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Nations Unies



International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

Press Release . Communiqué de presse
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TRIAL CHAMBER
CHAMBRE DE 1ÈRE
INSTANCE

The Hague, 02 December 2003
CT/P.I.S/ 806e

JUDGEMENT IN THE CASE THE PROSECUTOR V. MOMIR NIKOLIĆ

• **MOMIR NIKOLIĆ SENTENCED TO 27 YEARS' IMPRISONMENT**

Please find below the summary of the Judgement delivered by Trial Chamber I composed of Judge Liu Daqun (Presiding), Judge Volodymyr Vassylenko, and Judge Carmen Maria Argibay, as read out by the Presiding Judge.

This hearing is for the Trial Chamber to deliver Judgement in this case. What follows is a summary of the written Judgement and forms no part of it. The written Judgement will be made available to the parties and to the public at the end of this hearing.

Mr. Nikolić, a 48 year-old Bosnian Serb, was indicted by the Office of the Prosecutor on 26 March 2002 for crimes including genocide, persecutions and extermination. He was arrested by SFOR on 1 April 2002, and transferred to the Tribunal, where he has remained in detention at the United Nations Detention Unit. Momir Nikolić was jointly charged with three other accused and his trial was scheduled to commence on 6 May 2003.

Before the beginning of trial, the Prosecution and Defence presented the Trial Chamber with a joint motion for consideration of a plea agreement between Momir Nikolić and the Prosecution on 6 May 2003. After two days of plea hearings and an amendment to the plea agreement, the Trial Chamber accepted Momir Nikolić's plea of guilt to one count of crimes against humanity, namely persecutions, punishable under Article 5(h) and Article 7(1) of the Statute, and entered a conviction thereupon.

Pursuant to the Plea Agreement, the Prosecution moved to dismiss the remaining counts and they were subsequently dismissed. Additionally, under the Plea Agreement, Momir Nikolić agreed to testify in other proceedings before the Tribunal, including those trials related to Srebrenica. In September 2003, Mr. Nikolić testified in the trial of his two former co-accused for eight days.

A sentencing hearing was held between 27-29 October 2003, at which seven live witnesses were heard and the testimony of four witnesses was accepted pursuant to Rule 92 *bis*.

As the guilty plea was made pursuant to a plea agreement, the Trial Chamber has considered the use of plea agreements in cases of serious violations of international humanitarian law. The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant to the Statute of the Tribunal, the decision of whether to enter into or accept plea agreements should be taken with caution.

A written Factual Basis for the crime and for Mr. Nikolić's participation in it was filed with the Plea Agreement. The Factual Basis and the Indictment, which Mr. Nikolić

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acknowledged to be true, forms the factual basis upon which the Trial Chamber will determine sentence. The facts described therein are as follows.

The crime of persecutions, as charged in Count 5 of the Indictment, was carried out by the following means:

- the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons;
- the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potočari and in detention facilities in Bratunac and Zvornik;
- the terrorising of Bosnian Muslim civilians in Srebrenica and Potočari;
- the destruction of personal property and effects belonging to the Bosnian Muslims; and
- the forcible transfer of Bosnian Muslims from the Srebrenica enclave.

The criminal acts were carried out on the civilian population who fled the Srebrenica enclave following the attack and take-over by the Serbs.

In Potočari, women, children and the elderly were separated from the able-bodied men. While the men were detained, their wives and children were placed on buses and forcibly transferred to Muslim-held territory. This forcible transfer was accompanied by acts of terror, humiliation and utter cruelty.

The detained men were moved out of Potočari for execution. Similarly, the men who had escaped from Srebrenica in “the column” were captured and detained, pending execution. Along the route between Bratunac and Zvornik, the names previously used to mark settlements and communities or places of learning, culture and work or geographic features are now used to identify the killings fields: Jadar River, Čerska Valley, Kravica Warehouse, Petkovci School, Pilica Cultural Centre, and the villages of Tišća and Orahovac. At one location, Branjevo Military Farm, approximately 1,200 Bosnian Muslim men who had been captured from the column were executed by automatic weapon fire. It total, over 7,000 men were murdered.

The Trial Chamber has considered the principles and purposes of punishment in light of the mandate of the Tribunal. It finds that principles of sentencing derived from national systems, namely deterrence, retribution and rehabilitation, are applicable on the international level; the application and purpose for each may, however, be different when applied on the international level.

Turning to sentencing factors, the Trial Chamber first considered the gravity of the offence, bearing in mind that this requires taking account of the particular circumstances of the case, as well as the form and degree of participation of Momir Nikolić in the crime.

The Trial Chamber observes that the crime of persecution is inherently serious. Its unique character is derived from a requirement of a specific discriminatory intent, on account of which the crime is regarded as a particularly serious offence. In this case, the gravity of the offence is demonstrated by the persecutory acts for which Momir Nikolić has been convicted.

The crimes committed following the fall of Srebrenica are, unfortunately, well-known. The mass-murder or forcible transfer of the Muslim population from this part of eastern Bosnia in slightly over one week was committed with a level of brutality and depravity not seen previously in the conflict in the former Yugoslavia which had already cost too many their lives.

Momir Nikolić was not unaware of the crimes unfolding following the fall of Srebrenica. Rather, he appears to be right at the centre of criminal activity as the operation spread from Potočari, to Bratunac and on to Zvornik. Momir Nikolić was present at the Hotel Fontana during the three meetings in which the fate of the Muslim population was discussed

and decided. He did not raise any objections to what he was told was the plan: to deport Muslim women and children to Muslim held territory, and to separate, detain, and ultimately kill the Muslim men. Rather than resist, Momir Nikolić recommended possible detention and execution sites. On 12 July 1995, Momir Nikolić was in Potočari – he saw with his own eyes the separation of men from their families; he heard the cries of children as they saw their fathers taken away; he saw the fear in the eyes of the women pushed on to buses as they knew that the fate of their fathers, husbands and sons was beyond their control. He has described himself as the co-ordinator of various units operating in Potočari, but he did nothing to stop the beatings, the humiliation, the separations or the killings.

Mr. Nikolić returned to Potočari on 13 July 1995, and by his own account, he established that “all was going well” – the deportations continued as did the separations. He busied himself with security arrangements for General Mladić and when they met, reported that “there were no problems”. On the same day, Momir Nikolić saw columns of prisoners being marched to various sites, to await their death. Later that night, Momir Nikolić was present when three other persons involved in the crimes openly discussed the killing operation. The intricate details of the operation were discussed, in order to facilitate the execution of the plan. Momir Nikolić was an integral part of the implementation of the plan, in order that the aims of the operation were achieved.

Further, in the months subsequent to the executions, Momir Nikolić co-ordinated the exhumation and re-burial of Muslim bodies. This ongoing support proved valuable in that crucial evidence was destroyed – and has prevented many families knowing the whereabouts of their missing family members.

The Trial Chamber finds that a sentence in the range of 20 years to life imprisonment to be appropriate based solely on the gravity of the crime for which Momir Nikolić is convicted, his role and participation in the commission of that crime, and having taken into consideration the sentencing practices in the former Yugoslavia as well as the sentencing practices of this Tribunal. The Trial Chamber will now consider whether any aggravating or mitigating circumstances exist in this case, and, if so, the effect of any such circumstances on the determination of an appropriate sentence for Momir Nikolić.

The Prosecution submits that three aggravating factors in this case should be considered by the Trial Chamber: (i) the position of authority of Momir Nikolić; (ii) the role of Momir Nikolić; and (iii) the vulnerability of the victims and the depravity of the crimes. The Nikolić Defence submits that there are no aggravating circumstances, as the aggravating factors submitted by the Prosecution are subsumed in the overall gravity of the offence.

The Trial Chamber finds that Momir Nikolić was in a position of authority as the Chief of Security and Intelligence. While his tasks largely required implementing rather than giving orders, Momir Nikolić directed the military police of the Bratunac Brigade, as well as co-ordinated other units, and this was of significance to the implementation and completion of the underlying criminal acts committed following the attack on Srebrenica. The role that Nikolić played and the functions that he performed, while not in the capacity of a commander, were of significant importance to the overall murder operation that was ongoing.

The Trial Chamber finds that the depravity of the crimes is subsumed in the overall gravity of the offence.

The Trial Chamber takes particular note of the vulnerability of the victims, who included women, children and the elderly, as well as captured men. They were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating factor in the commission of the criminal acts.

The Prosecution submits that the mitigating circumstances that the Trial Chamber should consider are the guilty plea, acceptance of responsibility, remorse, co-operation with the

Office of the Prosecutor and prior good character. In addition to these factors, the Nikolić Defence further submits that the issues of voluntary surrender, comportment in the UNDU and personal circumstances are mitigating factors which entitle Momir Nikolić to a significant reduction in sentence.

Taking into account these considerations, the Trial Chamber finds that Momir Nikolić's guilty plea is an important mitigating factor due to its contribution to establishing the truth, promoting reconciliation and because of Momir Nikolić's acceptance of his individual criminal responsibility for his role in the crime of persecutions. The Trial Chamber also considers Momir Nikolić's guilty plea as a mitigating factor because it spared witnesses being required to come and testify about painful and traumatic events. This is particularly appreciated in the case of Srebrenica where there are numerous indictments brought by the Prosecution, and future trials will likely require the presence of these witnesses.

Finally, the Trial Chamber takes note of the fact that other accused have been given credit for pleading guilty before the start of trial or at an early stage of the trial because of the savings of Tribunal resources. The Trial Chamber appreciates this saving of Tribunal resources. The Trial Chamber finds, however, that in cases of this magnitude, where the Tribunal has been entrusted by the Security Council – and by extension, the international community – to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard for the rights of the accused and the interests of victims, the saving of resources cannot be given undue consideration or importance.

In considering co-operation with the Prosecution, the Trial Chamber notes that Mr. Nikolić has met with the Prosecution, testified in cases as a Prosecution witness and has provided the Prosecution with information previously unknown to it. The Trial Chamber observes that the Prosecution considers that Mr. Nikolić has co-operated fully. The Trial Chamber has also considered the veracity of Mr. Nikolić's testimony in the *Blagojević* Trial in assessing co-operation with the Prosecution: The Trial Chamber takes into consideration numerous instances where the testimony of Momir Nikolić is evasive and finds this to be an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge.

The Trial Chamber has carefully considered Momir Nikolić's expression of remorse and his apology to the victims, their families and the Bosniak people for his participation in the crime of persecutions. The Trial Chamber recalls Momir Nikolić's explanation of his reasons for pleading guilty, as well as his related reason for providing the Prosecution with false information during the plea negotiations. Recalling that the standard for mitigating factors is on the balance of probabilities, the Trial Chamber finds that Momir Nikolić's expression of remorse is a mitigating factor, but cannot afford substantial weight to this factor.

Additionally, the Trial Chamber has established the following mitigating circumstances: Momir Nikolić did not discriminate prior to the war, and was a respected member of his community; Momir Nikolić has behaved properly while in detention; and Momir Nikolić's family circumstances.

Momir Nikolić has accepted his responsibility for the criminal acts he committed in furtherance of the commission of these crimes. He has offered his co-operation to the Prosecution. He has expressed his remorse to the victims. Momir Nikolić's guilty plea will likely have some positive impact on all communities in the former Yugoslavia and may have opened avenues for reconciliation. The Trial Chamber has taken these factors into consideration in determining an appropriate sentence for him.

As already discussed, Momir Nikolić was an active participant in the crimes committed in Potočari, Bratunac and Zvornik. He did not try to avoid his official duties during those fateful days or remain on the sidelines; by his own account, he appears to have taken a very active – even **pro-active** – role in ensuring that the operation went forward and was, in his words, “successful”.

The Trial Chamber has taken into consideration the crimes committed in July through November of 1995 for which Momir Nikolić has been convicted, as reflected in the charge of persecutions, and the degree and form of Momir Nikolić's participation in the commission of those crimes. The Trial Chamber has accorded appropriate weight to each aggravating and mitigating factor. As the Trial Chamber has continually stressed to both Parties and to Momir Nikolić, it is not bound by their recommendations relating to the sentence. The Trial Chamber has carefully considered the submissions, and the recommended sentence, by each party. The Trial Chamber finds, however, that it cannot accept the sentences recommended by either the Defence or the Prosecution; neither sentence adequately reflects the totality of the criminal conduct for which Momir Nikolić has been convicted.

Having given due weight to factors set out, the Trial Chamber hereby sentences you to a period of 27 years' imprisonment. You are entitled to 610 days credit for the time you have served in detention as of the date of this Sentencing Judgement, together with such additional time as you may serve pending the determination of any appeal of this Sentencing Judgement.

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.
