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DRAŽEN ERDEMOVIĆ SENTENCED TO 5 YEARS OF IMPRISONMENT

“ The Accused is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so”

On Thursday 5 March 1998, Trial Chamber II-ter (consisting of Judge Mumba, presiding, Judge Shahabuddeen and Judge Wang) handed down its Sentencing Judgement in the case of Dražen ERDEMOVIĆ.

The Chamber unanimously convicted the Accused, who pleaded guilty to a charge of a Violation of the laws or customs of war (“war crime”), to a term of imprisonment of 5 years.

The Accused has a right of appeal which will expire in fifteen days from today.

The Registrar of the International Criminal Tribunal for the former Yugoslavia has been directed to make arrangements with one of the States who have entered an Agreement for the service in their prisons of the penalties imposed by the International Tribunal.

The time spent by the Accused in the custody of the ICTY from 28 March 1996 (the day on which Judge Riad signed an order for the transfer of the Accused from the territory of the Federal Republic of Yugoslavia to the custody of the ICTY) to the day of his transfer to the State where the sentence will be served, will be deducted from the imprisonment term.

Background on the proceedings to date

On 31 May 1996 Dražen ERDEMOVIĆ appeared before a Trial Chamber and entered a GUILTY plea on the count of Crimes against humanity.

On 29 November 1996, he was convicted to 10 years imprisonment.

On 23 December 1996, the Accused appealed against the Sentencing Judgment, seeking either acquittal or revision of the sentence.

On 7 October 1997, the Appeals Chambers rejected the applications for acquittal or revision of the sentence but ordered that the case be “remitted to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead” : a majority of four Judges of the Appeals Chamber (which consists of five Judges) found that the initial guilty plea entered by the Accused in May 1996 “was not informed” in that the Accused “did not understand the nature of the charges against him and the distinction between the alternative charges (...) In electing to plead guilty to a crime against humanity instead of a war crime the Appellant pleaded guilty to the more serious offense and the one entailing a heavier penalty”.

On 14 January 1998 Dražen ERDEMOVIĆ appeared before Trial Chamber II-ter and pleaded GUILTY to a charge of a Violation of the laws or customs of war (“war crimes”).

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International
Criminal Tribunal
for the Former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

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 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 footsoldier 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 Dražen Erdemović has been absolutely excellent"*. *"These are words 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”*.

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 SHAHABUDEEN’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 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”*.
