(c) Case Analysis

Dražen Erdemović: The International Criminal Tribunal for the Former Yugoslavia in Action

Keywords: defences; international criminal law; International Criminal Tribunal for the former Yugoslavia; sentencing.

1. INTRODUCTION

The first person to be sentenced by the United Nations *ad hoc* International Criminal Tribunal for the former Yugoslavia (Tribunal) was Dražen Erdemović,[1] a member of the Bosnian Serb Army who had pleaded guilty to one count of a crime against humanity - murder - and another of violations of the laws and customs of war - murder.[2] Erdemović was a soldier in the 10th Sabotage Detachment of the Bosnian Serb army and the charges against him arose in connection with the slaughter of Bosnian Muslim civilians in the United Nations 'safe areas' of Srebrenica and Potocari.

2. THE CHARGES

2.1. The offences

Erdemović was a Croat originally serving in the military police of the Yugoslav National Army. When the war broke out in the Republic of Bosnia-Herzegovina he was called up to serve in that country's army. Some three months later, with the creation of the Croat Defence Council he was summoned by that body and assigned to the police. He then moved to Tuzla in Bosnia, which was his birthplace. There he joined the Bosnian

1. Prosecutor *v.* Dražen Erdemović, Sentencing Judgment, Case No. IT-96-22-T, 29 November 1996 (hereinafter Judgment).
2. The specifics of the charges are set out in the Indictment, ICTY Doc. CC/PIO/081-E, 29 May 1996.

Leiden Journal of International Law 10: 363-381, 1997.

Serb Army of the Republika Srpska, the name assumed by the authority representing the Bosnian Serbs engaged in conflict with the Bosnian Government. As such, regardless of his nationality, from the point of view of the Bosnian authorities he was engaged in a rebellious non-international conflict and if captured would have been liable to trial in accordance with Bosnian law. However, he was arrested in the Federal Republic of Yugoslavia and held for investigation for "the criminal act of war crime against the civilian population" under the Yugoslav Criminal Code. Here, it should be mentioned that national criminal codes will often use the term 'war crime' to cover any offence committed during conflict, without regard to the technical meaning of the term. At the time of his arrest, the Prosecutor of the Tribunal was investigating the alleged massacre of thousands of Bosnian Muslims following the Bosnian Serb take-over of Srebrenica, which had been established as a safe area by the Security Council in 1993.[3] Wishing to investigate Erdemović's activities on which the Yugoslav accusations were based and to question him as a witness to these events, the Prosecutor requested his transfer from the Yugoslav authorities, who complied. As a result of this examination Erdemović was indicted for a crime against humanity and a violation of the laws and customs of war, the former being an offence under Article 5(a) of the Tribunal's Statute,[4] and the latter one under Article 3 common to the four Geneva Conventions of 1949,[5] covering non-international conflicts even though there is nothing expressed in this or any other article of the Conventions extending personal criminal liability to those offending against the Article's prohibitions. Moreover, the offences listed in common Article 3 are made subject to the jurisdiction of the Tribunal by virtue of Article 3 of its Statute.

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3. UN Doc. S/RES/819 (1993); *see also* S/RES/824 & 836 (1993).
4. Statute of the International Criminal Tribunal for the former Yugoslavia, originally published as an annex to the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993) and adopted pursuant to Security Council Resolution 827 of 25 May 1993.
5. Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III); and Geneva Convention Relative to the Prosecution of Civilian Persons in Time of War (Geneva Convention IV), 75 UNTS 287 (1949).

2.2. The accused's plea

Erdemović pleaded guilty to the crimes against humanity charge and the Trial Chamber dismissed the "violation of the laws or customs of war charge", which had been lodged as an alternative. This decision of the Trial Chamber lends support to the argument that if a charge of 'crimes against humanity' is proven, there is little or no reason to proceed with any other charge, since 'crimes against humanity' may be considered to be 'wholesale' in character, involving within itself all other serious breaches of the law of armed conflict.

The indictment against him arose from allegations that he had been involved in direct participation as a member of a firing squad in the murder of Bosnian Muslim refugees who had taken shelter in the Srebrenica 'safe area' and the similarly 'safe' compound at Potocsri. While awaiting the delivery of judgment and sentence, Erdemović, perhaps hoping for leniency based on his cooperation, agreed to give evidence in the hearings relating to the affirmation of the indictments against Radovan Karadžić and General Ratko Mladić and the issuance of international arrest warrants against them.[6] In some ways this is reminiscent of the decision not to execute Oberleutnant Eck after he had been sentenced to death for the sinking of *SS Peleus* and the slaughter of surviving members of its crew,[7] until after he had given evidence against Admirals Doenitz and Raeder before the International Military Tribunal at Nuremberg.

3. ERDEMOVIĆ'S CONTENTIONS

According to his evidence, Erdemović was never a willing member of any of the firing squads involved, and on occasion tried to save particular individuals, since "I was sorry for those people. I simply had no reason to shoot at those people. They had done nothing to me." In fact:

> I first resisted and Brano Gojkovic [- another member of his squad -] told me if I was sorry for those people that I should line up with them; and I know

6. Prosecutor *v.* Radovan Karadžić and Ratko Mladić, Review of Indictment pursuant to Rule 61, Cases No. IT-95-5-R61 & No., IT-95-18-R61, 11 July 1996 (hereinafter Karadžić and Mladić Rule 61).
7. J. Cameron, The Peleus Trial (1945).

> that this was not just a mere threat but that it could happen, because in our unit the situation had become such that the commander of the group has the right to execute on the spot any individual if he threatens the security of the group or in any other way he opposes the Commander of the group appointed by the Commander Milorad Pelemis.[8]

Erdemović also stated that because of his sympathy for some of the refugees he had been reduced in rank and after returning from the killings had himself been shot by a member of the 10th Sabotage Unit who participated in the killings:

> my assumption is that someone, one of those men [...] had conveyed to the Commander of my unit my behaviour at the farm [where the slaughter had taken place] and that probably they had reached the conclusion that I just could not stand it and that, perhaps, I do not know, that I might do what I am doing today, that is, testifying against it.[9]

In answer to a direct question by the presiding Judge as to his reasons for testifying, Erdemović stated:

> I wanted to testify because of my conscience, because of all that happened because I did not want that. I was simply compelled to, forced to, and I could choose between my life and those people. The fate of those people was decided by somebody holding a much higher position than I did. As I have said already, what really got me, I mean, it has completely destroyed my life and that is why I testified.[10]

4. THE ISSUE OF MITIGATION

One might have assumed that, had the Tribunal believed in the complete integrity of Erdemović concerning the fears that he had that he might himself be executed, and the honesty of the reason he put forward for testifying, due attention would have been given to Principle IV of the statement adopted by the International Law Commission of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the

8. Evidence of Dražen Erdemović, 5 July 1996, during Karadžić and Mladić hearing, Karadžić and Mladić Rule 61, *supra* note 6, at 40.
9. *Id.*, at 51.
10. *Id.*, at 52.

Judgment of the Tribunal:[11]

> The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

The question therefore arises whether Erdemović really had any moral choice and to what extent the Tribunal in assessing sentence took this into account. Reference must, therefore, be made to the arguments put forward by the Prosecutor and defence counsel concerning aggravating and mitigating factors. While the Prosecutor considered the killing of some 1200 persons, in which Erdemović participated, a "crime of enormous proportions" and his role to have been "significant", he nevertheless suggested, in considering the significance of his acting under orders, that "his low rank [...] at the time of commission of the offences suggests a greater pressure on him than on one holding a higher rank".[12] Interestingly, the Prosecutor pointed out that the accused did not put forward duress as a ground for his actions; however, "the coercive elements described by [him], while not amounting to a defence, should be given consideration as a factor in mitigation of the sentence", as should also the fact that

> [p]rior to his detention by the Yugoslav Government, [he] had expressed a strong desire to surrender to the authorities here in The Hague. He even affirmed such interest in light of the fact that surrendering to the Tribunal would most likely result in criminal liability for his participation in the activities outside Srebrenica.[13]

The Prosecutor also pointed out by way of mitigation that Erdemović had confessed and pleaded guilty, had fully cooperated with the Prosecutor's office and given evidence against Karadžić and Mladić, even though no promise of any kind had been given to him in this regard. He also considered it important that the accused had shown great remorse for what he had done, so that while

> [h]is role in the mass execution of innocent civilians [...] was significant [,...] it is the view of the Prosecutor that by virtue of the factors of mitigation set forth in this brief, his sentence should be substantially mitigated.[14]

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11. 1950-II YILC 374.
12. Prosecutor's Brief on Aggravating and Mitigating Factors, Case No. IT-96-22-T, 11 November 1996, at 3.
13. *Id.*, at 4.
14. *Id.*, at 7.

Since Article 24(1) of the Tribunal's Statute requires the court "in determining the terms of imprisonment [to] have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia",[15] and this requirement is repeated in Rule 101(B)(iii) of the Rules of Procedure and Evidence,[16] defence counsel drew attention to Article 142 of that country's Criminal Code[17] which deals with war crimes against the civilian population. In his view, this crime is equivalent to the crime against humanity with which Erdemović was charged by the Tribunal, and which was then pending against him in Yugoslavia. Under Article 142 a prison sentence of from five to 20 years is prescribed, with a general maximum of 15. Counsel also thought it important to refer to the Code's provisions on 'extreme necessity', but reserved his comments with regard to mitigation for a later date.

In presenting its 'Sentencing Judgment' the trial chamber dealt with the voluntary character of Erdemović's guilty plea and went on to comment that freedom to offer such a plea was not only the right of the accused, but also was "formally acknowledged in the procedures of the International Tribunal and [is] established in common law legal systems",[18] recognizing the right of the accused to choose his own defence strategy. The only comment that need be made in this connection is that the procedure with regard to the preparation and particularly judicial review of the indictment in accordance with Articles 18 and 19 of the Statute hardly conform to the practice of common law jurisdictions. Equally, Rule 89 of the Tribunal's Rules of Procedure and Evidence is hardly consistent with normal common law practice. It provides:

> [i]n cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
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> A Chamber may admit any relevant evidence which it deems to have probative value.
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> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

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15. Statute, *supra* note 4, at Art. 24.
16. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, as amended.
17. Penal Code of the SFRY, introduced on 28 September 1976, published *in* Official Gazetter SFRY, No. 44/76, on 8 October 1976, entered into force on 1 July 1977.
18. Judgment, *supra* note 1, para. 13.

> A Chamber may request verification of the authenticity of evidence obtained out of court.[19]

In so far as the issue of superior orders is concerned, the Tribunal reviewed post-World War II cases[20] and stated:

> 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 to obey [*sic*]. This duty to disobey could only recede in the face of the most extreme duress.
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> [...] 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, 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.
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> With regard to a crime against humanity, [...] 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.
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> [...] 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 [...] be taken into account at the same time as the other factors in the consideration of mitigating circumstances.[21]

While one may understand the reasons for the Tribunal considering that the plea of superior orders as a mitigating factor is only one of many factors to be assessed, it is not quite so clear why the idea that 'a crime against humanity' is so substantially different from a similar crime - murder - under 'ordinary law', and should in any way alter the validity of the defences available to an accused. There is some substance to the argument that if the plea of duress under orders is adequate for murder under an ordinary system of criminal law, the same should prevail regardless of the system of law that is being applied. Does it really affect the person of the accused and the validity of his defence that 'humanity as a whole' might

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19. Rule 89, Rules of Procedure and Evidence, *supra* note 16.
20. *See, e.g.*, Y. Dinstein, The Defence of 'Obedience to Superior Orders' *in* International Law (1965); L.C. Green, Superior Orders in National and International Law (1976); and N. Keijzer, Military Obedience (1978).
21. Judgment, *supra* note 1, paras. 18-20.

consider its interests to have been affected? In any case, given the facts it is well-nigh impossible to assume that Erdemović ever had 'humanity' in mind at any time during his service or his participation in the shootings.

5. CRIMES AGAINST HUMANITY

Perhaps one of the most significant legal statements to be found in the judgment is its analysis of crimes against humanity, for this is the first occasion on which an international tribunal has had occasion to deal with the matter since the end of World War II, and the exposition given by the court goes somewhat further than is normally found in the literature, although, to some extent, it accords with what is increasingly becoming state practice in so far as grants of asylum are concerned.

> 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 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,[22]

although some may feel that any "serious act of violence which harms an individual" in the manner set out by the Tribunal equally brings humanity under attack.

As regards the seriousness with which crimes against humanity are assessed,

> there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. [The Trial Chamber] thus concludes 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.
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> 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. The Trial Chamber rejects such an analysis. Identifying the penalty applicable for a crime against humanity [...] cannot be based on penalties provided for the punish-

22. *Id.*, para. 28.

> ment of a distinct crime not involving the need to establish an assault on humanity.[23]

In view of the Tribunal's comment that 'life' is one of an individual's most essential possessions, one might have expected that the punishment for murder would be considered equal to that for a crime against humanity which is directed against life, especially if one bears in mind the comment by Sir Hartley Shawcross in regard to the atrocities at Belsen: "[m]urder is murder, whether the victims number one or six million."[24]

In examining the provisions of the Yugoslav Criminal Code, as it was required to do in assessing penalties, the trial chamber noted that the Code did not expressly provide for crimes against humanity, although it did cover "genocide and war crimes perpetrated against the civilian population". This enabled it to hold "that the code reserves its most severe penalties for crimes, including genocide, *which are of a similar nature to crimes against humanity*".[25]

6. ASSESSING PUNISHMENT

Having emphasised the gravity and seriousness of crimes against humanity, the trial chamber turned its attention to the issue of mitigation, introducing its remarks with the comment, which is of major significance, "that any reduction of the penalty stemming from the application of mitigating circumstances in no way diminishes the gravity of the crime".[26] In this connection, the trial chamber examined the practice of war crimes courts since 1945 when faced with the plea of superior orders and duress as amounting to grounds for mitigating punishment. While, in the light of this examination, it accepted that earlier tribunals had recognized that superior orders might allow for reduction of sentence:

> this general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused [...] held a low rank in the military or civilian hierarchy. [...H]owever, a subordinate defending himself on the grounds of superior orders may be subject to a lower

23. *Id.*, paras. 31-32.
24. Hartley Shawcross, *Introduction*, *in* R. Phillips, The Belsen Trial (1949).
25. Judgment, *supra* note 1, para. 35 (emphasis added).
26. *Id.*, para. 46.

> 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.
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> [...] 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 [- as indeed Erdemović testified that he did -], 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 [examined] preferred to consider it a mitigating factor.*[27]

The Tribunal's Rules of Procedure and Evidence include among mitigating factors to be examined cooperation with the Prosecutor.[28] This enabled the court to consider:

> 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.
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> 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.[29]

In view of its acknowledgment of the extent of Erdemović's cooperation and the realities of his situation, one might have concluded that the trial chamber would have been satisfied and accepted this as grounds for mitigation and immediately pronounced sentence. Instead, it considered it essential to proceed to give an account of the purpose and functions of a penalty imposed for the commission of crimes against humanity. Seeking, presumably, to give support to the need to repress and prevent the commission of crimes against humanity by indicating what would be the likely fate of offenders, it delivered a lengthy judgment covering well-nigh every aspect

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27. *Id.*, para. 54 (emphasis added).
28. Rule 101(B.ii), Rules of Procedure and Evidence, *supra* note 16.
29. *Id.*, paras. 55-56.

of the case in the same way as it might have done had Erdemović pleaded not guilty. In this, it seems to have been applying, perhaps somewhat in reverse, the view of Ben Gurion in regard to the *Eichmann* case, that it was to serve as a history lesson and as a warning for the future.

The trial chamber pointed out that the Security Council's intention in establishing it was to halt violations of international humanitarian law in the former Yugoslavia and have them "effectively redressed", as well as to provide a powerful means for the rule of law to prevail, and "to deter the parties [...] from perpetrating further crimes [and] to discourage them from committing further atrocities".[30] To these intentions it added its own view that "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'."[31] This aim should be compared with the situation in Rwanda where, despite the existence of a Security Council appointed tribunal similar to that for Yugoslavia, thousands of supporters of the overthrown regime are being held and tried before national tribunals.

7. THE PURPOSE OF THE PROCESS

As if to emphasize that it was participating in a teaching operation, the trial chamber examined the purpose of punishment in national legal systems, including that of the socialist Yugoslav state, which was essentially directed to "strengthen[ing] the morals of the socialist self-managing society", and stated that while it

> may have recourse to the functions of penalties identified with 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.[32]

30. *Id.*, para. 58.
31. *See* 1st Ann. Rep. of the Tribunal, UN Doc. A/19/342.
32. Judgment, *supra* note 1, para. 62.

Nevertheless, the trial chamber considered that it ought to review the practice of national tribunals when

> having to punish *offences of the same nature as crimes against humanity*, including that of the Supreme Court of Israel in the *Eichmann* case with the latter's comment 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.[33]

While references of this kind might be very edifying and morally uplifting, it may be questioned whether, especially in view of Erdemović's guilty plea, they really added anything to the significance of the judgment. It hardly needed this survey for the trial chamber to conclude that

> most important [are] the concepts of deterrence and retribution [... and] that in the context of gross violations of human rights which are committed in peace time [although the cases cited related to acts committed during conflict], 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.[34]

However, at least where crimes against the person are concerned, this is the purpose of any system of criminal law, even though the crime in question may not be as grave as those over which the Tribunal possessed jurisdiction. We may question, therefore, whether the trial chamber was breaking any new ground or delivering any significant juridical statement by asserting that it

> sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounces 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.[35]

Here there seems to be an error in the printing of the judgment, or the trial chamber has been careless in its expression. Surely, 'thwarting impunity'

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33. Israel *v.* Eichmann, 36 ILR 257, at 341 (1968).
34. Judgment, *supra* note 1, para. 64.
35. *Id.*, para. 65.

would rather be directed against appeasement, and not, as here expressed, 'contributing' to it. In addition, the trial chamber has added to the concept of 'reprobation' that of 'retribution' not previously referred to and which, to some extent at least, is being excluded from most public statements as being one of the major purposes of punishment.

Stigmatization of crime is, of course, important, but modern criminology, as well as political statements on penal policy, all tend rather to emphasise the reformative and rehabilitative purpose of imprisonment. The trial chamber, while paying lip service to this, appears to revert to an almost medieval attitude to the purpose of punishment:

> [w]ithout 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 [...] 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 recurrence.[36]

In other words, the trial chamber appears to be more concerned with providing condemnation of a policy and seeking to prevent further crimes of a like nature in the future, than it is with trying and punishing the offender actually appearing before it. In fact, some support for this view may be found in the willingness of the court to apply as accepted fact a finding reached in the course of a hearing leading to the issue of indictments directed against persons other than the accused himself. In this instance, the trial chamber explaining why there was no substantive reason to consider the charge of crime against humanity in the light of Erdemović's guilty plea, simply mentioned that

> 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 Karadžić and Ratko Mladić.[37]

This suggests that once a member of the trial chamber, before whom a request for issuance of an indictment has been made, agrees that there is sufficient *prima facie* evidence for him to approve the request, such issuance, although no case has been tried and no defence offered, consti-

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36. *Id.*, para. 66.
37. *Id.*, para. 83, citing Karadžić and Mladić Rule 61, *supra* note 6.

tutes sufficient proof of commission of the crime alleged for it to serve as a matter of judicial knowledge, as proven fact, in a case against an accused actually before the court.

As if further to support the view that the trial chamber was more concerned with a jurisprudential exercise than dealing with Erdemović himself, it, having discussed the purposes of punishment, then went on to provide a detailed account of the manner in which its judgments were to be enforced and imprisonment supervised. Since the Statute expressly provided that "imprisonment shall be served in a State designated by the International Tribunal",[38] all that was required was for the trial chamber to inquire which state was prepared to maintain a place of detention and to sentence Erdemović accordingly. By the time the judgment was delivered eleven states - Bosnia/Herzegovina, The Republic of Croatia, Denmark, Finland, Germany, Italy, Iran, Norway, Pakistan, The Netherlands and Sweden - had expressed a willingness to accept those convicted by the Tribunal. Of these, it might be suggested that both Bosnia/Herzegovina and Croatia have been too involved in the hostilities in the former Yugoslavia for their offers even to have been seriously considered, while, at least when an accused's victims have been Muslims, it might be questioned whether Iran and Pakistan would be suitable places for the accused to be held. In the instant case, after negotiations conducted on behalf of the Tribunal, Norway's offer was accepted.

8. ASSESSING THE JUDGMENT

The only comment that need be made here refers to the manner in which the trial chamber interpreted the supremacy it enjoys over national systems. Article 27 of the Statute provides that "imprisonment shall be in accordance with the applicable law of the State concerned",[39] that is the state of detention. Presumably, therefore, the accused would be entitled to benefit from any local provision relating to parole, reduction of sentence for good behaviour, and the like. However, asserting its primacy and emphasising the jurisdiction it possesses over the enforcement of penalties,

38. Art. 27 Statute, *supra* note 4.
39. *Id.*

the trial chamber maintained:

> 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.[40]

This is not quite what Article 28 states. The wording suggests that it is only if and when the holding state wishes to exercise such 'mercy' towards a convicted person that notice is required, although there is some value in suggesting that when deciding upon a holding state its policy in this regard should be taken into account. Moreover, it is not for the President alone to decide what to do if informed that the holding state wishes to apply its law in this fashion. The Article states that when so informed by the holding state, "the President [...], *in consultation with the judges* [- presumably only those who constituted the Chamber before which the accused had appeared -], shall *decide the matter on the basis of the interests of justice and the general principles of law*".[41] The President is not, therefore, as free an agent able to exercise his discretion as he pleases, as the judgment implies.

Having reached this point in its decision, the trial chamber, having already during the course of its comments drawn attention to the factual situation, and to such matters as Erdemović's age, status, cooperation with the Prosecution, and the like, considered it necessary to do so yet again, largely extracting its comments from the accused's own statements and, therefore, at somewhat greater length than earlier, but, from a legal point of view, really adding nothing to what had previously been said.

When estimating the weight to be accorded to the various considerations that had been put forward with a view to mitigating the penalty, the trial chamber, perhaps understandably, indicated that it would "require the corroboration of the accused's statements by independent evidence",[42] although such corroboration would probably be difficult to obtain since it

40. Judgment, *supra* note 1, para. 73.
41. Art. 28 Statute, *supra* note 4 (emphasis added).
42. Judgment, *supra* note 1, para. 87.

would almost certainly have to come from another member of Erdemović's squad, who would thus lay himself open to similar charges. However, in view of information given by Erdemović to the Prosecutor enabling him to undertake investigations into the fall of Srebrenica:

> it appears that some credibility may be given to the overall account of the accused. Furthermore, [the trial chamber] is aware of the general climate reigning in Srebrenica at the time of the events. 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.[43]

Unable to accept this plea put forward to explain his compliance with the orders received, on the other hand the trial chamber did accept that Erdemović was truly remorseful and accepted that his "co-operation with the Office of the Prosecutor must play significantly in the mitigation of the penalty".[44] Moreover, in the light of the evidence presented to it by the accused, by witnesses for the prosecution, and facts reported by the Prosecutor himself, the trial chamber agreed:

> to give weight to the relative young age of the accused at the time of the events [- 23 -] to his current family status [- while he was a Croat, his common law wife and mother of his child was a Serb from Bosnia -], to the lack of danger he presents, to the gesture of help afforded to witness X [- who testified that he owed him his life -] and to a series of traits characterising a corrigible personality [...] as well as his subordinate level in the military hierarchy [... and] the fact the sentence pronounced will be served in a prison far from his own country.[45]

Despite all these considerations in his favour which might have led one to believe that a nominal or very short sentence would be imposed - the Prosecutor suggested no more than ten years, while the defence proposed a complete remission of penalty or a nominal one year - the trial chamber saw fit to impose a sentence of ten years. It almost appears as if the trial chamber, aware of public horror at what had occurred at Srebrenica and elsewhere in the former Yugoslavia, felt that it had no option but to return

43. *Id.*, para. 91.
44. *Id.*, para. 101.
45. *Id.*, para. 111.

a verdict of guilt and a fairly substantial sentence even though Erdemović was the 'smallest of small fry'.

In view of this, it is perhaps not surprising that the defence gave notice of appeal:

> because of the erroneous and incomplete establishment of facts which led to an erroneous application of law; because of the erroneous application of law which has influenced the validity of the sentence and because of the decision on the penalty.[46]

Since there has not, at the time of writing, been any hearing on this submission there is no need to discuss its merits.

However, the Defence made an introductory point which is of major significance and may well explain why the trial chamber went to such length in delivering judgment and why it felt it necessary, despite its acknowledgment of all the points favourable to Erdemović, to impose the sentence that it did:

> the sentence [...] is the first sentence passed for a crime against humanity since the Nuremberg trials. This very fact, as well as the complexity of the causes and conditions which led to the commission of the specific acts, and the fact that other trials are underway or pending before the same court for the same or equally grave criminal acts, has attracted special interest on the part of the world public and, naturally, interest on the part of legal scholars and practitioners. Precisely because this is the first sentence of this tribunal and because the positions adopted may set a precedent for rulings in other proceedings and thus become a source of international criminal law, it is absolutely understandable and indispensable to have the established facts and their supporting arguments, as well the legal conclusions on the sentence, seriously reviewed and evaluated.[47]

This would have been particularly the case had Erdemović not pleaded guilty. The fact that he did so and the trial chamber still delivered itself of so lengthy a judgment[48] is one of the reasons for the type of criticism expressed in this paper. Continuing the thought expressed by defence counsel, it is perhaps understandable that the members of the trial chamber felt it necessary to deliver such a lengthy judgment, contributing in this way to the jurisprudence underlying the role and purpose of the Tribunal. Because of this, it is possible to draw, from the trial chamber's comments, positive

46. 23 December 1996, Case IT-96-22-A, at 3.
47. *Id.*, 2.
48. The distributed English text runs to 58 typewritten pages.

results concerning the trial of offences within the Tribunal's jurisdiction and for these to serve as the basis for the development of a *jurisprudence constante*, not only for the future activities of the Tribunal, but also with respect to the development of the law concerning crimes against humanity.[49]

Perhaps the most significant contribution to the develoment of the law arising from the Erdemović judgment is the recognition by the trial chamber of the fact that when there is a guilty plea to a charge of crimes against humanity there is no need to proceed with any charge relating to the laws or customs of war, since the greater includes the lesser and there can be no doubt that crimes against humanity constitute a graver and more generic charge than is the case with a charge of war crimes, or even grave breaches of international humanitarian law as defined in the Geneva Conventions and Protocol I. The comment thus made does not, of course, apply to those 'lesser' war crimes which do not or are not likely to create general condemnation by the world community, such as, perhaps, offences relating to the wrongful seizure of property or not involving harm to non-combatants whether civilians, other protected persons or combatants rendered *hors de combat*. In so far as an accused has been charged with genocide, this offence is clearly the gravest of all crimes against humanity and, in future, it might be advisable to proceed with the general charge of crimes against humanity, with the acts alleged to amount to genocide merely detailed in the statement of specifics.

Crimes against humanity are, as the trial chamber clearly indicated, crimes which affront the entire international community and humanity at large. As such, whether they are committed in peace or war and in an international or non-international conflict - and even one which would not qualify for inclusion under Article 1(4) common to the Geneva Conventions or one within the purview of Protocol II - they are clearly subject to universal jurisdiction - a factor which a number of states are now recognizing by way of amendment to their criminal law. Moreover, such a development would remedy the jurisdictional *lacuna* which is embodied in the Genocide Convention. Equally important, and recognizing the point made by the defence counsel in his notice of appeal concerning the 'interest on the part of legal scholars and practitioners', the establishment of such a

49. *See, e.g.*, Prosecutor *v.* Tadić, Sentencing Judgment, 14 July 1997, para. 8: "genocide, itself a specific crime against humanity".

principle, which, it is suggested, in light of the above, already constitutes *lex lata as* distinct from *lex ferenda*, will put an end to debate as to whether any difference arises in the legal character of offences committed in a non-international as distinct from an international armed conflict. At the same time, such recognition of the legal position will mean that it becomes impossible to argue, as is sometimes done by critics of Nuremberg, that this was a Tribunal established for a specific purpose and that with the termination of that purpose the judgment is really not a convincing precedent, particularly when one recalls that the jurisdiction exercised at Nuremberg over crimes against humanity was far more restrictive than has now become the accepted view as to what constitutes such crimes.

Criticism apart, therefore, one must regard the Erdemović judgment as having made potentially a useful contribution to the law concerning the nature and punishment of crimes against humanity. If the reasoning therein is accepted in future trials it will have laid the foundation for a new practical approach in international criminal law, and more than justified the establishment by the Security Council of the Tribunal.

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