounds for a mitigation of sentence.

While justification on account of moral duress and the state of necessity pursuant to an order from a superior may not be excluded absolutely, its conditions of application are especially strict. The acts invoked, if proven, must be assessed according to very rigorous criteria and appreciated *in concreto*, and involve in particular the lack of moral choice by the accused when placed in a situation where he could not resist.

Exercising its unfettered discretion, the Trial Chamber has not hesitated to be particularly demanding, since the ambit of the International Tribunal is the prosecution of the most serious crimes of international humanitarian law.

However, the elements drawn from the facts of the case and the hearing have not enabled the Judges to consider that evidence warranting a full exculpation of the accused's responsibility exists. The elements invoked by the defence will accordingly be taken into account as mitigating circumstances. On this basis, the Trial Chamber confirmed the validity of the guilty plea.

1. APPLICABLE LAW AND PRINCIPLES

The sentence delivered in this case is the first sentence to be delivered by the International Tribunal and relates to a crime against humanity.

The Trial Chamber was therefore confronted with legal issues which it had to resolve before proceeding to the actual consideration of the gravity of the acts and the circumstances of the accused.

In the logical order in which they are addressed, these issues are:

1. The scale of penalties applicable when an accused is found guilty of a crime against humanity;
2. The principles governing sentencing;
3. Enforcement of the sentence.

1. The scale of penalties applicable when an accused is found guilty of a crime against humanity

Under the Statute and the Rules, the International Tribunal may sentence an accused who has pleaded guilty or is found guilty, to imprisonment only, which may be up to for the remainder of his life.

In addition to the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, which will be addressed below, the texts provide no indication as to the term of imprisonment incurred for a crime against humanity. The Trial Chamber has therefore identified the characteristics specific to such crimes and to the penalties attached thereto under international as well as national law.

As stated at Nuremberg and recalled by the Security Council in its resolution establishing the International Tribunal, "crimes against humanity" refer to inhumane acts of "extreme gravity". These crimes violate human beings in what is most essential to them. They transcend the individual, since, through the assault on the latter, humanity is negated. And, whether at Nuremberg, where the most severe sentences (going as far as the death penalty) were pronounced and executed, or within the domestic legislation of States that have introduced crimes against humanity therein, or within the relevant legislation of the former Yugoslavia, the harshest penalties have been laid down for crimes against humanity. It is the expression of a general principle of law recognised by all nations.

As to recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, as referred to in the Statute, the Trial Chamber notes that crimes against humanity are not strictly speaking found in the provisions of the Yugoslavian code, which provides for "genocide and war crimes against the civilian population". The case-law of the courts of the former Yugoslavia is hardly significant, in particular on account of the small number of judgements. Accordingly the Trial Chamber considers that the general practice regarding prison sentences in the courts of the former Yugoslavia is not binding

on it. The Judges consider even that making recourse to that practice the sole standard for determining the scale of penalties would, owing to the principle *nullum crimen nulla poena sine lege* sometimes invoked, be tantamount to disregarding the criminal character that is universally attached to crimes against humanity, as such crimes have for a long time been part of the international legal order, and the harshest penalties attached to them. Consequently, the Judges merely "consulted" that practice.

2. Principles governing sentencing

The Trial Chamber identified in turn the factors enabling the penalty to be fitted to the case in point, and the purposes and functions of the penalty.

a) Factors enabling the penalty to be fitted to the case in point

According to the terms of the applicable texts, these factors are primarily the gravity of the offence, the personal circumstances of the accused, and the existence of aggravating or mitigating circumstances, including substantial co-operation of the accused with the Prosecutor.

The Trial Chamber has rejected the existence of any aggravating circumstances. Besides the fact that they are not defined in the Rules, the Trial Chamber's position is that circumstances that might characterise the gravity of the crime may only cancel out any leniency based on mitigating circumstances.

The situation is wholly different as regards any mitigating circumstances. The Statute and the Rules provide non-restrictively for situations which, if proven, are such to lessen the degree of guilt of the accused and warrant a mitigated sentence. In this respect, the Trial Chamber takes account, *inter alia*, of remorse.

As stated above, mitigation on account of superior orders alone is expressly enshrined in the Statute, replicating on this point the Statute of the Nuremberg Tribunal.

The fact that an accused acted pursuant to superior orders was often raised before the international and national military courts established after the second world war.

The Nuremberg Tribunal did not question the admissibility of superior orders for a mitigation of sentence, pointing out however that the order received by a soldier to kill or torture in violation of international law of war had never been regarded as justifying such acts of violence; a soldier could rely on it only to obtain a mitigation of punishment; the real test of criminal responsibility being by no means a question of the order received, but of the moral choice of the perpetrator of the act charged.

Nonetheless, the Trial Chamber believes that dismissing the defence of superior orders, as was the practice of the Nuremberg Tribunal, was due to the high position of authority of the accused, and that, as a result, the precedent-setting value of the judgement in this regard is reduced in the case of an accused of low rank.

In his report the Secretary-General of the United Nations addressed the issue of superior orders in connection with duress, considering that the order of a government or superior may be considered "in connection with other defences such as coercion or lack of moral choice". The Trial Chamber will content itself with that position provided the elements prone to characterise a state of necessity or duress as argued by the accused are proven by him.

Lastly, given the Tribunal's situation which is exceptional because it does not have its own facility for imprisonment, the Trial Chamber takes note of the unavoidable isolation in which convicted persons serving their sentences in institutions often far removed from their place of origin will find themselves.

b) Purposes and functions of the penalty for a crime against humanity

Given the unique nature of the International Tribunal, the Trial Chamber shall consider the purposes and functions of the penalty for crimes against humanity, and more particularly a term of imprisonment.

Neither the Statute, nor the Report of the Secretary-General, nor the Rules elaborate on the objectives sought by imposing such a sentence. Accordingly, to identify them, the focus must be on the very object and purpose of the International Tribunal.

The Trial Chamber thereupon examined the purposes and functions of the penalty for a crime against humanity in the light of international criminal law and of national criminal systems, including that of the former Yugoslavia.

As they emerge from the texts at the origin of the International Tribunal, the objectives as envisaged by the Security Council, i.e. deterrence, reprobation, retribution as well as collective reconciliation, are part of a broader aim of the Security Council to maintain peace and security in the former Yugoslavia.

The only precedents in international criminal law, the Nuremberg and Tokyo Tribunals, do not expressly state the purposes sought in imposing penalties for war crimes or crimes against humanity, but a review of the declarations by the signatories of the London Charter would indicate that the penalties seemed to be aimed at general deterrence and retribution.

The purposes and functions of national criminal systems are often hard to identify precisely; they are multiple and have moreover been written to a large extent into the Criminal Code of the Federal Republic of Yugoslavia. The competence of the International Tribunal differs fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes.

In the light of the above review, the Trial Chamber deems most important the concepts of deterrence and retribution. But it would insist especially on reprobation as an appropriate purpose of punishment for a crime against humanity and the stigmatisation of the underlying criminal conduct.

3. Enforcement of the sentence

One of the major difficulties with which the International Tribunal has to contend relates to the place and form of execution of the sentence. In the light of the pertinent texts, the Trial Chamber notes that enforcement relies on the designation of a State and on the Tribunal's supervision of the conditions of imprisonment enforced on that State's territory.

The Trial Chamber accordingly considers that it is for the Registrar, upon consultation with the President of the International Tribunal and with the approval of the Presiding Judge of the Trial Chamber which delivered the sentence, to designate the State where the imprisonment will be served.

The Trial Chamber intends, however, to take account of the matter of place and conditions of execution of the sentence, in an effort to ensure due process, the proper administration of justice, and equal treatment for convicted persons.

Every accused should in fact know the possible consequences of a conviction for an international crime. A certain level of uniformity must be upheld in the enforcement of sentences, irrespective of the State in which the sentence is served. Lastly, the Trial Chamber feels it incumbent to provide some guidance in respect of the enforcement of international judgements.

In this regard, the Trial Chamber considers that, pursuant to the principle of equality before the law, there must not be any major disparities from one State to another in the enforcement of sentences. It therefore recommends a certain degree of uniformity and consistency in the enforcement of international criminal sentences. There are two concerns it believes are essential in the light of the international character of the penalty: respect for the duration of the sentence and respect for international standards relative to the treatment of prisoners.

As regards duration, no measure shall be taken by a State which might terminate the sentence or alter it by reducing it.

As regards the treatment of prisoners, under the Statute and the Rules the Tribunal has some powers regarding the treatment of convicted persons. The Trial Chamber considers that the penalty imposed and its execution must always comply with the principles of humanity and dignity at the heart of the international standards for the protection of the rights of prisoners.

Having specified its legal framework, the Trial Chamber will now analyse the criminal acts as submitted to it in the indictment against Drazen Erdemovic and the circumstances leading to their commission, with a view to determining the most appropriate sentence.

II. THE CASE IN POINT

The Trial Chamber first set out the relevant facts of the case and then considers their probative value, in particular from the angle of the mitigating circumstances invoked by the accused.

1. The relevant acts

The Trial Chamber would recall that the acts with which Drazen Erdemovic is charged occurred in the context of the events which followed the fall of the enclave of Srebrenica. Those events were attested to publicly during the hearing pursuant to Rule 61 in the Prosecutor's cases against Radovan Karad`ic and Ratko Mladic. The acts involved would implicate those indictees in the commission of crimes against humanity, and have been corroborated by many statements, including the testimony of the accused. They were further corroborated by him during his guilty plea. They are outlined below.

According to the public testimony of the investigator of the Prosecutor's office, the sites of the massacres with which the accused is charged have been identified, thus corroborating the accused's own statements. First, there is the Branjevo farm at Pilica where approximately 1,200 Muslims were executed by soldiers of the unit of which Drazen Erdemovic was a member, an involvement to which he admitted. Then there is the public building in Pilica where, according to the public testimony of the accused, approximately 500 Muslims were executed by members of the 10th Sabotage Unit.

As regards the acts with which Drazen Erdemovic is charged, the Trial Chamber has reviewed them as they were set forth in the indictment and formally recognised by the

accused when he entered his plea of guilty and subsequently elaborated on at the hearing. They will not be addressed in this summary.

The Trial Chamber has endeavoured in particular to address these acts from the angle of the gravity of the crime committed and the mitigating circumstances invoked by the accused. In the sentencing procedure, that discussion will be the prime support of the line of reasoning behind the sentence.

2. Gravity of the acts and mitigating circumstances

The Trial Chamber considers that the crime's extreme gravity has been demonstrated: participation in the murder of 1,200 unarmed civilians over a five-hour period on 16 July 1995. According to his many affirmations, Drazen Erdemovic is responsible for the murder of from ten to 100 people.

As regards mitigating circumstances, the Trial Chamber has distinguished two categories: one, those which were contemporary with the perpetration of the criminal act, that is, the mental incapacity of the accused, the urgent necessity he was allegedly in at the time he committed those acts, as well as his low military rank; and two, those relating to the accused's attitude after the commission of the acts, that is, the contrition he showed, his willingness to surrender to the International Tribunal, and his co-operation with the Office of the Prosecutor.

Lastly, the Trial Chamber discussed certain aspects of the personality of Drazen Erdemovic as elucidated by his testimony, the public testimony of witnesses X and Y, and the closing arguments of his defence counsel.

a) Mitigating circumstances contemporary with the perpetration of the criminal act

i) The Trial Chamber has not accepted the line of argument of the defence regarding the *mental condition* of the accused at the time of the acts. There is nothing in the case-file or in the experts' reports which enables conclusions to be drawn in respect of the accused's psychological state at the time of the crime.

ii) Urgent necessity stemming from duress and a superior order

To assess its probative value, the Trial Chamber identified a number of questions:

- Could the accused have avoided the situation he was in?
- Was the accused confronted with an insurmountable order he had no way of eluding?
- Were the accused or close members of his family exposed to the danger of immediate or short-term death?
- Did the accused have no moral choice to oppose the orders he received or, if he had, did he attempt to oppose those orders?

The Trial Chamber noted that the overall account of events by the accused could be considered quite likely to have happened. It is also aware of the general atmosphere prevailing at Srebrenica at the time the enclave fell and when the ensuing events occurred. However, in respect of the acts involving the person of the accused which might be a basis for allowing mitigating circumstances, the defence has provided no testimony, expertise or other element to corroborate what Drazen Erdemovic said.

Accordingly, the Judges considered themselves unable to accept the defence of urgent necessity.

iii) Low military rank

According to him, Drazen Erdemovic was a sergeant and as such was in command of a small unit. He was allegedly demoted before committing the crimes with which he is charged. But no document clearly establishes his military rank. The indictment, in which the accused pleaded guilty, describes him as a soldier in the 10th Sabotage Unit.

The Trial Chamber considers that Drazen Erdemovic, described by the Prosecutor as a low-ranking member of the Bosnian Serb Army, did not hold a position of authority at the time of the said crimes.

b) Mitigating circumstances relating to the attitude of the accused after the commission of the acts

i) Remorse and the willingness to surrender

Drazen Erdemovic's remorse for the crimes he committed is evident through his statements, his conduct and the report of the medical experts.

The Trial Chamber notes the constancy with which the accused has unequivocally and spontaneously expressed his responsibility in the massacre at Branjevo farm and his contrition therefor. The desire to clear his conscience was expressed by his willingness to surrender to the International Tribunal to answer for his crimes and in his plea of guilty. The medical experts noted the state of depression in which he arrived at The Hague, accompanied by a feeling of guilt.

In determining the penalty, the Trial Chamber accepts the remorse expressed by the accused.

ii) Co-operation with the Office of the Prosecutor

The Prosecutor has referred repeatedly to the co-operation of the accused, which he characterised as substantial, full, and unconditional. The Prosecutor revealed that without the accused's statements he would not have been cognisant of four events, including the massacres at the Branjevo farm and in the public building at Pilica.

Other information provided by Drazen Erdemovic has permitted the Prosecution to gain a better understanding of the geographic area where the massacres occurred, the logistic resources deployed, and the names and identity of a number of the individuals responsible for these acts. The accused gave essential testimony in the hearings against Radovan Karadzic and Ratko Mladic.

The Trial Chamber considers that the accused's co-operation with the Office of the Prosecutor must be accorded considerable significance in mitigating the penalty.

c) Aspects of the accused's personality

The Trial Chamber heard the accused on the subject of his childhood, schooling and professional training, and present family situation. It noted the statements of defence witnesses X and Y and acquainted itself with the findings of the medical experts.

On the basis of these elements taken as a whole, the Trial Chamber deems it appropriate to give special consideration to the relative youth of the accused at the time of the crimes, his present family situation, the fact that he does not pose a threat, his gesture in rescuing witness X, and a series of features characterising a corrigible personality.

Having considered all of the facts of the case submitted for its attention, the Trial Chamber is of the conviction that, given the inherent gravity of his crime, it is appropriate to grant Drazen Erdemovic the benefit of the following mitigating circumstances:

- His age at the time the crimes were committed and his low military rank;
- the remorse he expressed, his willingness to surrender, and the co-operation he has provided to the Office of the Prosecutor;
- the fact that he does not pose a threat, and has a corrigible personality.

TRIAL CHAMBER I

FOR THESE REASONS

Delivering its judgement publicly, in the presence of the parties and in first instance,

Pursuant to Articles 23, 24 and 27 of the Statute and Rules 100, 101 and 103 of the Rules of Procedure and Evidence,

Noting the indictment as confirmed on 29 May 1996,

Noting the plea of guilty by Drazen Erdemovic on 31 May 1996 to the count of crime against humanity, as provided under Article 5(a) of the Statute

Noting the briefs of the parties,

Having heard the Closing Arguments of the Prosecution and of the Defence,

IN PUNISHMENT of said crime,

SENTENCES Drazen Erdemovic

born on 25 November 1971 at Tuzla,

to 10 years' imprisonment; and

RULES that from the total duration of this sentence shall be deducted the periods during which the convicted person was in custody and provisional detention pending his transfer to the International Tribunal and his judgement by this Trial Chamber, that is from 3 March 1996 until today;

RULES that the Registry shall, upon consultation with the President of the International Tribunal and with the approval of the Presiding Judge of this Trial Chamber, designate the State where the sentence will be served; and

RULES that this judgement shall be enforceable immediately.

Done in French and in English, the French text being authentic
on 29 November 1996

The Hague, The Netherlands

