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

Case No. IT-96-22-T

Date : 29 november 1996

Original : French & English

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Elizabeth Odio Benito
Judge Fouad Riad

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh, Registrar

Judgement of: 29 November 1996

THE PROSECUTOR

v.

DRAZEN ERDEMOVIC

SENTENCING JUDGEMENT

The Office of the Prosecutor:
M. Eric Ostberg
M. Mark Harmon

Counsel for the Defence:
M. Jovan Babic

I. THE PROCEEDINGS

A. Background

1. On 28 March 1996, Judge Fouad Riad, pursuant to the provisions of Rule 90 bis of the Rules of Procedure and Evidence (hereinafter "the Rules") ordered the transfer and provisional detention in the Detention Unit of the International Tribunal for the former Yugoslavia (hereinafter "the International Tribunal") of Drazen Erdemovic then being held by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) in connection with a criminal investigation into the war crimes committed against the civilian population in July 1995 in Srebrenica and its surroundings. Judge Riad thus granted an application from the Prosecutor of the International Tribunal who considered that Drazen Erdemovic could provide additional evidence in the cases against Radovan Karadzic and Ratko Mladic.

2. On 29 May 1996, the Prosecutor of the International Tribunal, pursuant to Article 18 of the Statute, submitted to the reviewing Judge an indictment against Drazen Erdemovic. The latter is accused of having committed a crime against humanity (Article 5 of the Statute) or a violation of the laws and customs of war (Article 3 of the Statute) for the following: Drazen Erdemovic, born on 25 November 1971, in the municipality of Tuzla in Bosnia and Herzegovina, was a member of the 10th Sabotage Detachment of the Bosnian Serb army. On 16 July 1995, he was sent with other members of his unit to the Branjevo collective farm near Pilica, north-west of Zvornik. Once there, they were informed that later that day Muslim men from 17 to 60 years of age would be brought to the farm in buses. The men were unarmed civilians who had surrendered to the members of the Bosnian Serb army or police after the fall of the United Nations "safe area" at Srebrenica. Members of the military police took the civilians off the buses in groups of ten and escorted them to a field next to the farm buildings, where they were lined up with their backs to a firing squad. The men were then killed by Drazen Erdemovic and other members of his unit with the help of soldiers from another brigade.

On 29 May 1996, Trial Chamber II requested the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to order its national courts to defer all investigations and criminal proceedings against Drazen Erdemovic to the International Tribunal.

3. On the same date, pursuant to Article 19 of the Statute and Rule 47 of the Rules, Judge Rustam S. Sidhwa confirmed the indictment.

On 31 May 1996, Drazen Erdemovic appeared for the first time before the Trial Chamber. At the hearing, he pleaded guilty to Count No. 1, "crime against humanity," of the Indictment. Having verified that the accused had entered his plea fully cognisant of what he was doing, and having heard his additional statements, the Trial Chamber decided to accept as final Drazen Erdemovic's guilty plea. Accordingly, with the consent of the Parties, the Trial Chamber also decided that, for the remainder of the proceedings, it would dismiss the second count, "violation of the laws or customs of war", which had been charged as an alternative to the first. Further, the Trial Chamber ordered a psychological and psychiatric examination of the accused. It entrusted this task to a commission of three experts, two designated by the International Tribunal and the third selected from a list presented by the Defence. Last, pursuant to Sub-rule 62(v) of the Rules, the pre-sentencing hearing was scheduled for 8 and 9 July 1996.

4. On 24 June 1996, a status conference was held in preparation of the pre-sentencing hearing during which the Trial Chamber decided that protective measures would be taken for a witness called by the Defence.

5. On 27 June 1996, the commission of experts concluded in its report that Drazen Erdemovic's mental condition did not permit his appearance before the Trial Chamber at that time. The report's conclusion indicated "that the expert medical commission is of the opinion that, in his current condition, the accused Drazen Erdemovic, because of the severity of the post-traumatic stress disorder, (...) can be regarded as insufficiently able to stand trial at this moment." It also suggested that Drazen Erdemovic be evaluated a second time within six to nine months.

6. At a status conference held on 4 July 1996, the Trial Chamber heard the parties regarding the above-mentioned expert report and the action to be taken in respect of the proceedings. First, since Drazen Erdemovic agreed that co-operation with the International Tribunal was in his interest, the Trial Chamber decided to grant him leave to testify during the proceedings pursuant to Rule 61 in the case *The Prosecutor v. Radovan Karadzic and Ratko Mladic (IT-95-18-R61).* The Trial Chamber decided to postpone the pre-sentencing hearing and also ordered that the same commission of experts make an additional psychological and psychiatric evaluation and submit a report by 1 October 1996.

7. On 5 July 1996, Drazen Erdemovic testified during the hearings held pursuant to Rule 61 in the aforementioned case.

8. In its report submitted on 17 October 1996, the commission of experts declared Drazen Erdemovic competent to stand trial and reached the following conclusion: "The commission of medical experts share the opinion that under his current condition the accused Drazen Erdemovic is sufficiently able to stand trial." It added that "no additional measures need to be taken for the appearance of the accused."

9. A further status conference was held on 18 October 1996, at which the parties agreed to submit briefs to the Trial Chamber by 11 November 1996 about the general practice regarding prison sentences and mitigating and aggravating circumstances. The Trial Chamber also set the date for the pre-sentencing hearing, which took place on 19 and 20 November 1996.

On 18 October and 5 November 1996, the Trial Chamber issued two orders for the protection of defence witnesses designated by the pseudonyms X and Y.

B. The guilty plea

10. As stated above, Drazen Erdemovic pleaded guilty, pursuant to the provisions of Article 20(3) of the Statute and Rule 62 of the Rules, to the count of a crime against humanity and stated his consent to the version of the events as set forth briefly by the Prosecutor. He added the following, however:

"Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: zIf you're sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me"[1].

The Trial Chamber, which had also ordered a psychological examination of the accused, considers that, at this point in the proceedings and before reviewing the merits of the case, it should examine the validity of the guilty plea. That validity must be assessed in formal as well as substantive terms.

1. Formal validity

11. The Trial Chamber wished to ensure that, starting from the initial appearance, the plea was made voluntarily and in full cognisance of the nature of the charge and its consequences[2]. In addition, it asked designated experts whether "the examination of the subject (revealed) that he currently suffers from a psychiatric or neuropsychiatric disorder or from an emotional disturbance which affects his judgement or his volition".

12. Although in their first report, which was cited by the Defence, the experts found that Drazen Erdemovic was suffering from post-traumatic stress disorder, their second report stated that "his conscience (was) clear" and that he showed "no signs of memory impairment."

Further, the consistency of Drazen Erdemovic's assertions in respect of his guilt, firmly reiterated on 4 July 1996[3] and at the pre-sentencing hearing of 19 and 20 November 1996 - i.e. after the last medical and psychological examination - provides more than adequate confirmation of this.

The Judges are therefore convinced that Drazen Erdemovic was able to understand the significance of his declarations when he pleaded guilty on 31 May1996.

2. Substantive validity

13. The Trial Chamber would first point out that the choice of pleading guilty relates not only to the fact that the accused was conscious of having committed a crime and admitted it, but also to his right, as formally acknowledged in the procedures of the International Tribunal and as established *in common law* legal systems, to adopt his own defence strategy. The plea is one of the elements which constitute such a defence strategy.

Furthermore, the accused's co-operation in the Rule 61 hearing against Radovan Karadzic and Ratko Mladic and his reliance upon other mitigating circumstances (Rule 101 of the Rules) clearly fit into that strategy.

While the Defence has full discretion over the strategy it decides to adopt in response to the Prosecution, the Trial Chamber must nonetheless ensure that the rights of the accused are actually respected and, more specifically, the accused's right to counsel. In the case in point, this was done in accordance with the provisions of Rule 62 of the Rules[4].

14. Nevertheless, the very contents of a declaration which is ambiguous or equivocal might affect the plea's validity. In order to explain his conduct, the accused argued both an obligation to obey the orders of his military superior and physical and moral duress stemming from his fear for his own life and that of his wife and child. In and of themselves, these factors may mitigate the penalty. Depending on the probative value and force which may be given to them, they may also be regarded as a defence for the criminal conduct

1 Transcript, initial appearance hearing, 31 May 1996, p.9, (IT-96-22-T. D241).

2 Transcript, initial appearance hearing, 31 May 1996, pp. 9-10 (IT-96-22-T. D241).

3 Transcript, closed session hearing, 4 July 1996, p. 6 (IT-96-22-T. D270).

4 Transcript, initial appearance hearing, 31 May 1996, pp. 9-10, (IT-96-22-T. D241).

which might go so far as to eliminate the mens rea of the offence and therefore the offence itself. In consequence, the plea would be invalidated. The Trial Chamber considers that it must examine the possible defence for the elements invoked.

15. The defence of obedience to superior orders has been addressed expressly in Article 7(4) of the Statute. This defence does not relieve the accused of criminal responsibility. The Secretary-General's report which proposed the Statute of the International Tribunal and which was approved by Security Council resolution 827 of 25 May 1993 (S/RES/827(1993)) clearly stated in respect of this provision that, at most, obedience to superior orders may justify a reduced penalty "should the International Tribunal determine that justice so requires" (S/25704, para. 57).

16. In respect of the physical and moral duress accompanied by the order from a military superior (sometimes referred to as "extreme necessity"), which has been argued in this case, the Statute provides no guidance. At most, the Secretary-General refers to duress in paragraph 57 of his report and seems moreover to regard it as a mitigating circumstance.

17. A review by the United Nations War Crimes Commission of the post-World War Two international military case-law, as reproduced in the 1996 report of the International Law Commission (Supplement No. 10 (A/51/10) p. 93), shows that the post-World War Two military tribunals of nine nations considered the issue of duress as constituting a complete defence. After an analysis of some 2,000 decisions by these military tribunals, the United Nations Commission cited three features which were always present and which it laid down as essential conditions for duress to be accepted as a defence for a violation of international humanitarian law:

> "(i) the act charged was done to avoid an immediate danger both serious and irreparable;
> (ii) there was no adequate means of escape;
> (iii) the remedy was not disproportionate to the evil." (rapport de la Commission du droit international, 1996, p. 96.)
> These criteria have already been identified in the *Krupp Case*[5].

18. The Trial Chamber notes that these military tribunals have on occasion characterised the said criteria in different ways. The variations in the criteria have defined them more precisely. In addition, some of the decisions set forth other criteria and therefore further narrow the scope of that defence.

The absence of moral choice was recognised on several occasions as one of the essential components for considering duress as a complete defence[6]. A soldier may be considered as being deprived of his moral choice in the face of imminent physical danger[7]. This physical threat, understood in the case-law as a danger of death or serious bodily harm, must in some cases also meet the following conditions: it must be *"clear and present"*[8] or else be *"imminent, real, and inevitable"*[9].

These tribunals also took into account the issue of voluntary participation in an enterprise that leaves no doubt as to its end results[10] in order to determine the individual responsibility of the accused members of the armed forces or paramilitary groups. The rank held by the soldier giving the order and by the one receiving it has also been taken into account in assessing the duress a soldier may be subject to when forced to execute a manifestly illegal order[11].

Although the accused did not challenge the manifestly illegal order he was allegedly given, the Trial Chamber would point out that according to the case-law referred to, in such an instance, the duty was to disobey rather than to obey[12]. This duty to disobey could only recede in the face of the most extreme duress.

19. Accordingly, while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict. They must be sought not only in the very existence of a superior order - which must first be proven - but also and especially in the circumstances characterising how the order was given and how it was

---

5 *Trial of Alfried Felix Alwyn Krupp von Bohlen and Halbach and eleven others*, U.S. Military Tribunal, Nuremberg, 17 November 1947-30 June 1948, Case No. 58, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (hereinafter *L.R.T.W.C.*), Vol. X, p. 147, London 1949.

6 *Einsatzgruppen case, In re Ohlendorf and Others*, quoted in *L.R.T.W.C.*, Vol. XV, p. 174. See also: *The German High Command Trial, Trial of Wilhelm von Leeb and thirteen others*, U.S. Military Tribunal, Nuremberg, 30 December 1947-28 October 1948, Case No. 72, *L.R.T.W.C.*, Vol. XII, p. 72; *I.G. Farben Case, Trial of Karl Krauch and twenty-two others*, U.S. Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, Case No. 57 *L.R.T.W.C.*, Vol. X, p. 57.

7 *Trial of Wilhelm von Leeb and thirteen others: High Command Trial*, U.S. Military Tribunal, Nuremberg, 30 December 1947-28 October 1948, Case No. 72, *L.R.T.W.C.*, Vol. XII, p.72.

8 *Trial of Friedrich Flick and five others*, U.S. Military Tribunal, Nuremberg, 20 April-22 December 1947, Case No. 48, *L.R.T.W.C.*, Vol. IX, p. 20.

9 *Einsatzgruppen Case, in Ohlendorf and others*, quoted in *L.R.T.W.C.*, Vol. XV, p. 174.

10 *Einsatzgruppen Case* quoted in *L.R.T.W.C.*, Vol. VIII, p. 91, See also *Trial of Field Erhard Milch*, U.S. Military Tribunal, Nuremberg, 20 December 1946-17 April 1947, *L.R.T.W.C.*, Case No. 39, Vol. VII, p. 40.

11 *Trial of Lieutenant General Shigeru Sawada and three others*, U.S. Military Commission, Shanghai, 27 February 1946-15 April 1946, Case No. 25, *L.R.T.W.C.*, Vol. V, pp. 18-19.

12 *Trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy, Jaluit Atoll Case*, U.S. Military Commission, U.S. Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945, Case No. 6, *L.R.T.W.C.*, Vol. I, pp. 74-76, pp. 79-80. See also *Trial of Wilhelm List and Others*, U.S. Military Tribunal, Nuremberg, 8 July 1947-19 February 1948, *L.R.T.W.C.*, Case No,. 47, Vol. VIII, pp. 50-52; 1956 U.S. Department of the Army, Field Manual 27/10 501 (1956).

received. In this case-by-case approach - the one adopted by these post-war tribunals - when it assesses the objective and subjective elements characterising duress or the state of necessity, it is incumbent on the Trial Chamber to examine whether the accused in his situation did not have the duty to disobey, whether he had the moral choice to do so or to try to do so. Using this rigorous and restrictive approach, the Trial Chamber relies not only on general principles of law as expressed in numerous national laws and case-law[13], but would also like to make clear through its unfettered discretion that the scope of its jurisdiction requires it to judge the most serious violations of international humanitarian law.

With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.

20. On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will, as the Secretary-General seems to suggest in his report, be taken into account at the same time as other factors in the consideration of mitigating circumstances.

In conclusion, the Trial Chamber, for all the reasons of fact and law surrounding Drazen Erdemovic's guilty plea, considers it valid.

* *
*

21. In order to arrive at the most appropriate sentence for the case in point, the Trial Chamber will review the legal context falling within its jurisdiction and will determine the relevant principles applicable to crimes against humanity.

II. APPLICABLE LAW AND PRINCIPLES

22. After reviewing the texts, the Trial Chamber will elaborate, first, on applicable sentencing practice, and, second, the general principles governing the determination of punishment for crimes against humanity.

A. Applicable texts

23. Article 23(1) of the Statute sets forth the general principle regarding sentences and penalties as follows:

Judgement

"1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."

Rule 100 of the Rules adds:

Pre-sentencing Procedure

"If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence."

Article 24 of the Statute spells out the factors by virtue of which the Trial Chamber will exercise its jurisdiction in determining penalties:

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.

---

13 See *inter alia* as an example of recent legislation the Nouveau code pénal fran?ais (1994), art. 122:
"a person acting under force or duress which he could not resist shall not be held criminally responsible" or article 122-7: "a person who in the face of a present or imminent danger which threatens him, someone else or property or who commits an act necessary to preserve his life or property shall not be criminally responsible unless a disproportion exists between the means employed and the gravity of the threat" (unofficial translations). In addition, the French Cour de Cassation has always adopted a strict attitude towards admitting as a cause for impunity duress which it considers to stem from a physical or moral origin. See also, Criminal decisions, 8 February 1936, *Rozoff Case*, D. 1936-I, 44, note Donnedieu de Vabres, Crim. 29 January 1921, S., 1922, I. 185, note Roux; 8 July 1971, D., 625, note Robert;
8 May 1974, B.C., no. 165, Crim. 31 October 1963, Crim. 21 December 1901, S., 1905, I, 143, Crim. 28 December 1900, D. P., 1901, I, 81, Note de Poittevin; Crim., 8 February 1936, D. P., 1936, I, 44, Note Donnedieu de Vabres; M. Puesch, no. 106; J. Pradel and A. Varinard, I., no. 43, Crim. 6 January 1970, B.C., No. 11, Crim. 29 January 1921, *Trémintin Case*, S, 1922 I, 185, Note Roux, J. Pradel and A. Varinard, I. no. 43.

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.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

Rule 101 of the Rules elaborates on the duration of penalties and the factors to be taken into account when sentencing:

Penalties

"(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.
(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute, as well as such factors as:
(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial co-operation 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(3) of the Statute.
(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Sub-rule 102(B).
(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal."

24. Article 27 of the Statute deals with how sentences are to be enforced:

Enforcement of sentences

"Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal."

Rule 103 of the Rules restates the provisions of Article 27 of the Statute relative to the place of execution of penalties and stipulates that:

Place of imprisonment

(A) Imprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons.
(B) Transfer of the convicted person to the State shall be effected as soon as possible after the time-limit for appeal has elapsed.

Article 28 of the Statute deals with pardon and commutation of sentences:

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Rule 104 of the Rules prescribes the International Tribunal's supervision of imprisonment:

Supervision of imprisonment

"All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it."

B. Sentencing practice applicable when an accused is found guilty of a crime against humanity

25. Under the terms of the Statute and the Rules, the International Tribunal imposes on an accused who pleads guilty or who is found guilty only prison sentences for terms which may include imprisonment for life. Consequently, any other form of penalty such as a death sentence, forced labour, or fines is excluded. The same provisions apply to all the crimes falling within the International Tribunal's jurisdiction, whether grave breaches of the Geneva Conventions of 1949 (Article 2 of the Statute), violations of the laws or customs of war (Article 3 of the Statute), the crime of genocide (Article 4 of the Statute) or crimes against humanity (Article 5 of the Statute).

In the present case, the Trial Chamber has immediately excluded the application of Article 24(3) of the Statute because neither during the proceedings nor at the hearings has it been alleged, proved or acknowledged that property and proceeds were acquired by criminal conduct of the accused.

The accused Drazen Erdemovic pleaded guilty to having committed a crime against humanity which is provided for under Article 5(a) of the Statute:

Crimes against Humanity

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

(a) Murder (...)"

26. Except for the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, which will be discussed below, and to the penalty of life imprisonment, the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators of crimes falling within the International Tribunal's jurisdiction, including crimes against humanity, might be sentenced. In order to review the scale of penalties applicable for crimes against humanity, the Trial Chamber will identify the features which characterise such crimes and the penalties associated with them under international law and national laws, which are expressions of general principles of law recognised by all nations.

27. Generally speaking, crimes against humanity are recognised as very grave crimes which shock the collective conscience. The indictment supporting the charges against the accused at the Nuremberg Trial specified that the crimes against humanity constituted breaches of international conventions, domestic law, and the general principles of criminal law as derived from the criminal law of all civilised nations[14]. The Secretary-General of the United Nations, in his report which proposed the Statute of International Tribunal, considered that "crimes against humanity refer to inhumane acts of *extreme gravity*, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (S/25704, paragraph 48) (italics added). In 1994, the International Law Commission asserted that "the definition of crimes against humanity encompasses inhumane acts of a *very serious character* involving widespread or systematic violations aimed at the civilian population in whole or in part". (Report of the International Law Commission 1994, Supplement No. 10 (A/49/10), commentary on the draft statute for an international criminal court, Article 20, para. 14) (italics added) .

28. Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.

29. Under the terms of Article 27 of the Charter of the Nuremberg Tribunal, if that Tribunal found an accused guilty of a crime against humanity pursuant to Article 6(c), it could pronounce a death sentence or any other punishment it deemed just. Of the 22 persons tried at Nuremberg, 16 were convicted of crimes against humanity, 12 were sentenced to hang and four to prison terms, one of which was for life, two for 20 years and the other for 15 years. Moreover, the military tribunals which were established in the occupied zones at the end of the Second World War to try the Axis war criminals also pronounced death sentences on many accused found guilty of crimes against humanity.

30. As in international law, the States which included crimes against humanity in their national laws provided that the commission of such crimes would entail the imposition of the most severe penalties permitted in their respective systems. As regards the relevant laws in the former Yugoslavia, which will be examined in detail below, at this point it need only be mentioned that the Criminal Code of the Socialist Federative Republic of Yugoslavia (hereinafter "Criminal Code of the former Yugoslavia") prescribed the harshest penalties for the commission of acts of genocide or war crimes against the civilian population.

31. The Trial Chamber thus notes that there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.

32. It might be argued that the determination of penalties for a crime against humanity must derive from the penalties applicable to the underlying crime. In the present indictment, the underlying crime is murder (Article 5(a) of the Statute). The Trial Chamber rejects such an analysis. Identifying the penalty applicable for a crime against humanity - in the case in point the only crime falling within the International Tribunal's jurisdiction - cannot be based on penalties provided for the punishment of a distinct crime not involving the need to establish an assault on humanity.

---

[14] *Proces des grands criminels de guerre devant le Tribunal militaire international (T.M.I.)*, Nuremberg, 14 novembre 1945-1 octobre 1946, Vol. 1, p. 69.

33. The Trial Chamber will now review the reference to "recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" as provided in Article 24(1) of the Statute and Sub-rule 101(A) of the Rules. It will therefore review both the content of the notion of the general practice regarding prison sentences and the nature of recourse to that practice.

34. An initial interpretation might refer back to the relevant provisions of the law in the former Yugoslavia in effect at the time of the events herein described. These provisions are found in Chapter XVI of the Criminal Code of the former Yugoslavia which makes offences of criminal acts against humanity and international law. The criminal codes of the former Yugoslav republics contain no provision on this subject. Articles 141 to 156 of Chapter XVI of the Criminal Code of the former Yugoslavia cover *inter alia* genocide and war crimes perpetrated against the civilian population. Under the terms of these provisions, those crimes are punishable by a prison term of a minimum of five years and a maximum of 15, or by a death sentence. Pursuant to the same code, a 20-year prison term may be imposed instead of a death sentence. That sentence may also be imposed in cases of aggravated crimes.

35. The Trial Chamber notes that a crime against humanity as defined in Article 5 of the International Tribunal's Statute is not, strictly speaking, provided for in the Criminal Code of the former Yugoslavia. Upon examination of this code, however, the Trial Chamber is of the opinion that the only principle which should be given weight is this: that the code reserves its most severe penalties for crimes, including genocide, which are of a similar nature to crimes against humanity.

36. The Trial Chamber notes that the above direct and straightforward approach refers only to the provisions of the law. It considers, however, that this approach does not adhere fully to the strict wording of the provisions of the Statute and the Rules which refer to the "general practice regarding prison sentences in the courts of the former Yugoslavia" (Article 24 of the Statute and Sub-rule 101(B)(iii)).

37. Consequently, this reference to the general practice regarding prison sentences may be interpreted also as a reference to the case-law of the courts of the former Yugoslavia. The Trial Chamber notes that there have been no decisions relating to cases similar to those before the International Tribunal which might serve as precedents for the matter at hand. The Trial Chamber was unable to obtain the factual elements which characterised the specific cases which came before the national courts of the former Yugoslavia and which the latter took into consideration when determining the length of prison sentences. Therefore, in light of the limited number of decisions available, the Trial Chamber cannot draw significant conclusions as to the sentencing practices for crimes against humanity in the former Yugoslavia. In this respect, the briefs filed by the parties provide no additional guidance.

38. Nonetheless, the Trial Chamber must interpret the reference to the courts of the former Yugoslavia by recognising it has a logic and a practical effect. It might be argued that the reference to the general practice regarding prison sentences is required by the principle *nullum crimen nulla poena sine lege.* Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality codified *inter alia* in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights, according to which "no one shall be held guilty of any criminal offence on account of any act or omissions which did not constitute a criminal offence, under national or international law, at the time when it was committed (...)." Moreover, paragraph 2 of that same article states that "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations." On this point, the 1949 Netherlands Special Appeals court, seized of a line of defence based on the principle *nulla poena sine lege* in a case relating to a crime against humanity, expressed itself as follows:

> "In so far as the appellant considers punishment unlawful because his acts, although illegal and criminal, lacked a legal sanction precisely outlined and previously prescribed, this objection also fails. The principle that no act is punishable in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving punishment, were to be considered punishable after the event. However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent" (*Rauter*, Special Appeals Court, Netherlands, 12 January 1949, *ILR*, 1949, pp. 542-3).

39. Given the absence of meaningful national judicial precedents and the legal and practical obstacles to a strict application of the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber considers that the reference to this practice can be used for guidance, but is not binding. This opinion is supported by the interpretation of the Secretary-General of the United Nations who in his report considered that "in determining the term of imprisonment, the Trial Chambers *should have recourse* to the general practice of prison sentences applicable in the courts of the former Yugoslavia" (S/RES/827 (1993), paragraph 111) (italics added). Furthermore, as the Secretary-General noted, the reference is limited to the length of the imprisonment.

40. In conclusion, the Trial Chamber finds that reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.

C. Legal priciples governing sentencing

1. Legal factors in determining a specific sentence

41. Now that the scale of penalties applicable to crimes against humanity has been specified, the Trial Chamber must identify the factors enabling the penalty to be fitted to the case in point. Crimes which *in abstract terms* might appear analogous are distinguished *in actual fact, inter alia*, by the circumstances attaching to their commission, the personality and the individuality of the perpetrator or even of the victim. The principles of proportionality and of appropriateness of sentence to the individual therefore require that different penalties be imposed by taking into account relevant factors.

42. Pursuant to the aforementioned applicable texts, in determining an individual sentence, the Trial Chamber will take into account factors such as the gravity of the offence, the individual circumstances of the convicted person and the existence of aggravating or mitigating circumstances, including substantial co-operation with the Prosecutor (Article 24(2) of the Statute and Sub-rule 101(B)).

43. The Trial Chamber first notes that the Statute and the Rules do not require that all the factors enumerated in these provisions be taken into account in every case. Nor do the Statute and the Rules limit the Trial Chamber's review to the factors mentioned. Should additional elements regarding the appropriateness of the sentence to the individual be brought to its attention, the Trial Chamber might take them into consideration when exercising its unfettered discretion.

44. As regards the factors referred to expressly in the Statute, the Trial Chamber considers that the gravity of the offence has already been discussed at length. In addition, the individual circumstances of the convicted person, which the Statute mentions without providing any further details, cover many factors whose relevance varies according to those circumstances. Without claiming to have dealt exhaustively with the issue, the Trial Chamber does note that the individual circumstances of the accused may, in general, be characterised or affected by his behaviour at the time the offence was committed or shortly afterward and, more specifically, by his age, physical and mental condition, degree of intent, purposes, motives, state of mind, personality, previous conduct, remorse or contrition which he may have demonstrated since the time the crime was committed. The conclusions of a psychological and psychoanalytical evaluation or of a pre-sentencing report submitted to the Trial Chamber may prove particularly relevant here.

45. The Trial Chamber holds the view that, when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration. Beyond the fact that the Statute contains no reference or definition in this respect, the Trial Chamber's stance is consistent with that taken by the International Military Tribunal at Nuremberg which sentenced 12 accused who had been convicted of crimes against humanity to the harshest penalty, capital punishment, because mitigating circumstances had not been proved to its satisfaction. The Trial Chamber must, however, pursuant to the provisions of Article 24 of the Statute, consider circumstances surrounding the commission of the crime likely to characterise its gravity which might preclude any leniency stemming from mitigating circumstances.

46. The situation is completely different as regards the mitigating circumstances mentioned in Sub-rule 101(B)(ii) of the Rules. These have particular significance for crimes against humanity because of the intrinsic gravity of the crimes. The Trial Chamber would point out, however, that any reduction of the penalty stemming from the application of mitigating circumstances in no way diminishes the gravity of the crime and would adopt the *obiter dictum* of the United States military tribunal when it delivered its sentence in the *Hostage case* in the following words:

> "Throughout the course of this opinion, we have had the occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed and the provocation if any that contributed to its commission. *It must be observed however that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime." (USA v. Wilhelm List (Hostage case),* XI *T.W.C.* 757, p. 1317) (italics added).

47. In this respect, the Statute and the Rules provide for situations which, if proved, are of a nature to reduce the degree of guilt of the accused and justify a lesser penalty. Mitigation of penalty based on obedience to superior orders alone is expressly enshrined in the Statute

in Article 7(4), which states that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

48. Since the International Tribunal is confronted for the first time with a guilty plea accompanied by an application seeking leniency by virtue of mitigating circumstances based on superior orders which are likely to have limited the accused's freedom of choice at the time the crime was committed, the Trial Chamber believes it necessary to ascertain in the relevant case-law whether such a defence has indeed permitted the mitigation of the sentences handed down. Further, the Trial Chamber notes that the wording of Article 8 of the Statute of the International Military Tribunal at Nuremberg, and that of Allied Control Council Law No. 10 of 20 December 1945 are practically identical to that of Article 7(4) of the Statute of the Tribunal.

49. The fact that an accused carried out an order from an hierarchical superior was frequently raised before international and national military tribunals after the Second World War to mitigate criminal responsibility. The most common defence was to argue that the accused had acted pursuant to an order he could not disobey. On some occasions, duress was introduced as a factor for consideration with the accompanying claim that, had the accused not obeyed, he would have been killed or severely punished or reprisals would have been taken against his relatives. It has often proved difficult to distinguish between the various forms of this line of defence and to pinpoint which factors - if not all - influenced the determination of the penalty.

50. The International Military Tribunal at Nuremberg did not question the admissibility of such grounds for reducing the penalty and pointed out that "the provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible". (T.M.I., Judgement, Vol. 1, pp. 235-6.) The Tribunal did not accept superior orders as grounds for lessening the penalty for any of the senior commanders and emphasised, in the case of Keitel, that "superior orders, even to a soldier, cannot be considered in mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification", and in the case of the accused Jodl stated that "participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes." (ibid., Vol. I, pp. 309 and 349).

51. However, the Trial Chamber considers that the rejection by the Nuremberg Tribunal of the defence of superior orders, raised in order to obtain a reduction of the penalty imposed on the accused, is explained by their position of superior authority and that, consequently, the precedent setting value of the judgement in this respect is diminished for low ranking accused.

52. As regards other tribunals which have ruled on cases involving accused of various ranks, the Trial Chamber notes that superior orders, whether or not initial resistance on the part of the accused was present, have been admitted as mitigating circumstances or have led to considerably mitigated sentences. This was the case in the following decisions: *RU v. Eck et al. (Peleus case), L.R.T.W.C.* Vol. I, p.21; *US v. Sawada et al., L.R.T.W.C.* Vol. V, pp. 13-14; *US v. Von Leeb et al. (High Command case), L.R.T.W.C.* Vol. XII, p.1, XI *Trial of War Criminals (T.W.C.) 1*, p. 563; *France v. Carl Bauer et al., L.R.T.W.C.* Vol.VIII, p.15; *US v. Wilhelm List et al. (Hostage case), L.R.T.W.C.* Vol. VIII, pp. 74-76; *US v. Ohlendorf et al. (Einsatzgruppen case)* (1948) *4 T.W.C*, p.1

53. In practice, the Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction of penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy. The Trial Chamber emphasises, however, that a subordinate defending himself on the grounds of superior orders may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.

54. The order of a superior must, however, also be examined in the light of the related issue of duress. The Secretary-General, conscious of a link between the two, suggested in his report that acting upon an order of a Government or a superior may be considered "in connection with other defences such as coercion or lack of moral choice." (Report of the Secretary-General, S/25704, para. 57). The Trial Chamber notes that when duress was not accepted as grounds for exculpating the accused - the analysis it made when reviewing the guilty plea in this case - the tribunals have nevertheless acknowledged that it might be a mitigating circumstance entailing a more lenient sentence. In the *case Gustav Alfred Jepsen et al.*, a United Kingdom military tribunal sitting at Luneburg summed up:

> "These considerations take a different aspect when one is considering not the question of liability but the degree of heinousness; a man who does things only under threats may well ask for greater mercy than one who does things *con amore.* That is another matter, it raises considerations which do not find a proper place in your present deliberations when you are deciding the question of guilt or innocence." (UK military tribunal at Luneburg, 12-23 August 1946, *L.R.T.W.C.*, Vol. XV, p. 172).

It is therefore no longer a matter of questioning the principle of criminal responsibility, but rather one of evaluating the degree of the latter since, if the subordinate did indeed commit the offence against his will because he feared that disobedience would entail serious consequences, in particular for himself or his family, the Trial Chamber might then consider that his degree of responsibility is lessened and mitigate the ensuing sentence accordingly. In case of doubt whether the accused did actually act under the yoke of duress, the tribunals preferred to consider it a mitigating factor (*ibid.*).

55. Although not mentioned in the Statute, the Rules also include as a mitigating circumstance substantial co-operation with the Prosecutor by the accused before or after he is found guilty (Sub-rule 101(B)(ii)). The Trial Chamber further considers that it might take into account that the accused surrendered voluntarily to the International Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition and stated his willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the International Tribunal, if this manner of proceeding is beneficial to the administration of justice, fosters the co-operation of future witnesses, and is consistent with the requirements of a fair trial.

56. The Trial Chamber will certainly not exclude other circumstances which, in addition to those mentioned in the Statute and the Rules, might justify mitigation of the penalty. It notes, however, that, in general, national criminal practice in this respect authorises taking into consideration any grounds of defence which might have been rejected as grounds for exculpating the accused.

2. Purposes and functions of the penalty

57. Having identified the factors enabling the penalty to be fitted to the specifics of the case, and given the International Tribunal's unique nature, the Trial Chamber will now consider the purposes and functions of a penalty for a crime 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, in order to identify them, the focus must be on the International Tribunal's very object and purpose, as perceived by the Member States of the Security Council of the United Nations and by the International Tribunal itself. The Trial Chamber will thereupon examine the purposes and functions of a sentence for a crime against humanity in the light of international criminal law precedents and of national criminal systems, including that of the former Yugoslavia, and, last, will state what purposes and functions it assigns to a term of imprisonment for a crime against humanity.

58. In setting up the International Tribunal, the Security Council, exercising its jurisdiction to determine measures to be taken to maintain international peace and security (Article 39 of the Charter of the United Nations), sought to halt violations of international humanitarian law in the former Yugoslavia and have them "effectively redressed" (resolution 827 (1993)). The declarations by the Member States of the Security Council at the time resolution 827 was adopted show that they saw the International Tribunal as a powerful means for the rule of law to prevail, as well as to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities[15]. Furthermore, the declarations of several Security Council Members were marked by the idea of a penalty as proportionate retribution and reprobation by the international community of those convicted of serious violations of international humanitarian law[16]. The International Tribunal, in its first annual report to the General Assembly and the Security Council (1994), restated those aims and added that the impunity of the guilty would only fuel the desire for vengeance in the former Yugoslavia, jeopardising the return to the "rule of law", "reconciliation" and the restoration of "true peace"[17].

The International Tribunal's objectives as seen by the Security Council - i.e. general prevention (or deterrence), reprobation, retribution (or "just deserts"), as well as collective reconciliation - fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity.

59. The only precedents in international criminal law relevant for the International Tribunal - the judgements of the International Military Tribunals at Nuremberg and Tokyo - do not expressly state the purposes sought in imposing sentences for war crimes or crimes against humanity. However, a review of the declarations of the signatories of the London Charter of 8 August 1945[18] and of the case-law of those Tribunals would indicate that the penalties seemed directed at general deterrence and retribution. The Nuremberg Tribunal moreover stated that "only by punishing individuals who commit such crimes can the provisions of international law be enforced" (I.M.T., vol. I, p. 235)

60. The purposes and functions of the national criminal systems are often difficult to pinpoint, as lawmakers' motivations in laying down penalties for crimes are complex and ambiguous. That said, the purposes and functions attributed to punishment seem to cover general prevention or deterrence (the punishment serving to dissuade society's members from committing offences), specific prevention (the punishment aimed at deterring the convicted person from recidivism), retribution (or "just deserts" as attenuated in the contemporary

---

15 See in particular the declarations by France (p. 12), Morocco (pp. 27-28), Pakistan (p. 31), United Kingdom (pp. 19-20), and United States (p. 12); provisional minutes of the 3217th session (S/Trans. 3217, 25 May 1993).

16 *Ibid.*, in particular declarations by Hungary (p. 21), Morocco (p. 17) and New Zealand (p. 22).

17 See paras. 11-16 of first annual report of the International Criminal Tribunal for the former Yugoslavia, A/49/342, Statute/1994/1007, 29 August 1994.

18 Regarding these statements, see *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London 1945.

version by the principle that punishment shall be proportionate to the crime's gravity and the moral guilt of the perpetrator), rehabilitation of the convicted person (or his treatment, re-education, or social reintegration), and protection of society (by neutralising the convicted person). The importance and appropriateness of each of these change with time and from one legal system to another. In addition, punishment often appears to serve several purposes, the relative weight of which depends on the nature of the crime and the individual circumstances of the perpetrator[19].

61. This multiple purpose was in fact written into the Criminal Code of the former Yugoslavia, in force at the time the crimes were committed, in Article 33 which reads:

> "Within the general purpose of criminal sanctions (article 5(2)), the purpose of punishment is to:
> (1) prevent the perpetrator from committing criminal offences and re-socialise him;
> (2) pedagogically influence others not to commit criminal offences;
> (3) strengthen the morals of the socialist self-managing society and to influence the development of social responsibility and of discipline amongst the citizens."[20]

Article 5(2) reads:

> "The general purpose of prescribing and imposing criminal sanctions is the repression of socially dangerous activities, which threaten or harm the social values protected by the penal legislation."[21]

62. Although, in determining the purpose of a term of imprisonment for crimes against humanity the Chamber may have recourse to the functions of penalties identified within national criminal systems, it needs to do so cautiously; the *ratione materiae* jurisdiction of the International Tribunal differs fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes. While bearing this in mind, the purposes and functions adopted by national civil or military courts having to punish offences of the same nature as crimes against humanity shall now be reviewed.

The post-World War Two national military tribunals convicting persons for offences of the same nature as crimes against humanity did not expressly state the purposes and functions sought, but the frequent recourse to capital punishment would indicate an inclination towards general deterrence and retribution. As regards national civilian courts (without addressing the *Barbie*[22] and *Touvier*[23] judgements, as French Cours d'assises do not give reasons for their judgements), it is worth noting that in Israel, in the *Eichmann case*, retribution was a major factor in the penalty pronounced, in particular for war crimes and crimes against humanity. In fact, the Supreme Court of Israel, when confirming the conviction and sentence imposed by the District Court, stated that "even as there is no word in human speech to describe deeds such as the deeds of the appellant, so there is no punishment under human law sufficiently grave to match the appellant's guilt"[24].

63. The courts of the former Yugoslavia delivering sentences on persons found guilty of crimes against the civilian population in war time alluded to the aims of the punishment in relation to the specifics of the case in applying the above-cited Article 33 of the Criminal Code. For instance[25], in 1985, the District Court of Sabac, in condemning an accused to five years' imprisonment for having beaten a civilian to death in 1943, stated that the purpose of the penalty for this crime, which was not subject to any statute of limitation, was "to prevent the defendant from committing further crimes and give him the opportunity to re-educate himself as well as to serve as an example to others in terms of responsibility and discipline", in light of the aggravating and mitigating circumstances allowed (the latter including the accused's age, 19 years at the time of the offence)[26]. In another case, the Zagreb District Court, in pronouncing in 1986 the harshest punishment (the death sentence) on a former Minister of Croatia who during the Second World War had ordered the deportation or death of hundreds of civilians, stated that for those crimes the overriding principle was that of "general prevention as a warning and remembrance"[27]. In 1982, the Supreme Court of Serbia confirmed a 20-year prison term for an accused who had killed three civilians in war time, concluding that, on the basis of the circumstances, the way in which the crime had been committed, the fact that the accused had participated in the murder of three people, and his confession to one of them, that the sentence "fits the gravity of the crime and is appropriate to contain the danger the

---

19 Regarding the subject of penalties in the various legal systems of the world, *Recueils de la société Jean Bodin* for the comparative history of the institutions, Volumes LVI to LVIII, *La Peine - Punishment*, De Boek-Wesmael, 1991.

20 Unofficial translation from Serbo-Croat.

21 **21** *Ibid.*

22 **22** Cour d'Assises of the département of the Rhône of 4 July 1987.

23 **23** Cour d'Assises of the département of Yvelines of 20 April 1994.

24 **24** 36 I.L.R. 1968, p. 341.

25 **25** Of eight decisions examined.

26 **26** Unofficial translation from Serbo-Croat, p. 14. Sabac District Court, no. 24/85 (02.10.1985), confirmed by the Supreme Court/Court of Appeal of Serbia, Criminal division, no. I.1 199/85 (23.01.1986).

27 Unofficial translation from Serbo-Croat p. 26. Doc. no. K-1/84-61. Confirmed on appeal by the Supreme Court of Croatia, Kz-706/86-8 (24.07.1986) and by the Federal Court, Kzs-1/86 (01.09.1986).

defendant poses to society"[28]. In the final analysis, the review of the convictions for crimes against the civilian population shows that the courts of the former Yugoslavia seem to have emphasised the preventive role.

64. In the light of this review of international and national precedents relating to crimes against humanity (or crimes of the same nature), the Trial Chamber deems most important the concepts of deterrence and retribution. It further notes that in the context of gross violations of human rights which are committed in peace time, but are similar in their gravity to the crimes within the International Tribunal's jurisdiction, reprobation (or stigmatisation) is one of the appropriate purposes of punishment. One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. This concept moreover served as a basis for this Chamber's deliberations in relation to the procedures pursuant to Rule 61 of the Rules, while noting that in none of these cases was there a conviction followed by a sentence[29].

65. On the basis of the above, the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity. In addition, thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.

Intimately related to the reprobative function is general prevention, which played a salient role in the judgements of the post-World War Two international military tribunals, as pointed out above[30]. The Trial Chamber also adopts retribution, or "just deserts", as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the moral guilt of the convicted[31].

66. Last, it would seem that the particularities of crimes falling within the jurisdiction of the International Tribunal rule out consideration of the rehabilitative function of punishment although imprisonment of the convicted in application of Article 27 of the Statute might have that aim. Without denying any rehabilitative and amendatory function to the punishment, especially given the age of the accused, his physical or mental condition, the extent of his involvement in the concerted plan (or systematic pattern) which led to the perpetration of a crime against humanity, the Trial Chamber considers at this point in the determination of the sentence that the concern for the above mentioned function of the punishment must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law, and in particular an attempt to preclude their reoccurrence. Having said this, the Judges would not be considering all the relevant legal issues if they did not also consider the execution of the sentence *per se*.

D. Enforcement of sentences

67. Before it determines the penalty, and because of the inherent complexity of the penalty's enforcement by States, the Trial Chamber will next consider the question of where imprisonment will take place and the arrangements which will be made for the enforcement of the sentence.

1. Jurisdiction of the Trial Chamber

68. According to the Statute and the Rules, imprisonment shall be served in a State designated by the International Tribunal.

Article 27 of the Statute and Rule 103 of the Rules refer expressly to the enforcement of sentences and the place of imprisonment. The Trial Chamber would point out that Article 27 of the Statute sets forth a procedure for the enforcement of sentences, i.e. the designation of a State and the supervision by the International Tribunal of the conditions of the imprisonment. In addition, the Statute and the Rules provide that imprisonment shall be in accordance with the laws of the State concerned and under the supervision of the International Tribunal.

69. The Trial Chamber notes first that the Registrar is responsible for negotiating the agreement which will bind the International Tribunal and the States in question in regard to the enforcement of the penalties imposed. A special role must also be given to the President

---

[28] Unofficial translation from Serbo-Croat, p.6. No. Kz. I. 658/82 (10.02.1983).

[29] See Tribunal's procedure in the event an arrest warrant is not served pursuant to Rule 61 of the Rules in cases *Prosecutor v. Nicoli}*, Review of indictment under Rule 61 (No. IT-94-2-R61, Trial Chamber I, 20 October 1995); *Prosecutor v. Marti}*, Review of indictment under Rule 61 (No. IT-95-11-R61, Trial Chamber 1, 8 March 1996); *Prosecutor v. Mrksi}* et al., Review of indictment under Rule 61 (No. IT-95-13-R61, Trial Chamber I, 3 April 1996); *Prosecutor v. Karad'i} and Mladi}*, Review of indictment under Rule 61 (Nos. IT-95-5-R61 and IT-95-18-R61, Trial Chamber I, 11 July 1996).

[30] The importance of this objective in punishing war crimes and crimes against humanity is reaffirmed in the preamble of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 November 1968): "Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security." A Compilation of International Instruments, United Nations Centre for Human Rights, Geneva, Vol. 1, Part 2, p. 678.

[31] Via a letter to the Secretary-General dated 10 February 1993, the permanent representative of France to the United Nations submitted the report of the Committee of French Jurists studying the establishment of the International Criminal Tribunal for the former Yugoslavia (S/25266). While stating that the extreme gravity of the crimes in the Tribunal's jurisdiction warranted strict punishment, the Committee considered that the judges should take account of the circumstances in which the offence was committed as well the personality of the accused, in order to uphold the essential rule of proportionality and of matching the punishment to the specific case (see paras. 127-131).

of the International Tribunal, who is already vested with power in this respect, and to the Presiding Judge of the Trial Chamber. Accordingly, the Trial Chamber considers that the place of enforcement of the sentence shall be decided by 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.

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

First, the Trial Chamber shares the view of the Secretary-General that the sentences should be served outside the territory of the former Yugoslavia (S/25704, para. 121). It believes that because of the situation prevailing in that region, it would not be possible to ensure the security of the convicted person or the full respect of a decision of the International Tribunal in that regard.

The principle of *nulla poena sine lege* must permit every accused to be cognisant not only of the possible consequences of conviction for an international crime and the penalty but also the conditions under which the penalty is to be executed.

Moreover, the Trial Chamber is concerned about reducing the disparities which may result from the execution of sentences.

Finally, the Trial Chamber considers that it must provide guidance for the execution of international judicial decisions and, in particular, the rights of the convicted person.

2. Fundamental considerations

a) Primacy of the International Tribunal

71. The Trial Chamber notes that when the International Tribunal was established, no provision was included to endow it with the institutional capacity to enforce its sentences directly. The Statute and the Rules, in part, made up for this institutional lacuna by offering an indirect and joint instrument for the execution of sentences. Under this instrument, States will carry out the execution of a sentence imposed by the International Tribunal, which will supervise execution in the context of the binding obligations on all States to take whatever steps are required to implement its decision (S/25704, para. 125).

States are called upon expressly by the Statute and the Rules to assist the International Tribunal in the execution of sentences. According to Article 27, States must indicate to the Security Council their willingness to accept convicted persons[32], in order to "carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal" (S/25704, para. 121).

Accordingly, a State which has indicated its willingness and has been designated will execute the sentence *on behalf of the International Tribunal* in application of international criminal law and not domestic law. Therefore, that State may not in any way, including by legislative amendment, alter the nature of the penalty so as to affect its truly international character.

The Trial Chamber's view is reinforced by United Nations General Assembly resolution 3074 (XXVIII) of 3 December 1973 which provides that "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and *punishment* of persons found guilty of war crimes and crimes against humanity" ("Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, para. 8) (italics added).

b) Uniformity and cohesion

72. The Trial Chamber considers it possible to deduce from the principle of equal treatment before the law that there can be no significant disparities from one State to another as regards the enforcement of penalties pronounced by an international tribunal. It therefore recommends that there be some degree of uniformity and cohesion in the enforcement of international criminal sentences.

The Trial Chamber concludes that two essential elements derive from the international character of the prison sentences set by the International Tribunal: respect for the duration of the penalty and respect for international rules governing the conditions of imprisonment.

3. Duration of the penalty

73. Article 27 of the Statute states that "imprisonment shall be in accordance with the applicable law of the State concerned" and therefore reserves to the States the control over some aspects of the enforcement of penalties. The Trial Chamber recalls that, pursuant to

[32] To date eleven States have notified the Security Council of their willingness to accept convicted persons by the Tribunal. These States are: Bosnia-Herzegovina, Republic of Croatia, Denmark, Finland, Germany, Italy, Iran, Norway, Pakistan, The Netherlands and Sweden.

the general supervisory power which this same text grants to the International Tribunal, it also has jurisdiction over the enforcement of the penalties.

Since it does not have any further details regarding the respective jurisdictions of the International Tribunal and the designated State, the Trial Chamber is of the opinion that no measure which a State might take could have the effect of terminating a penalty or subverting it by reducing its length.

As regards the measures affecting the enforcement of the sentences, such as the remission of sentence and provisional release in effect in a certain number of States, the Trial Chamber can only recommend that these be taken into account when the choice of the State is made. The Trial Chamber wishes that all the measures of this type be brought beforehand to the attention of the President of the International Tribunal who, pursuant to Article 28 of the Statute, moreover, is entitled to review pardons or commutations of penalties before such measures are granted or enforced.

4. Treatment of prisoners

74. The International Tribunal bases its right to supervise how persons it has convicted are treated on Article 27 of the Statute and Rule 104 of the Rules.

The Trial Chamber considers that the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons, which have *inter alia* been enshrined in article 10 of the International Covenant on Civil and Political Rights[33], article 5, paragraph 2 of the American Convention on Human Rights[34] and, as regards penalties more specifically, article 5 of the Universal Declaration of Human Rights[35] and article 3 of the European Convention on Human Rights[36].

The Trial Chamber would also refer to the following instruments: Standard Minimum Rules for the Treatment of Prisoners[37]; Basic Principles for the Treatment of Prisoners[38]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[39]; European Prison Rules[40] and Rules governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal[41].

The significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights. The Basic Principles for the Treatment of Prisoners state that "except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights" (paragraph 5).

Last, the Trial Chamber considers that the penalty imposed on persons declared guilty of serious violations of humanitarian law must not be aggravated by the conditions of its enforcement.

75. In addition, because persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which they will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees. The situation is all the more true in cases of convicted persons who have co-operated with the Prosecutor because it is not unreasonable to assume that they will also be excluded from the very group to which they should normally belong.

* *
*

---

33 Article 10 paragraph 1 of the ICCPR states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

34 Article 5 paragraph 2 of the American Convention on Human Rights provides that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

35 Article 5 of the Universal Declaration of Human Rights states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

36 Article 3 of the ECHR states "no one shall be subjected to torture or inhuman or degrading treatment or punishment."

37 Adopted at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Compilation of International Instruments, United Nations Centre for Human Rights, Vol. 1, p. 243, 1994.

38 Adopted and proclaimed by the General Assembly resolution 45/111 of 14 December 1990, United Nations Centre for Human Rights, id. 263.

39 Adopted by the General Assembly resolution 43/173 of 9 December 1988, United Nations Centre for Human Rights, id. p. 265.

40 Recommendation no. R (87) 3 of the Council of Ministers of the Council of Europe on 12 February 1987.

41 Adopted on 5 May 1994, amended 16 March 1995 and revised 14 July 1995, ICTY Basic Documents, p. 297.

In light of the principles which have just been defined, for the case in point, the Trial Chamber will review all the relevant elements and information submitted during the hearings and discussed with both parties present so that, in accordance with the terms of Rule 100 of the Rules, it may decide on the appropriate sentence.

III. THE CASE IN POINT

A. Relevant facts

76. The Trial Chamber recalls that the acts for which Drazen Erdemovic stands accused are part of the events which followed the fall of the Srebrenica enclave. It notes, moreover, that those events were attested to during the Rule 61 hearings in the case *The Prosecutor v. Karadzic and Mladic.* On that occasion, they were corroborated by many testimonies, including that of the accused[42]. The Trial Chamber emphasises that Drazen Erdemovic did not contest these same events in his guilty plea[43].

On 6 July 1995, the Srebrenica enclave was the target of attacks by the Bosnian Serb army. At the time, the enclave was recognised by United Nations Security Council resolution 819[44] as a "safe area" which could not be the target of any armed offensive or other hostile act. The assault continued until 11 July 1995, the date when Srebrenica fell to the Bosnian Serb forces.

The fall of the enclave triggered the flight of thousands of Muslim civilians. Some sought refuge in the United Nations base at Potoãari; others, about 15,000 people, fled across the woods towards Tuzla, an area under the control of the Bosnian government.

After having been separated from the women and children by members of the Bosnian Serb police and army, an undetermined number of Muslim men who had sought refuge in Potoãari were transported by bus out of the enclave to various sites where they were to be executed. Many of the men who had fled towards Tuzla either surrendered or were arrested by the Bosnian Serb army or police. Some were summarily executed while others were grouped together and killed later at various locations.

77. During the hearing, a witness, an investigator in the Office of the Prosecutor, testified that several of those locations have been identified[45]. His statement was based on the accused's own declarations which were corroborated by the investigations and observations of the Office of the Prosecutor[46].

The first location in question is the Branjevo farm in Pilica where, according to the statement of the accused at the hearing, about 1,200 Muslims were executed by the soldiers of the unit of which Drazen Erdemovic was a member. Erdemovic admitted to having participated in the massacres. Exhumations performed there permitted the discovery of about 153 bodies, approximately half of which had their hands tied behind their back, as well as identity papers which had belonged to the victims, Bosnian Muslims from the Srebrenica region. On-site observations also permitted the discovery of "some clothing, shoes, human debris, in other words, things indicating that a mass grave might be located nearby"[47]. The existence of the mass grave, moreover, is attested to by aerial photographs taken on the date of the events which were presented to the Trial Chamber during the hearing of 19 November 1996[48].

The second location is the Pilica public building in the Zvornik municipality where, according to the statement of the accused at the hearing, about 500 Muslims were executed by members of the 10th Sabotage Unit. Members of the Office of the Prosecutor were able to visit the building, and observations confirm that massacres may have occurred there. Furthermore, photographs showing bullet marks, traces of blood, human remains and bits of hair were submitted to the Trial Chamber during the hearing[49].

78. The Trial Chamber will review the acts for which Drazen Erdemovic is charged as presented in the indictment, formally recognised by the accused in his guilty plea and then clarified during the hearings of 19 and 20 November 1996.

On the morning of 16 July 1995, Drazen Erdemovic and seven members of the 10th Sabotage Unit of the Bosnian Serb army were ordered to leave their base at Vlasenica and go to the Pilica farm north-west of Zvornik[50]. When they arrived there, they were informed by

---

42 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, pp. 37-52 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}.*

43 English transcripts of the initial appearance hearing of 31 May 1996, *The Prosecutor v. Dra'en Erdemovi}*, p. 9, IT-96-22-T.

44 Reaffirmed in resolutions 824 of 6 May 1993 and 836 of 4 June 1993.

45 Statement of Jean-René Ruez at the hearing 19 November 1996, morning, pp. 10-18, English provisional transcript.

46 Statement of Jean-René Ruez at the hearing 19 November 1996, morning, p. 17, English provisional transcript.

47 Statement of Jean-René Ruez at the hearing 19 November 1996, morning, p. 15, English provisional transcript.

48 Exhibits nos. 4 and 5.

49 Exhibits nos. 10, 11, 12, 13.

50 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 49 of English provisional transcript.

their superiors that buses from Srebrenica carrying Bosnian Muslim civilians between 17 and 60 years of age who had surrendered to the members of the Bosnian Serb police or army would be arriving throughout the day.

Starting at 10 o'clock in the morning[51], members of the military police made the civilians in the first buses, all men, get off in groups of ten. The men were escorted to a field adjacent to the farm buildings where they were lined up with their backs to the firing squad. The members of the 10th Sabotage Unit, including Drazen Erdemovic, who composed the firing squad then killed them. Drazen Erdemovic carried out the work with an automatic weapon[52]. The executions continued until about 3 o'clock in the afternoon[53].

The accused estimated that there were about 20 buses in all, each carrying approximately 60 men and boys. He believes that he personally killed about seventy people[54].

79. The Trial Chamber will review the specific circumstances which led the accused to commit the crime with which he is charged as he himself related them in his defence. The Trial Chamber will assess the probative value and possible mitigating character of these later in this decision.

Drazen Erdemovic testified that after he had completed his military service in the JNA military police in Belgrade, he was sent to Slavonia[55]. He says that until March 1992[56], he served there beside soldiers of all origins, Slovenian, Hungarian, Serbian and Albanian[57].

According to his statements, in May[58] or July[59] 1992, he received a summons to join the army of Bosnia and Herzegovina although he did not wish to participate in the war. He emphasised the fact that he had previously ignored a summons from the Tuzla barracks[60]. He left that army in November of the same year[61].

He states that he was mobilised into the military police of the Croatian Defence Council (HVO) at the time of its establishment and that he served there until 3 November 1993, the date he left that army[62]. In fact, his position there became insecure specifically because he had been arrested and beaten by HVO soldiers for having helped Serbian women and children to return to their territory[63].

He explained that he then went to Republika Srpska in Bosnia where he was to meet with a man who would provide him with identity papers which would enable him to go to Switzerland with his wife[64].

The man failed to appear[65], however, and Drazen Erdemovic states that he wandered about in Republika Srpska and Serbia for about five months during which time he tried to avoid the war[66].

He asserted that in April 1994 he finally joined the Bosnian Serb army. The decision to serve in that army was based on his need for money to feed himself and his wife, his desire to obtain identity papers in order to travel freely[67] and "the assurance of some status as a

---

51 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 44 of English provisional transcript.

52 Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 52 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

53 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 44 of English provisional transcript.

54 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 44 of English provisional transcript.

55 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 27 of English provisional transcript.

56 Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 38 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

57 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, pp. 27-28 of English provisional transcript.

58 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 36 of English provisional transcript.

59 Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 38 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

60 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 28 of English provisional transcript.

61 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 3 of English provisional transcript.

62 Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

63 Statement of Witness X at the hearing of 20 November 1996, morning, p. 17 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 42 of English provisional transcript.

64 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 29 of English provisional transcript.

65 Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

66 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 36 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 3 of English provisional transcript.

67 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, pp. 36-37 of English provisional transcript.

Croat in Republika Srpska"[68]. He says that he specifically chose the 10th Sabotage Unit because it was not comprised of Serbs only but also had "a few Croats, a Slovene and a Muslim"[69].

Regarding the unit's mission, he stated that he only carried out reconnaissance of the army of Bosnia and Herzegovina, made quick trips onto its territory and placed explosives in the midst of Bosnian artillery weapons[70].

He stated that he had the chance to save the life of a man who, in fact, testified about this event before the Trial Chamber[71].

Drazen Erdemovic claimed that in the army of Bosnia and Herzegovina he was given the rank of lieutenant[72] or sergeant[73] and that he was the commander of a small unit[74].

He declared that he experienced no difficulties before October 1994 which is when particularly nationalist soldiers joined the unit[75], and a new commander, Lieutenant Milorad Pelemis, was appointed leader[76]. In addition, he stated that this lieutenant was placed under the authority of Colonel Salapura of the Bosnian Serb army intelligence centre[77].

The accused emphasised that he lost his rank two months after having received it[78], mainly because he had refused to carry out a mission likely to cause "civilian losses"[79]. He asserted that after this demotion, he was no longer in a position to oppose the orders of his superiors[80].

80. On 16 July 1995, Drazen Erdemovic claims that he received the order from Brano Gojkovic[81], commander of the operations at the Branjevo farm at Pilica, to prepare himself along with seven members of his unit for a mission the purpose of which they had absolutely no knowledge[82]. He claimed it was only when they arrived on-site that the members of the unit were informed that they were to massacre hundreds of Muslims. He asserted his immediate refusal to do this[83] but was threatened with instant death and told "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you"[84]. He declared that had he not carried out the order, he is sure he would have been killed or that his wife or child would have been directly threatened. Regarding this, he claimed to have seen Milorad Pelemis ordering someone to be killed because he had refused to obey[85]. He reported that despite this, he attempted to spare a man between 50 and 60 years of age who said that he had saved Serbs from Srebrenica. Brano Gojkovic then told him that he did not want any surviving witness to the crime[86].

---

68 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

69 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 37 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 31 of English provisional transcript.

70 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*; Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 43 of English provisional transcript.

71 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 47 of English provisional transcript; Statement of Witness X at the hearing of 20 November 1996, morning, p.16 of English provisional transcript.

72 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

73 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 37 of English provisional transcript.

74 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

75 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 38 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 31 of English provisional transcript.

76 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 8 of English provisional transcript.

77 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 40 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

78 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 40 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

79 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 32-33 of English provisional transcript.

80 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 47 of English provisional transcript.

81 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 8 of English provisional transcript.

82 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 37 of English provisional transcript; Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 44 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

83 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 8 and 37 of English provisional transcript.

84 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 8 and 37 of English provisional transcript.

85 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 44 of English provisional transcript.

86 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 48 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

81. Drazen Erdemovic asserted that he then opposed the order of a lieutenant colonel to participate in the execution of five hundred Muslim men being detained in the Pilica public building. He was able not to commit this further crime because three of his comrades supported him when he refused to obey[87].

He said that several days after those events, one of his colleagues, Stanko Savanovic, tried to kill him and two of his friends with a firearm. The accused claimed that this act was payment for having refused to participate in the executions[88]. Moreover, he suspects that Stanko Savanovic was acting on orders from Colonel Salapura[89].

Seriously wounded, he was treated first in the hospital in Bijeljina and then in the hospital in Belgrade[90].

He declared that after having been released from the Belgrade military hospital where he had stayed for about one month[91], still traumatised by everything that had happened to him, he contacted a journalist in whom he confided.

Two days later, he said he was arrested by the State Security Services of the Republic of Serbia and then transferred to the court in Novi Sad to stand trial[92].

He arrived in The Hague on 30 March 1996 and immediately confessed to the members of the Office of the Prosecutor as he had previously done to the court in Novi Sad[93].

In his statements at the hearing, he continuously reiterated his loathing of war[94] and nationalism[95] and how deeply he regretted his criminal act[96]. He repeated several times that he had always had friends of all origins - Serbs, Croats and Bosnians[97].

82. All these acts, as ascribed to Drazen Erdemovic and as related by him in support of his defence, in the eyes of the Trial Chamber, characterise the elements which will permit it to determine both the gravity of the offence and the circumstances which might lessen the penalty. The Trial Chamber will now discuss all these elements so that it may give reasons for the sentence it will pronounce.

B. Discussion of and Grounds for the Sentence

1. Charges

83. The Trial Chamber reaffirms that there is no valid reason for discussing the charge of crime against humanity since Drazen Erdemovic pleaded guilty to this count. Furthermore, all the facts relating to the fall of Srebrenica in which the accused played a part were characterised as a crime against humanity *inter alia* in the case against Radovan Karadzic and Ratko Mladic in the decision of 11 July 1996 which, pursuant to Rule 61 of the Rules, this Trial Chamber rendered[98].

The Trial Chamber considers that individual responsibility is based on Articles 1 and 7.1 of the Statute which grant to the International Tribunal full jurisdiction not only over "great criminals" like in Nuremberg - as counsel for the accused maintains[99] - but also over executors.

2. Discussion of and grounds for determining the gravity of the offence, mitigating circumstances and

---

87 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 39 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 41 of English provisional transcript; Exhibit no. 16: Statement of Dra‘en Erdemovi} at the hearing of 5 July 1996, p. 49 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad‘i} and Mladi}*.

88 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, pp. 41-42 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 39 of English provisional transcript.

89 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 10 of English provisional transcript.

90 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 42 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 40 of English provisional transcript.

91 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 42 of English provisional transcript.

92 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 42 of English provisional transcript.

93 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, p. 42 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 42 of English provisional transcript.

94 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, pp. 27, 29, 39 of English provisional transcript.

95 Statement of Dra‘en Erdemovi} at the hearing of 20 November 1996, morning, pp. 3 and 27 of English provisional transcript; Statement of Witness Y at the hearing of 20 November 1996, morning, p. 20 of English provisional transcript.

96 Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 36 of English provisional transcript; Statement of Dra‘en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 41 of English provisional transcript.

97 Statement of Witness Y at the hearing of 20 November 1996, morning, p. 18 of English provisional transcript.

98 Cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Radovan Karad‘i} and Ratko Mladi}*, 11 July 1996.

99 Closing Statement of Defence at the hearing of 20 November 1996, afternoon, p. 57 of English provisional transcript.

any other element relevant for deciding the sentence to be pronounced

84. In accordance with the legal principles it set forth above (II.C.1), the Trial Chamber will now review all the factors which permit it to fit the sentence to the case in point. In order to do so, it will set forth all the elements appropriate for classifying the gravity of a crime against humanity committed as well as the factors relating to the accused's personal situation including the mitigating circumstances claimed which it considers relevant and whose probative force it will analyse.

a) Gravity of the crime

85. In the brief dated 11 November 1996 which he submitted to the Trial Chamber as well as in his closing argument at the hearing, the Prosecutor underscored the gravity of the crime[100]: "The killing of approximately 1,200 unarmed civilians during a five-hour period on 16 July 1995 was a crime of enormous proportions. Mr. Erdemovic, depending on which of his numerous accounts is accurate, is responsible for killing between 10 and 100 people. His role in this mass execution was significant"[101]. The use of an automatic weapon was also noted by the Trial Chamber.

The Trial Chamber considers that the extreme gravity of the crime committed under the conditions related has been characterised.

b) Mitigating circumstances

86. The Trial Chamber will distinguish between two types of mitigating circumstances among those invoked as being the most important by Drazen Erdemovic and his counsel and referred to by the Prosecutor:

- the circumstances contemporaneous with the carrying out of the criminal act: the state of mental incompetence claimed by the Defence; the extreme necessity in which Drazen Erdemovic allegedly found himself when placed under duress by the order and threat from his hierarchical superiors as well as his subordinate level within the military hierarchy;

- the circumstances following the commission of the acts and attaching to the attitude of the accused: remorse and co-operation with the Office of the Prosecutor.

Furthermore, the Trial Chamber will discuss several elements of Drazen Erdemovic's personality in light of his testimony, the statements of witnesses X and Y at the hearing, the conclusions of the medical experts and the argument of his counsel.

i) Circumstances contemporaneous with the carrying out of the criminal act

87. Before it analyses the mitigating circumstances, the Trial Chamber wishes to recall Sub-rule 89(C) of the Rules which states that it "may admit any relevant evidence which it deems to have probative value."

In respect of this, the Trial Chamber will require the corroboration of the accused's statements by independent evidence.

a. The accused's mental condition at the time of the events

88. In his closing argument, counsel for the accused stated that "after refusing to carry out the order, after the unsuccessful refusal to obey it because he was fearful for his life, the accused Erdemovic was no longer conscious of his acts. He literally did not have, nor could he have had, any freedom of will. He did not want to commit the acts of his own will. It was the will of the commander"[102].

The Trial Chamber considers that no conclusions as to the psychological condition of the accused at the moment of the crime can be drawn from the two evaluation reports submitted to it on 27 June and 4 July 1996.

The Trial Chamber concludes that no testimony or evaluation have been presented to establish that at the moment of the events the accused Drazen Erdemovic was in the state described by his counsel.

b. Extreme necessity arising from duress and the order from a superior

89. In accordance with the principles the Trial Chamber has established above in respect of the relevant elements for which it requires proof to be presented, it identified a certain number of questions, specifically at the hearings of 19 and 20 November 1996:

- could the accused have avoided the situation in which he found himself?

---

100 Closing Statement of Prosecution at the hearing of 20 November 1996, afternoon, p. 50 of English provisional transcript.

101 Prosecutor's Brief on Aggravating and Mitigating Circumstances, 11 November 1996, p.2.

102 Closing Statement of Defence at the hearing of 20 November 1996, afternoon, p. 64 of English provisional transcript.

- was the accused confronted with an insurmountable order which he had no way to circumvent?
- was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards?
- did the accused possess the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?

90. As it has already indicated, the Trial Chamber notes that the statements of the accused permitted the Office of the Prosecutor to initiate and to direct investigations into the fall of Srebrenica and the massacres at the Branjevo farm and the Pilica public building[103]. It therefore appears that some credibility may be given to the overall account of the accused. Furthermore, it is aware of the general climate reigning in Srebrenica at the time of the events.

91. The Trial Chamber would point out, however, that as regards the acts in which the accused is personally implicated and which, if sufficiently proved, would constitute grounds for granting mitigating circumstances, the Defence has produced no testimony, evaluation or any other elements to corroborate what the accused has said. For this reason, the Judges deem that they are unable to accept the plea of extreme necessity.

c. Subordinate level in the military hierarchy

92. The Trial Chamber notes the fact that during the hearings of 5 July and 19 and 20 November 1996, the accused declared that he had been given the rank of sergeant and had acted as the commander of a small unit[104]. It also notes the fact that, according to Drazen Erdemovic's own statements, he lost his rank before committing the acts ascribed to him[105]. It observes, however, that no document has established precisely his rank in the military hierarchy.

93. The Trial Chamber also observes that in his closing statement the Prosecutor affirmed that "Mr. Erdemovic, a low-ranking member of the Bosnian Serb army, followed orders"[106].

94. It notes, moreover, that the indictment which describes Drazen Erdemovic as "a soldier in the 10th Sabotage Unit" attributes no rank to him and recalls that the accused pleaded guilty to the acts as described in that same indictment.

95. The Judges therefore consider that Drazen Erdemovic, 23 years of age at the time of the events, did not then occupy a position of authority.

ii) Circumstances following the commission of the acts

a. Remorse

96. Drazen Erdemovic's feelings of remorse, which the Prosecutor believes are sincere[107], must be analysed in the light of the statements, his behaviour and the observations of the medical experts.

First, the Trial Chamber notes the consistency of the accused's various versions of the events. He never failed to admit his participation in the massacre at Srebrenica and unequivocally and spontaneously expressed his responsibility in the events. He thus declared during the Rule 61 hearing that "he wanted to testify because of his conscience"[108], and that he regretted what had happened[109]. Later, during the hearings of which he was the subject, he reiterated his regret for having participated in such crimes[110].

---

103 See *inter alia* statement of Jean-René Ruez at the hearing of 19 November 1996, morning, pp. 17, 33 of English provisional transcript. "Having to do with the points in his statement, there were many which we were able to corroborate and the verification that we carried out was what led to the confirmation of the events as they took place."

104 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*; Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, pp. 37-38 of English provisional transcript.

105 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 39 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 32-33 of English provisional transcript.

106 Closing Statement of Prosecution at the hearing of 20 November 1996, afternoon, p. 52 of English provisional transcript.

107 Prosecutor's Brief on Aggravating and Mitigating Circumstances, 11 November 1996, p. 15.

108 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 52 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*;

109 Exhibit no. 16: Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, p. 52 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*: "Because of all that happened, I did not want that."

110 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, pp. 36 and 41 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 37 and 39 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, afternoon, p. 68 of English provisional transcript: "I wish to say that I feel sorry for all the victims."

97. Furthermore, the Trial Chamber also takes note of the constantly reiterated and consistent expression of this remorse in the acts and the conduct of the accused. This was revealed both in his unwavering desire to surrender to the Tribunal to answer for his acts[111] and by the fact that he pleaded guilty which exposed him to conviction.

98. Last, the conclusions of the experts invoked by the Defence[112] point out that in the year following the events, Drazen Erdemovic suffered from post-traumatic shock disorder which took the form of depressions accompanied by a feeling of guilt *vis-à-vis* his behaviour during the war in the former Yugoslavia.

The feeling of remorse will be taken into account by the Trial Chamber in its determination of the penalty.

b. Co-operation with the Office of the Prosecutor

99. In the brief he submitted to the Trial Chamber[113] as well as during the hearing, on several occasions, the Prosecutor mentioned the accused's co-operation which he characterised as substantial[114], "full(y) and comprehensive(ly)"[115]. In his words, "Mr. Erdemovic has provided substantial assistance to the Office of the Prosecutor (...) his co-operation was and continues to be voluntary and unconditional"[116]. He made clear that no promise had been given by his Office to the accused in exchange for his co-operation[117].

The Prosecutor summarised the information which the accused provided. In this respect, he stated that Drazen Erdemovic had revealed to him the occurrence of four events[118]:

1. the summary execution of a Muslim civilian in Srebrenica on 11 July 1995;
2. the summary execution of a Muslim prisoner in Vlasenica;
3. details about the massacres at the Branjevo farm in Pilica where 1,200 civilians were killed;
4. details about the massacres in the public building in Pilica where about 500 civilians were killed.

The Prosecutor emphasised the fact that he had been unaware of those events before they were revealed by the accused[119]. In addition, he declared that this information permitted his Office to initiate on-site investigations which, to a large extent, confirmed the truth of what he had been told[120]. During the hearing, the Prosecution witness presented several exhibits which confirmed the occurrence of the events at the Branjevo farm[121] and which allowed him to establish the link between the events at the farm and the Pilica school. He thus affirmed that "had we not had Drazen Erdemovic's testimony, we would not have been able to discover through the investigation alone the place of execution of those prisoners who had been locked up in the Pilica school"[122].

In addition, as part of the investigations into the events which occurred after the fall of Srebrenica, the Prosecutor drew the attention of the Trial Chamber to the fact that "the information provided by Mr. Erdemovic expanded the geographic range in which these killings took place and corroborate other evidence that the Office of the Prosecutor has showing the executions of civilians from Srebrenica"[123]. These statements also allowed them to confirm that the events at Srebrenica were "well planned, systematic and organised"[124]. According to the statement of the witness from the Office of the Prosecutor, the information provided by the accused had "a significant impact for the investigation in terms of the logistics that were involved for this execution to be carried out"[125].

---

111 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 43-44 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, afternoon, pp. 68 of English provisional transcript; Statement of Jean-René Ruez at the hearing of 19 November 1996, afternoon, p. 54 of English provisional transcript.

112 Closing Statements of Defence at the hearing of 20 November 1996, afternoon, p. 60, English provisional transcript.

113 Prosecutor's Brief, 11 November 1996.

114 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 52, English provisional transcript.

115 Statement of Jean-René Ruez at the hearing of 19 November 1996, morning, p. 27, English provisional transcript.

116 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 52, English provisional transcript.

117 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 52, English provisional transcript.

118 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, pp. 52-53, English provisional transcript.

119 Statements of Prosecutor at the hearing of 19 November 1996, morning, p. 10, English provisional transcript.

120 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 53, English provisional transcript.

121 Exhibits nos. 4 and 5.

122 Statement of Jean-René Ruez at the hearing of 19 November 1996, morning, p. 24, English provisional transcript.

123 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 53, English provisional transcript.

124 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 53, English provisional transcript.

125 Statement of Jean-René Ruez at the hearing of 19 November 1996, morning, p. 16, English provisional transcript.

100. In respect of the quality of the information provided, the Prosecutor indicated that the accused had not only co-operated by providing details about the events but had also supplied the names of many of those responsible for what happened[126]. The Prosecutor *inter alia* emphasised the significance of the information about the Drina army corps and the structure of the Bosnian Serb army.

Last, during the Rule 61 hearings against Radovan Karadzic and Ratko Mladic, the accused also gave testimony deemed essential and which ended with the issuance of international warrants of arrest.

101. In consideration of everything presented above, the Trial Chamber considers that the accused's co-operation with the Office of the Prosecutor must play significantly in the mitigation of the penalty.

iii) Factors relating to personality

102. Drazen Erdemovic was born in 1971 in Tuzla Bosnia and Herzegovina in the Socialist Federative Republic of Yugoslavia. He is a Bosnian citizen and calls himself a Croat from Bosnia and Herzegovina[127]. This information was neither challenged nor contradicted.

103. Drazen Erdemovic completed eight years of primary education and three years of technical secondary school during which he trained as a locksmith[128].

104. His common law wife, a Serb from Bosnia and Herzegovina, is the mother of his son born on 21 October 1994[129].

105. According to his own testimony, he grew up in multi-ethnic surroundings in a non-nationalistic environment. Before the war, he had friends from all the groups - Serbs, Croats, Muslims - with whom he maintained cordial relations[130]. During his military service in the JNA (the army of the SFRY) starting in December 1990, he mingled with, among others, soldiers of Slovenian, Serbian, Hungarian and Albanian origin[131]. Furthermore, he says that he joined the 10th Sabotage Unit of the army of Republika Srpska rather than another unit because, in addition to Serbs, it had "a few Croats, a Slovene and a Muslim"[132]. He claims that during elections in Tuzla, he voted for a reformist party opposed to the war[133].

106. According to his own testimony, while serving in the HVO military police, Drazen Erdemovic allegedly helped Serbs to cross over into territory under Bosnian Serb control, an act which he said caused sanctions to be taken against him. After this, he allegedly left the HVO[134]. At the time of the events charged, he claims to have argued unsuccessfully with his superior in favour of a Muslim who claimed to have saved Serbs[135].

107. Witness X indicated that he knew Drazen Erdemovic while they were in the same HVO military police unit. The witness was apprehended by a Republika Srpska army unit in August 1994 and Drazen Erdemovic allegedly "saved his life" by intervening on his behalf so that he would be released[136].

108. Witness Y indicated having known Drazen Erdemovic since January 1993 as part of a multi-ethnic group of friends[137]. According to the witness' statement, the accused was a calm and cheerful man, "a vivacious person (...) always outgoing"[138] who "hated the war and (who) hated the army, but he simply had to do all of it"[139] and who was not a nationalist.

109. At the time of the events, Drazen Erdemovic was 23 years old.

---

126 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 53, English provisional transcript.

127 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, morning, p. 2 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 51 of English provisional transcript.

128 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, morning, p. 2 of English provisional transcript.

129 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 4 and 33 of English provisional transcript.

130 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 26 of English provisional transcript.

131 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 27-28 of English provisional transcript.

132 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 37 of English provisional transcript.

133 Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, pp. 3-4, 47 of English provisional transcript.

134 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, pp. 42-43, 46 of English provisional transcript.

135 Statement of Dra'en Erdemovi} at the hearing of 19 November 1996, afternoon, p. 40 of English provisional transcript; Statement of Dra'en Erdemovi} at the hearing of 20 November 1996, morning, p. 38 of English provisional transcript. Exhibit No. 16, Statement of Dra'en Erdemovi} at the hearing of 5 July 1996, pp. 47-48 of English transcript, cases no. IT-95-5-R61 and IT-95-18-R61, *The Prosecutor v. Karad'i} and Mladi}*.

136 Statement of Witness X at the hearing of 20 November 1996, morning, pp. 13-17 of English provisional transcript.

137 Statement of Witness Y at the hearing of 20 November 1996, morning, p. 22 of English provisional transcript.

138 Statement of Witness Y at the hearing of 20 November 1996, morning, p. 19 of English provisional transcript.

139 Statement of Witness Y at the hearing of 20 November 1996, morning, p. 20 of English provisional transcript.

110. The psychological and psychiatric reports cited by the Defence itself, in answer to the questions asked by the Judges in respect of the danger which the accused represents, his fitness to receive a penalty, and his prognosis for the future, clearly state that the accused "is not a dangerous person for his environment" and that his physical and mental condition is now normal.

111. All the above considerations lead the Trial Chamber to agree to give weight to the relative young age of the accused at the time of events, to his current family status, to the lack of danger he presents, to the gesture of help afforded to witness X and to a series of traits characterising a corrigible personality.

* *
*

At the conclusion of this analysis of all the facts brought to its attention and heard in the presence of both parties, the Trial Chamber considers that in view of the intrinsic gravity of his crime and the individual circumstances which surrounded its commission, it is appropriate to grant to Drazen Erdemovic the benefit of mitigating circumstances based on the following elements:

- his age at the time of the events and his subordinate level in the military hierarchy;
- the remorse he has shown, his desire to surrender to the International Tribunal, his guilty plea and his co-operation with the Office of the Prosecutor;
- the fact that he now does not constitute a danger and the corrigible character of his personality;

and the fact that the sentence pronounced will be served in a prison far from his own country.

C. Determination of the penalty

In his closing statement, the Prosecutor suggested that the Trial Chamber hand down a prison sentence not exceeding 10 years[140].

The Defence argued principally for a remission of the penalty and in the alternative a mitigation of the sentence down to one year[141].

The Trial Chamber considers that in light of all the legal and factual elements which it has reviewed and accepted, it is appropriate to sentence Drazen Erdemovic as punishment for the crime against humanity for which he admitted guilt to a prison sentence of 10 years with credit to be given for previous periods spent in custody, pursuant to Sub-rule 101(E) of the Rules.

140 Closing Statement of Prosecution at hearing of 20 November 1996, afternoon, p. 55, English provisional transcript.

141 Closing Statement of Defence at hearing of 20 November 1996, afternoon, pp. 64-65, 67, English provisional transcript.

IV. DISPOSITION

Trial Chamber I

FOR THE FOREGOING REASONS,

Delivering its decision publicly, *inter partes* and in the 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 of Drazen Erdemovic on 31 May 1996 to the count of crime against humanity, pursuant to Article 5(a) of the Statute,
NOTING the briefs of the parties,

HAVING HEARD the Closing Statements of the Prosecution and of the Defence,

IN PUNISHMENT of the said crime,

SENTENCES Drazen Erdemovic
born on 25 November 1971 at Tuzla,

To ten years' imprisonment; and

RULES that from the total duration of this sentence shall be deducted the periods during which the accused 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 English, the French text being authoritative.

This twenty-ninth day of November 1996
The Hague,
The Netherlands

Claude Jorda
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)