UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-96-22-T *bis*

Date: 5 March 1998

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba (Presiding)**
Judge Mohamed Shahabuddeen
Judge Wang Tieya

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

Judgement of: 5 March 1998

PROSECUTOR

v.

DRA@EN ERDEMOVI]

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Peter McCloskey

Counsel for the Accused:

Mr. Jovan Babi}
Mr. Nikola Kosti}

In the case at bar, I elect to exercise the right confided to a judge of a Trial Chamber by

Article 23, paragraph 2, of the Statute of the International Tribunal to append a separate opinion to a judgement of the Chamber.

The remit of the Appeals Chamber embraces major propositions of law concerning 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, inclusive of recourse to considerations of policy for the purpose of determining this latter question.

I have dutifully joined in giving effect to the remit on the basis of the propositions of law it sets out. Naturally, I have done so as a member of this Trial Chamber. However, in exercise of the right abovementioned - a right which international judges generally have - I must also indicate that I desire to preserve my individual professional position (not herein stated) against risk of inference that I have acquiesced in those propositions of law by now joining in applying them.

There are two other matters which I should briefly explain. They concern certain practical difficulties which I have experienced in assisting with the implementation of the remit.

The first difficulty is this: 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?

The second difficulty is this: how, in this particular case, 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?

I. HOW TO IMPLEMENT THE REMIT AS TO THE DUTY TO CONFIRM THAT THE ACCUSED UNDERSTANDS THE NATURE OF THE CHARGES?

As to the first difficulty, the Appeals Chamber held that the guilty plea made by the accused in the original Trial Chamber to the first count of the indictment was not made on an informed basis: he did not understand the nature of the charges. The Appeals Chamber accordingly directed that a fresh plea be taken.

A question of interpretation is presented: To ensure that the accused understands the nature of the charges, must this Trial Chamber, before which the matter has now come, explain them element by element? Or, is it sufficient if, without doing that, the Trial Chamber satisfies itself by reasonable inquiries that the accused understands the nature of the charges?

The problem had occurred to the mind of Judge Stephen. In the course of the appeal proceedings, he asked the Prosecution whether there was an "obligation when an accused is represented by counsel on the part of the court to state in detail the ingredients of the counts that are alleged". (Appeal Transcript, 26 May 1997, p. 99). I am not certain of the position (if any) taken in the judgement of the Appeals Chamber on that point.

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So I turn to the Statute of the Tribunal. Article 20, paragraph 1, provides that the "Chambers shall ensure that a trial is fair ... with full respect for the rights of the accused ..." That governing criterion resonates throughout the Statute. Its implications for the case at hand will have to be worked out.

Article 20, paragraph 3, of the Statute requires a Trial Chamber to "read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea". Rule 62(ii) of the Rules of Procedure and Evidence, made under the Statute, correspondingly requires a Trial Chamber to "satisfy itself that the accused understands the indictment". Neither the Statute nor the Rules, however, elaborate how the statutory duty to "confirm that the accused understands the indictment" is to be discharged.

Article 21, paragraph 4(a), of the Statute gives to the accused an entitlement "to be informed promptly and in detail in a language which he understands of the nature and of the cause of the charge against him". That provision focuses on the right of the accused to be informed by the competent authorities laying the charge of the reason why he is charged. The information must relate both to the facts and to the legal classification of the facts. The Trial Chamber must ensure that that right, among others conferred on the accused, is respected. But the provision is not directed to imposing a duty on the Trial Chamber to advise the accused of the legal ingredients of the crime with which he is charged. No such duty seems to be imported by the practice relating to the corresponding language of Article 6, paragraph 3*(a)*, of the European Convention on Human Rights or Article 14, paragraph 3*(a)* of the International Covenant on Civil and Political Rights.

In these circumstances, I am of opinion that the Statute leaves it to the Tribunal to select a procedure which is "fair" for the purpose of enabling the Chamber to "confirm that the accused understands the indictment". It was thus open to the Appeals Chamber to say that such a procedure would require this Trial Chamber to explain each and every element of the charges to the accused. However, it does not appear that the Appeals Chamber went so far.

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The question as to the precise method by which the duty to confirm that the accused understands the indictment is thus open. How should it be answered?

I would propose an answer which, I believe, reflects a balance of competing views. It is possible to discover material from particular common law areas which supports the view that an element-by-element explanation of each offence is required at the stage of taking a plea. But that could require a substantial presentation, involving the necessity of going "into all the complicated lawyer's points", to use the language of one case.[1] When multiplied by the number of different offences that may be charged in an indictment, that could result in a pamphlet-size lecture. Whether comprehension would be promoted is doubtful.

The duty is to ensure that the accused understands the charge, and this is not necessarily identical with a duty to explain each and every element of it: without doing that, a trial judge may be satisfied, on suitable inquiry, that the accused understands the charge, as happens in many jurisdictions. An explanation of the elements of the charge, or of relevant elements, is given where something in the status or condition of the accused (such as his being legally unrepresented) or something in what he says when making his plea or some critically important element or other special reason alerts the trial judge to a need to give such an explanation in order to ensure that the accused understands what he is pleading to.[2]

Naturally, the graver the charge, the more onerous is the responsibility of the trial judge.

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[1] *Reg. v. Blandford JJ, Ex parte G. (An Infant)*, [1967] 1 Q.B. 82, at p. 87, Widgery J.

[2] See the *Blandford* case, *supra,* and the discussion of *Henderson v. Morgan,* 426 U.S. 637, in W.R.LaFave and Jerold H. Israel, *Criminal Procedure,* 2nd ed. (Minnesota, 1992), pp. 934-937.

Recognising that, I am yet not persuaded that the discharge of that responsibility mechanically requires an element-by-element parsing of offences. That could be oppressive to a court without being needed to protect the right of the accused to a fair hearing. I would not understand the Appeals Chamber to have intended to lay down such a requirement.

It remains to observe that after a plea of guilty is made and the facts, at the appropriate stage, are presented, it will be for the court to decline to accept the plea if it is not satisfied that the facts establish all of the legal ingredients of the offence, or if the explanation offered by the accused has the effect of contesting the allegations of the prosecution relating to one or more of those ingredients. But that is a different matter from saying that the court has to explain each and every one of the legal ingredients of the crime to the accused at the time of plea. An element judged to be of special significance to the case may be mentioned; but there is no need to specify every ingredient. Paragraph 11 of today's judgement shows that this Trial Chamber, correctly in my view, did not understand its functions in that detailed way.

II. HOW TO IMPLEMENT THE REMIT ON THE SUBJECT OF THE COMPARATIVE SERIOUSNESS OF THE OFFENCES?

As to the second difficulty, the problem here is one of translating into sentencing the ruling of the Appeals Chamber as to the relative seriousness of the two offences. The matter arises this way:

The accused was indicted on two counts, the first for a crime against humanity, the

second for a war crime. In the original Trial Chamber, he pleaded guilty to the first count. The Appeals Chamber considered that the charge for a crime against humanity was more serious than the charge for a war crime and found that this was not explained to the accused. Consequently, the plea was not made on an informed basis.

The difference in seriousness, as affirmed by the Appeals Chamber, was duly brought by the Presiding Judge of this Trial Chamber to the notice of the accused when his plea was taken. The point has also had to be borne in mind by the Trial Chamber in assessing sentence. But I have not found the task of implementing the remit on this point an easy one.

I construe the remit of the Appeals Chamber to mean that the sentence to be now passed in respect of the count relating to the war crime has to be lighter than the sentence which could have been passed, for the same act, in respect of the count relating to a crime against humanity. How is this to be done?

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The penal regime established by or under the Statute of the Tribunal does not differentiate in sentences between the two offences. Therefore, if one sentence is to be lighter than another, there must be some other method of establishing a benchmark with reference to which comparison may be intelligently made.

But the necessary axes of reference by which to make a useful comparison do not exist. This is not a case in which an accused has been convicted of both crimes, so that the sentence for the crime against humanity can provide a known point of reference. The charges being in the alternative, a conviction could only be made on one of the two counts, not on both. In this sense,

the indictment was effectively for one count only. Further, a conviction for the war crime does not by itself mean that all the legal ingredients of a crime against humanity were also satisfied in relation to the same act.

Thus, if I understand the remit correctly, its holding that the present sentence has to be lighter than something else poses the practical question: Lighter than what? In giving support to today's judgement, I cannot say that I have done so on the basis of my being able to find a satisfactory answer to that question.

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However, assuming that the foregoing problem can be resolved, a subsidiary problem of implementation arises. Viewing the realities of the case, how in practice is a difference between sentences to be measured?

Paragraph 12 of the indictment alleges that the accused participated with other soldiers in the shooting and killing of "hundreds" of unarmed civilians; on his own admission, he alone killed 70. Paragraph 16 of the indictment charges those acts as "a crime against humanity ... (murder)...", and, "alternatively", as "a violation of the laws or customs of war ... (murder)..." In each case, it is the same "murder".

Murder is not, by itself, a sufficient basis to derive the true measure of the penalty applicable in either case, but it does represent an important factor in the calculus of punishment. Where murder is committed as a war crime, one might well think that, barring mitigating circumstances, a conviction would ordinarily entail the maximum penalty available to the Trial Chamber in respect of such a crime. But since this is the same maximum that would apply where murder is committed as a crime against humanity, the holding by the Appeals Chamber would

mean that, even if there are no mitigating circumstances, this Trial Chamber is bound in law to impose a penalty less than the maximum where the same murder is committed as a war crime. Apart from the difficulty of seeing how this would be correct, on the facts I do not find a rational basis for measuring what should be the difference in sentences.

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.

Done in English and French, the English text being authoritative.

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Mohamed Shahabuddeen

Dated this fifth day of March 1998
At The Hague
The Netherlands

[Seal of the Tribunal]