# A CASE STUDY: THE TRIBUNAL VS. DRAZEN ERDEMVOIC

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## INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to his authority under Article 18 of the Statute of the Tribunal charges:

## DRAZEN ERDEMOVIC

with a **CRIME AGAINST HUMANITY** or alternatively a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR,** as set forth below:

1. On 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. Resolution 819 was reaffirmed by Resolution 824 on 6 May 1993 and by Resolution 836 on 4 June 1993.

2. On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through until 11 July 1995, when the first units of the Bosnian Serb army entered Srebrenica.

3. Thousands of Bosnian Muslim civilians who remained in Srebrenica during this attack fled to the UN compound in Potocari and sought refuge in and around the compound.


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VOLUME 7 – 2021
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4. Between 11 and 13 July 1995, Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Potocari and in Srebrenica.

5. Between 12 and 13 July 1995, the Bosnian Muslim men, women and children who had sought refuge in and around the UN compound in Potocari were placed on buses and trucks under the control of Bosnian Serb military personnel and police and transported out of the Srebrenica enclave. Before boarding these buses and trucks, Bosnian Muslim men were separated from Bosnian Muslim women and children and were transported to various collection centres around Srebrenica.

6. A second group of approximately 15,000 Bosnian Muslim men, with some women and children, fled Srebrenica on 11 July 1995 through the woods in a large column in the direction of Tuzla. A large number of the Bosnian Muslim men who fled in this column were captured by or surrendered to Bosnian Serb army or police personnel.

7. Thousands of Bosnian Muslim men who had been either separated from women and children in Potocari or who had been captured by or surrendered to Bosnian Serb military or police personnel were sent to various collection sites outside of Srebrenica including, but not limited to a hangar in Bratunac, a soccer field in Nova Kasaba, a warehouse in Kravica, the primary school and gymnasium of "Veljko Lukic-Kurjak" in Grbavci, Zvornik municipality and divers fields and meadows along the Bratunac-Milici road.

8. Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police at divers' locations including, but not limited to a warehouse at Kravica, a meadow and a dam near Lazete and divers' other locations.

9. On or about 16 July 1995, DRAZEN ERDEMOVIC and other members of the 10th Sabotage Detachment of the Bosnian Serb army were ordered to a collective farm near Pilica. This farm is located northwest of Zvornik in the Zvornik Municipality.

10. On or about 16 July 1995, DRAZEN ERDEMOVIC and other members of his unit were informed that busloads of Bosnian Muslim civilian men from Srebrenica, who had surrendered to Bosnian Serb military or police personnel, would be arriving throughout the day at this collective farm.


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11. On or about 16 July 1995, buses containing Bosnian Muslim men arrived at the collective farm in Pilica. Each bus was full of Bosnian Muslim men, ranging from approximately 17-60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10th Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing DRAZEN ERDEMOVIC and members of his unit.

12. On or about 16 July 1995, DRAZEN ERDEMOVIC, did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians.

## THE ACCUSED

13. DRAZEN ERDEMOVIC was born on 25 November 1971 in the municipality of Tuzla. He was a soldier in the 10th Sabotage Detachment of the Bosnian Serb army. He is currently in custody in the UN detention facility in The Hague.

## GENERAL ALLEGATIONS

14. At all relevant times to this indictment, a state of armed conflict and partial occupation existed in the Republic of Bosnia and Herzegovina in the territory of the former Yugoslavia.

15. DRAZEN ERDEMOVIC is individually responsible for the crime alleged against him in this indictment pursuant to Article 7(1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 3 and 5 of the Statute of the Tribunal.


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## CHARGES

**COUNTS 1-2**

**(CRIME AGAINST HUMANITY)**

**(VIOLATION OF THE LAWS OR CUSTOMS OF WAR)**

16. By his acts in relation to the events described in paragraph 12, DRAZEN ERDEMOVIC committed: **Count 1: A CRIME AGAINST HUMANITY** punishable under

Article 5(a)(murder) of the Statute of the Tribunal. Alternatively

**Count 2: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR** punishable under

Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

## FACT

1. Drazen Edre at his initial appearance on 31 May 1996, pleaded guilty to the count of a crime against humanity.

2. At the close of the initial appearance, the Trial Chamber ordered a psychiatric and psychological evaluation of the Appellant. The panel of three experts filed its report on 26 June 1996, concluding that the Appellant was suffering from post-traumatic stress disorder and that his mental condition at the time did not permit his trial before the Trial Chamber

3. Consequently, the Trial Chamber[i] postponed the pre-sentencing hearing and ordered a second evaluation of the Appellant to be submitted in three months' time. This second report was filed on 17 October 1996 and concluded that the Appellant's condition had improved such that he was now "sufficiently able to stand trial"[ii] .

4. In the meantime, the Appellant had been cooperating with the investigators of the Office of the Prosecutor and, in July 1996, testified at the hearing pursuant to Rule 61 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") in the case of Prosecutor v.


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VOLUME 7 – 2021
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Radovan Karad`i} and Ratko Mladi}[iii] . The transcript of the Appellant's testimony in that case was added to the trial record with the consent of the parties[iv] .

5. The Trial Chamber held a pre-sentencing hearing on 19 and 20 November 1996, for which it had asked the parties to make submissions on "the general practice regarding prison sentences and mitigating and aggravating circumstances"[v] .

6. In his testimony before the Trial Chamber, the Appellant described in detail the facts alleged in paragraphs 9 to 12 of the Indictment

7. The Prosecutor called one witness, Jean-René Ruez, an investigator in the Office of the Prosecutor, who testified as to the locations of several execution sites disclosed to him by the Appellant, information which was corroborated by the investigations of the Office of the Prosecutor. In particular, he testified that investigations had confirmed the existence of a mass grave at the Branjevo farm near Pilica, where the Appellant claimed he committed the crime in question. Investigations also confirmed that a massacre may have occurred in a public building in Pilica where, according to the Appellant's testimony, about 500 Muslims were executed on or about 16 July 1995.

8. The Trial Chamber, having accepted the Appellant's plea of guilty to the count of a crime against humanity, sentenced the Appellant to 10 years' imprisonment. This term of imprisonment was imposed by the Trial Chamber having regard to the extreme gravity of the offence and to a number of mitigating circumstances.

***(a) The extreme gravity of the crime***

The Trial Chamber took the view that the objective gravity of the crime was such 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".

It also took into account the subjective gravity of the crime, which was underscored by the Appellant's significant role in the mass execution of 1,200 unarmed civilians during a five-hour period, in particular, his responsibility for killing between 10 and 100 people.


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It is to be noted that the Trial Chamber also took the view that no consideration could be given to any aggravating circumstances when determining the sentence to be imposed for these crimes because of the extreme gravity per se of crimes against humanity.

***(b) The mitigating circumstances***

As regards the mitigating circumstances contemporaneous with the crime, that is the "state of mental incompetence claimed by the Defence and the extreme necessity in which [the Appellant] 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 Trial Chamber considered that these were insufficiently proven since the Appellant's testimony in this regard had not been corroborated by independent evidence[vi] .

With regard to the mitigating circumstances which followed the commission of the crime, the Trial Chamber took into account the Appellant's feelings of remorse, his desire to surrender to the International Tribunal, his guilty plea, his cooperation with the Office of the Prosecutor, and "the fact that he now does not constitute a danger and the corrigible character of his personality".

The Trial Chamber also accepted, as mitigating factors, the Appellant's young age, 23 years at the time of the crime, and his low rank in the military hierarchy of the Bosnian Serb army.

## THE APPEAL

***A. Grounds of Appeal***

9. The Appellant, in the Appellant's Brief filed by Counsel for the Accused Dra`en Erdemovi} against the Sentencing Judgement, filed on 14 April 1997 ("Appellant's Brief"), asked that the Appeals Chamber revise the Sentencing Judgement:

(a) by pronouncing the accused Dra`en Erdemovic guilty as charged, but excusing him from serving the sentence on the grounds that the offences were committed under duress and without the possibility of another moral choice, that is, in extreme necessity, and on the grounds that


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he was not accountable for his acts at the time of the offence, nor was the offence premeditated, or, in the alternative,

(b) "by upholding the Appeal and, taking into consideration all the reasons stated in the Appeal and the mitigating circumstances stated in the Sentencing Judgement, [by revising] the Sentencing Judgement by significantly reducing the sentence of the accused Dra`en Erdemovi."[vii]

10. The grounds of appeal invoked by the Appellant can be summarised as follows:

(a) The Trial Chamber committed an error of fact occasioning a miscarriage of justice when it asserted in the Sentencing Judgement that "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 10thSabotage Unit"[viii], of which the Appellant was a member[ix]. There is no evidence that the 10th Sabotage Unit participated in this execution.

(b) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in believing the Appellant's statement "that he participated in the shooting of Muslims, but in not believing his assertion that he was acting under duress because of an uncompromising order from his military superiors, and that the other moral choice for him was death, his own and that of his family, so that his actions were not voluntary but the will of his commanding officers". In particular, the Trial Chamber erred in requiring corroboration of the Appellant's assertion that he was acting under duress, although it accepted his uncorroborated statement that he participated in the shooting of Muslims. Thus, the Trial Chamber's assessment of the Appellant's testimony "is both inconsistent and unfair"[x] .

(c) The Trial Chamber erred in law by not accepting the Appellant's argument that he committed the offence whilst under duress or in a situation of extreme necessity and, in particular, "that the order given to the accused Erdemovic on 16 July 1995 by his superior officer had such an effect on his will that he objectively lost control over his behaviour and his personality was shattered"[xi], such that the accused had no 'moral alternative' but to commit the offence "contrary to his will and intention". In light of this, the Appellant "should have been pronounced guilty of the acts committed, but a sentence should not have been handed down"33 because of the law regarding a soldier's responsibility in the execution of superior orders, the duress exerted on the Appellant and the absence of moral choice available to him when he


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committed the offence, the credibility of his testimony, and the fulfilment of all the requirements of "extreme necessity as a generally accepted category in national legislations [and] international criminal law"34 .

(d) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in finding that "no conclusions as to the psychological condition of the accused at the moment of the crime can be drawn"[xii] from the two reports of the expert medical commissions on the psychiatric and psychological evaluation of the accused, submitted to the Trial Chamber on 26 June and 17 October 1996, nor from the accused's testimony[xiii] . Further, to the extent that there may have been insufficient evidence of the Appellant's mental state at the time the offence was committed, it was incumbent on the Trial Chamber, in the interests of justice, to request the expert panel to make such a determination and the Trial Chamber's failure to do so constitutes an error within the meaning of Article 25 of the Statute of the International Tribunal ("Statute").

11. The Prosecution's position in relation to the above grounds of appeal as set out in the Respondent's Brief filed on 28 April 1997 ("Respondent's Brief") and in the appellate hearings is, in brief, as follows:

(a) On the first ground, the Prosecution asserts that the Trial Chamber did not state at any point in the Sentencing Judgement that the Appellant had participated in the execution of 500 Muslims at the Pilica public building in the Zvornik municipality, that the Trial Chamber referred to this event as part of its description of the events that followed the fall of the Srebrenica enclave, and further that this incident was considered by the Trial Chamber "in order to verify the authenticity of the Appellant's testimony, not as a means of aggravating his culpability"[xiv]. Thus, according to the Prosecution, the Trial Chamber did not take this incident into account as an aggravating circumstance in the determination of the sentence against the Appellant.

(b) On the second ground, the Prosecution asserts that the assessment of the probative value of the evidence is subject to broad discretionary appreciation of the Trial Chamber which it exercised in a fair and consistent manner. In particular, the Prosecution submits that when the Trial Chamber stated that it required corroboration of the Appellant's statement by independent evidence[xv], it was not stating an evidentiary rule but rather was expressing its "intimate conviction" as to its satisfaction with respect to the state of the evidence[xvi] .


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(c) On the third ground, the Prosecution submits that the Trial Chamber "was correct in holding that the Appellant did possess freedom of moral choice in the execution of Muslims at Branjevo farm and that his testimony did not satisfy the relevant elements for granting mitigating circumstances for extreme necessity arising from duress and superior orders. Further, the Trial Chamber did consider superior orders in mitigation of the sentence because of the subordinate level of the Appellant in the military hierarchy"[xvii] .

(d) On the fourth ground, the Prosecution asserts that the burden was on the Appellant to adduce evidence in support of the claim that at the time of the crime he was suffering from diminished mental capacity. Since the Appellant did not submit any such evidence, the Prosecution claims, it is inappropriate for him to invoke an error of fact or of law as it was not a matter for the Trial Chamber to obtain such evidence[xviii] .

(e) Finally, the Prosecution argues that the 10-year prison sentence imposed by the Trial Chamber is not manifestly excessive so as to justify interference by the Appeals Chamber, "having regard to the gravity of the offense, the circumstances of the Appellant's participation in the crime, and the helplessness of the victims of the crime"[xix]. In particular, the Prosecution submits that the Appellant has not shown that the severity of the penalty handed down by the Trial Chamber is disproportionate in relation to other sentences handed down for this type of offence.

***B. Application to Introduce Additional Evidence***

12. The Appellant, in the Appellant's Brief, made a proposal that the Appeals Chamber "obtain the following additional evidence for the appeals hearing", ostensibly pursuant to Rule 115 of the Rules, by: (a) appointing "a distinguished professor of ethics who shall give a scientific opinion and position regarding the possibility of the moral choice of an ordinary soldier who is faced with committing a crime when following the orders of a superior at time of war"; and

(b) receiving an additional mental evaluation of the accused by the same panel of experts which conducted the psychological examination prior to the sentencing hearing, this time on the question of the "mental condition of the accused Erdemovic at the time the offence was committed, in line with the reasons stated in the appeal"[xx]

13. Rule 115 reads:


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(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. . . .

(B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Having regard to the provisions of Rule 115, the Appeals Chamber would reject the Appellant's motion to adduce the additional evidence for the following reasons. The evidence is not, in the view of the Appeals Chamber, relevant for the determination of this appeal and there is, therefore, no need to authorise the presentation of the additional material in the interests of justice. In any event, if the Defence believed that the evidence was of assistance to its case, it should have brought this evidence to the attention of the Trial Chamber for the purposes of the Sentencing Hearing. The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing. Further, the Appellant has filed no affidavit or other material to indicate the substance of any statement which either the "distinguished professor of ethics" or the panel of experts would present to the Appeals Chamber. So much then for this application.

## DISPOSITION

### THE APPEALS CHAMBER

(1) Unanimously **REJECTS** the Appellant's application that the Appeals Chamber should acquit him;

(2) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **REJECTS** the Appellant's application that the Appeals Chamber should revise his sentence;

(3) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **FINDS** that the guilty plea entered by the Appellant before Trial Chamber I was not informed;

(4) By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) **FINDS** that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings and that,


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**VOLUME 7 – 2021**
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consequently, the guilty plea entered by the Appellant before Trial Chamber I was not equivocal;

(5) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **HOLDS** that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to replead in full knowledge of the nature of the charges and the consequences of his plea; and

(6) **INSTRUCTS** the Registrar, in consultation with the President of the International Tribunal, to take all necessary measures for the expeditious initiation of proceedings before a Trial Chamber other than Trial Chamber I.

## THE SENTENCING JUDGEMENT

### *1. The guilty plea*

In accordance with Rule 62 bis of the Rules of Procedure and Evidence (RPP) the Trial Chamber first considered whether the guilty plea re-entered by the Accused had been made voluntarily, was not equivocal and whether there was a sufficient factual basis for the crime and the Accused's participation in it. It concluded that it "was satisfied with the guilty plea and convicted the accused accordingly".

### *2. The evidence*

The Trial Chamber then reviewed the evidence before it and eventually accepted "as fact the version of events which the parties have submitted". In particular, the Judges noted that "the accused agreed that the events alleged in the indictment were true and the Prosecutor agreed that the accused's claim to have committed the acts in question pursuant to superior orders and under threat of death was correct".

### *3. The aggravating factor*

The accused was part of an execution squad which murdered hundreds of Bosnian Muslim civilian men between the age of 17 and 60, and himself killed approximately 100 persons: "No matter how reluctant his initial decision to participate was, he continued to kill for most of that


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day. The Trial Chamber considers that the magnitude of the crime and the scale of the accused's role in it are aggravating circumstances".

***4. The mitigating factors:***

Personal circumstances of the accused: The Trial Chamber first considered "the personal circumstances" of the accused, namely his age ("he is now 26 years old...he is reformable."), his family situation ("the accused has a wife, who is of different ethnic origin, and the couple have a young child who was born on 21 October 1994..."), his background ("he was a mere foot soldier whose lack of commitment to any ethnic group in the conflict is demonstrated by the fact that he was by turns a reluctant participant" in the armed forces of the various parties to the conflict), and his character ("the accused is of an honest disposition; this is supported by his confession and consistent admission of guilt."). The admission of guilt: The Trial Chamber then turned to "the admission of guilt" and "commended" it: "an admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth. The remorse: The Judges also considered "the remorse" consistently expressed by the accused. The cooperation with the Prosecutor: The Judges finally recognised the degree of "cooperation with the Office of the Prosecutor": it "accordingly took note" of the Prosecutor's assessment that "the collaboration of Dra`en Erdemovic has been absolutely excellent". "These are word rarely spoken by the Prosecution of an accused".

5. Duress Following the Appeals Chamber's ruling that "duress does not afford a complete defence.", the Trial Chamber took it in consideration "only by way of mitigation". It concluded that "the evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.".

6. The Plea Agreement between the Parties One recalls that on 8 January 1998, on the eve of the re-plea by the accused and of the pre-sentencing hearing, the Defence and the Prosecution filed a Joint Motion for consideration of Plea Agreement". "This is the first time that such a document has been presented to the International Tribunal" noted the Chamber: "whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused".


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7. The sentencing policy of the Chamber The sentence determined by the Trial Chamber has taken into account the circumstances of the killings, looking in particular at the degree of suffering to which the victims of the massacres were subjected before and during the killings, the means used by the accused to kill and his attitude at the time. The Judges concluded as follows: "The degree of suffering of the victims cannot be overlooked. But the accused took no perverse pleasure from what he did". The Judges also decided "to give appropriate weight to the cooperative attitude of the accused", stating that "understanding of the situation of those who...confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward. The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. On the other hand, the International Tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia and it must not lose sight of the tragedy of the victims and the sufferings of their families".

## JUDGE SHAHABUDDEEN'S SEPARATE OPINION

Judge Shahabuddeen appended to the Sentencing Judgement a Separate Opinion in which he states the following: "I have dutifully joined in giving effect to the remit on the basis of the propositions of law [set out by the Appeals Chamber] ....I must also indicate that I desire to preserve my individual professional position against risk of interference that I have acquiesced in those propositions of law by now joining in applying them".

The propositions of law at stake concern "the comparative seriousness of a crime against humanity and of a war crime in relation to the same act, as well as the question whether, in international law, duress is a complete defence to a charge for killing innocent persons...".

Judge Shahabuddeen also raised two other matters concerning "certain practical difficulties which I have experienced in assisting with the implementation of the remit", namely: "how


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should the remit be understood as to the exact way in which this Trial Chamber should proceed to discharge its duty to confirm that the accused understands the indictment?" and "how is effect to be given to the remit as regards its holding on the comparative seriousness of the two offences in question bearing in mind that this Trial Chamber has, and could have, only one conviction before it?".

Having discussed these points, Judge Shahabuddeen concludes as follows: "the Trial Chamber has sought to take account of the holding of the Appeals Chamber, the effect of which is that today's sentence has to be less than that for a crime against humanity in respect of the same acts. The sentence now imposed is in fact much less than that previously awarded in respect of the crime against humanity, and this for a number of reasons; but I myself cannot with confidence say to what extent those reasons reflect that holding".

## TRIAL CHAMBER JUDGMENT

In determining the appropriate sentence for Drazen Erdemovic, the Trial Chamber has based its judgement on a line of reasoning in law and in fact which it will now summarise in broad terms, recalling that the judgement in its entirety will be available to the public, in the authentic version (i.e. in French), immediately after this hearing. The operative provisions of the judgement, including the sentence pronounced, will be read at the end of this summary, the accused being present in accordance with Rule 101(D) of the Rules of Procedure and Evidence.

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

It then outlined the legal framework of its jurisdiction, identifying the law and principles it deems applicable regarding crimes against humanity. Lastly, it analyses the acts with which the accused is charged, in particular from the angle of the mitigating circumstances he invoked in his defence.


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

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

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

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

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

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

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

While justification on account of moral duress and the state of necessity pursuant to an order from a superior may not be excluded absolutely, its conditions of application are especially strict. The acts invoked, if proven, must be assessed according to very rigorous criteria and


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appreciated in concreto, and involve in particular the lack of moral choice by the accused when placed in a situation where he could not resist.

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

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

***1. Applicable Law and Principles***

The sentence delivered in this case is the first sentence to be delivered by the International Tribunal and relates to a crime against humanity. The Trial Chamber was therefore confronted with legal issues which it had to resolve before proceeding to the actual consideration of the gravity of the acts and the circumstances of the accused. In the logical order in which they are addressed, these issues are:

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

2. The principles governing sentencing;

3. Enforcement of the sentence.

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

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

In addition to the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, which will be addressed below, the texts provide no indication as to the term of imprisonment incurred for a crime against humanity. The Trial Chamber has therefore


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identified the characteristics specific to such crimes and to the penalties attached thereto under international as well as national law.

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

As to recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, as referred to in the Statute, the Trial Chamber notes that crimes against humanity are not strictly speaking found in the provisions of the Yugoslavian code, which provides for "genocide and war crimes against the civilian population". The case-law of the courts of the former Yugoslavia is hardly significant, in particular on account of the small number of judgements. Accordingly, the Trial Chamber considers that the general practice regarding prison sentences in the courts of the former Yugoslavia is not binding on it. The Judges consider even that making recourse to that practice the sole standard for determining the scale of penalties would, owing to the principle nullum crimen nulla poena sine lege sometimes invoked, be tantamount to disregarding the criminal character that is universally attached to crimes against humanity, as such crimes have for a long time been part of the international legal order, and the harshest penalties attached to them. Consequently, the Judges merely "consulted" that practice.

***2. Principles governing sentencing***

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

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


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VOLUME 7 – 2021
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According to the terms of the applicable texts, these factors are primarily the gravity of the offence, the personal circumstances of the accused, and the existence of aggravating or mitigating circumstances, including substantial co-operation of the accused with the Prosecutor.

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

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

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

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

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

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

In his report the Secretary-General of the United Nations addressed the issue of superior orders in connection with duress, considering that the order of a government or superior may be considered "in connection with other defences such as coercion or lack of moral choice". The


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Trial Chamber will content itself with that position provided the elements prone to characterise a state of necessity or duress as argued by the accused are proven by him.

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

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

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

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

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

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

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

The purposes and functions of national criminal systems are often hard to identify precisely; they are multiple and have moreover been written to a large extent into the Criminal Code of the Federal Republic of Yugoslavia. The competence of the International Tribunal differs


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fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes.

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

**SENTENCES** Drazen Erdemovic born on 25 November 1971 at Tuzla, to 5 years' imprisonment.

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## ENDNOTES

[i] Sentencing Judgement, supra n. 2, para. 5
[ii] Ibid., para. 8
[iii] Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Radovan Karad`i} and Ratko Mladi}, Case Nos. IT-95-5-R61, IT-95-18-R61, T.Ch. I, 11 July 1996.
[iv] Trial Transcript, supra n. 5, 19 Nov. 1996, p. 57
[v] Sentencing Judgement, supra n. 2, para 9.
[vi] "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."
[vii] Appellant's Brief, The Prosecutor v. Dra`en Erdemovic, Case No. IT-96-22-A, 14 Apr. 1997, p. 24 ("Appellant's Brief").
[viii] Sentencing Judgement, supra n. 2
[ix] Appellant's Brief, supra n. 25, p. 4
[x] Appellant's Brief in Reply, The Prosecutor v. Dra`en Erdemovi}, Case No. IT-96-22-A, 21 May 1997, para. 2
[xi] Appellant's Brief, supra n. 25
[xii] Sentencing Judgement, supra n. 2
[xiii] Appellant's Brief, supra n. 25, pp.
[xiv] Respondent's Brief, The Prosecutor v. Dra`en Erdemovi}, Case No. IT-96-22-A, 28 Apr. 1997, s. B.1.2.
[xv] Sentencing Judgement, supra n. 2, para. 87.
[xvi] Transcript, The Prosecutor v. Dra`en Erdemovi}, Case No. IT-96-22-A, 26 May 1997, pp. 130 – 132 ("Appeals Transcript").


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[xvii] Respondent's Brief, supra n. 37, s. B. 3.
[xviii] Appeals Transcript, supra n. 41, p. 118
[xix] Respondent's Brief, supra n. 37, s. B. 5.
[xx] Appellant's Brief, supra n. 25, pp. 23-24.

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