



## CASE 3

### *Prosecutor v. Dragan Obrenovic*

Case No. IT-02-60/2-S, 10 December, 2003, The International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Section A

#### ■ Introduction

Wartime atrocities comprise some of the grimmest chapters of human history. They speak to the dark side of human nature, to one human being's potential to commit unspeakable acts against another. Done variously in the name of war, country, nationality, religion, ethnicity or vengeance, such acts feed on a culture of hatred and violence. The international community has recognized the need to establish norms or conventions governing the conduct of warring nations and individuals to attempt to lessen the horrors of warfare for combatants and innocent civilians alike. From time to time, international courts and tribunals have been established to bring the perpetrators of war crimes to justice. One of the most recent examples is the International Criminal Tribunal for the Former Yugoslavia, established in 1993 by United Nations Security Council Resolution 827 to deal with violations of international humanitarian law during the civil war that raged in the region throughout the 1990s. The Tribunal, situated in The Hague, The Netherlands, has authority to prosecute and try serious "breaches of the 1949 *Geneva Conventions*, violations of the laws or customs of war, genocide, and crimes against humanity" that occurred in the former Yugoslavia after 1991. The following case represents the sentencing of only one of scores of individuals who have been indicted by the Tribunal. Many still await trial or disposition; others remain at large.

#### ■ Facts

In 2001 the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia indicted Lieutenant Colonel Dragan Obrenovic, a former deputy and acting commander in the Yugoslavian forces headquartered in eastern Bosnia and Herzegovina. The indictment charged him with several violations of the *Statute of the Tribunal*: complicity in genocide; extermination, a crime against humanity; murder, as a crime against humanity; murder, as a violation of the laws or customs of war; and persecutions on political, racial and religious grounds, also a crime against humanity. Obrenovic was also later charged along with others as a member of a joint criminal enterprise, whose purpose had been "to forcibly transfer the women and children from the Srebrenica enclave to Kladanj ... ; and to capture, detain, summarily execute by firing squad, and bury thousands of Bosnian Muslim men and boys aged 16 to 60." Lt. Col. Obrenovic was charged in both his individual capacity and under the theory of command responsibility.

A plea agreement was entered into between the prosecutor and the accused after the completion of the testimony of the prosecution's first witness. The Trial Chamber (the trial court) accepted the agreement and the guilty plea to Count 5 of the indictment: persecutions, a crime against humanity. The Chamber found that the crime of persecutions had been carried out as follows:

- (a) the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons; (b) the cruel and inhuman treatment of Bosnian Muslim civilians, including beatings of civilians in schools and other detention centers ... ; (c) the terrorization of Bosnian Muslim civilians ... ; and, (d) the destruction of personal property and effects of Bosnian Muslim civilians ... who were detained and murdered....

Lt. Col. Obrenovic accepted personal responsibility for the criminal acts, although he did not physically and personally perpetrate them. He also accepted responsibility for being part of a joint criminal enterprise. Under the principle of command responsibility, he is also criminally responsible for the criminal acts of his subordinates, who he knew or had reason to know were about to commit criminal acts, or had done so, and he failed to take necessary and reasonable steps to prevent such acts or to punish the perpetrators.

All other charges were dismissed against Lt. Col. Obrenovic. As part of the plea agreement the prosecutor agreed to recommend a sentence within the range of 15 to 20 years imprisonment. The Trial Chamber consequently held a sentencing hearing.

### ■ Issue

What was the appropriate sentence for this accused under all the circumstances?

### ■ Held

Accused sentenced to 17 years in prison.

### ■ Judicial Reasoning

Article 24 of the *Statute of the Tribunal* sets out the penalties and factors to be considered on sentencing. The penalties are limited to imprisonment. The Trial Chamber must take account of the gravity of the offence and the individual circumstances of the defendant, and may order the return of property and proceeds acquired by criminal conduct. Sentencing rules also provide that imprisonment may be for a period up to life; the Trial Chamber must also consider additional factors, including any aggravating and mitigating circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia. Credit is also to be given for time served in detention awaiting indictment, trial, or appeal.

An examination of the purposes of sentencing must begin with a consideration of the purpose of the Tribunal itself. The Tribunal was established to contribute to peace and reconciliation and the establishment of truth, and the promotion of the rule of law in the former Yugoslavia. Punishment should reflect both the need for justice for the victims of the crimes as well as the international community's refusal to tolerate human rights violations and crimes committed during armed conflicts.

The three broad purposes of punishment recognized under the Tribunal's jurisprudence are retribution, deterrence, and rehabilitation. While the gravity of the offence has come to be considered the most important of these, retribution or the notion of "just deserts" has also been given close consideration because of the necessity to express international condemnation and outrage at the violation of the human rights of extremely vulnerable people.

While the gravity of the offence is the "litmus test" for determining sentence, the Appeal Tribunal has stated that sentences must be individualized, making the circumstances of each case extremely important. In the present case, the evidence proves that

the crimes committed following the fall of Srebrenica were of enormous magnitude and scale, and the gravity of these crimes is unquestionable. Over 7,000 men were separated from their families, murdered and buried in mass graves. The manner in which the executions were carried out ... was both methodical and chilling in its "efficiency" and display of utter inhumanity. Over eight years later, the impact of the crimes committed ... continue[s] to be felt upon [sic] the women, children and men who survived the horrific events.

As far as Lt. Col. Obrenovic's *individual* responsibility for the crimes of persecution is concerned, he not only knew that members of his brigade were helping to organize the killings and mass burials but also released brigade members on at least three occasions to implement the plans. Though the plan itself came from his superiors he thus aided and abetted it by releasing men to participate in it. His participation can best be described as "co-perpetratorship."

Based on the gravity of the offence alone, a sentence in the range of 20 to 40 years imprisonment is appropriate. However, the impact on the sentence of aggravating, mitigating, and personal circumstances must be considered.

The *aggravating* factors in this case were the accused's position of leadership, the depravity of the crimes, and the vulnerability of the victims. Since Lt. Col. Obrenovic's very liability for the crimes stems mostly from his position as commander, it would be wrong and unfair to also use the leadership argument as an aggravating factor on sentencing. However, the vulnerability of the victims who were subjected to cruel treatment by their captors should be considered an aggravating factor.

*Mitigating* factors include the accused's guilty plea, which can be seen as advancing the Tribunal's mandate to establish the truth, restore peace, and promote reconciliation. His acceptance of responsibility through his guilty plea also helped bring closure for the victims without putting them through the painful experience of testifying about the horrific events. The guilty plea also helped to save precious Tribunal resources. It is also clear that Lt. Col. Obrenovic has expressed sincere remorse more than once for his actions, such as in the following extract from his statement to the Trial Chamber:

I am responsible for this. The guilt for this I feel remorse and for which I apologize to the victims and to their shadows, I will be happy if this contributed to reconciliation in Bosnia, if neighbours can again shake hands, if our children can again play games together, ... It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world. ... What has won the victory is misfortune and unhappiness, as a consequence of blind hatred. ... If my confession, my testimony, and my remorse, ... contributes to the quicker healing of these wounds, I will have done my duty of a soldier, a fighter, a human being and a father.

The genuine remorse shown by the accused is a substantial mitigating factor. And his cooperation with the prosecutor in providing truthful testimony and detailed information and documents regarding the events in Srebrenica, along with his promise to testify in other proceedings, is also a significant mitigating circumstance.

Finally, it appears that, before the war, Lt. Col. Obrenovic was a highly respected member of the community who discriminated against no one. Moreover, evidence showed that, even during the war, he helped several Muslims whom he did not know. These facts, too, are mitigating.

The accused, by his deeds and actions, especially his acceptance of responsibility and his cooperation with the office of the prosecutor, has begun the process of rehabilitation and it is expected that upon his release he will continue on that path. These substantial steps toward rehabilitation are also to be taken into consideration in mitigating the sentence.

For all of the foregoing reasons, and taking into consideration the enormity of the impact of these crimes on the victims and their survivors, the Trial Chamber sentences Dragan Obrenovic to seventeen years imprisonment to be served in one of the states that have agreed to take those convicted of offences by this Tribunal. He shall be given credit for the 969 days that he served in detention prior to sentencing.

## ■ Questions and Activities

### Knowledge/Understanding

- Identify the war crimes against Bosnian Muslim civilians with which the International Criminal Tribunal charged Lt. Col. Obrenovic.
  - Of which war crime was he convicted? Explain why.
  - What role did he play in the commission of these crimes? Does Obrenovic's role make him any less culpable? Why or why not?
- What sentence did Obrenovic receive? Outline the factors considered in determining whether the punishment was proportionate to the crime.
  - State the fundamental principle applied to determine the degree of punishment.
  - After assessing all the circumstances, do you think Obrenovic's punishment fit the crime? Explain your opinion.
- Define each of the broad purposes of punishment: *retribution*, *deterrence*, and *rehabilitation*. Which of these purposes most appropriately applied to Obrenovic's sentence? Explain and support your choice.

### Thinking/Inquiry

- The International Criminal Tribunal reviewed several cases to consider the central function of *deterrence* as it applies to war crimes. Read and analyze each of the following statements:

The Trial Chamber in the *Todorovic* sentencing judgment stated that:

... deterrence is one of the principles underlying the determination of sentences, in that penalties imposed by the International Tribunal must, in general, have sufficient value to ensure that those who consider committing similar crimes will be dissuaded from doing so.

In the *Sakic* case the Trial Chamber stated that:

In combating international crimes, deterrence refers to the attempt to integrate or reintegrate those persons who believe themselves beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society

(Source: [www.un.org/icty/Supplement/supp46-e/obrenovic.htm](http://www.un.org/icty/Supplement/supp46-e/obrenovic.htm). Retrieved 18 March 2004.)

- Compare each of the definitions of deterrence. In what respects are they similar or different?
  - Does each appropriately apply to the *Obrenovic* sentence? Explain why or why not.
  - Create a definition of deterrence that would most appropriately apply to the commission of war crimes.
- Dragan Obrenovic was a deputy commander and responsible for the municipality where more than 7000 Bosnian Muslim civilians were massacred over the course of a week. Should he be held criminally accountable for the orders given by the government, his superior officer, or the independent actions of his military subordinates? Discuss in a one-paragraph opinion.

- (b) Should soldiers under orders, who carry out acts of atrocity against innocent civilians, be indicted for war crimes? Explain your answer in two to three paragraphs.

### Application

1. In June–July 1950 the United Nations adopted the *Nuremberg Principles* as part of an *International Criminal Code*. Principle VI articulates three major categories of war crimes.

PRINCIPLE VI: THE CRIMES HEREINAFTER SET OUT ARE PUNISHABLE AS CRIMES UNDER INTERNATIONAL LAW:		
Crimes Against Peace:	War Crimes	Crimes Against Humanity
(i) Planning, preparation, initiation, or waging of aggression or a war in violation of international treaties, agreements or assurances  (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)	Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity	Murder, extermination, enslavement, deportation, and other inhuman acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime

2. **You be the judge:** Read and analyze each of the four situations described below.
- Decide and describe whether and how any of the categories of war crimes above apply.
  - Determine whom should be held criminally responsible according to international law.
  - Applying the principles of sentencing outlined in the *Obrenovic* case, decide what punishment should be imposed.
    - On August 6, 1945, President Truman authorized the order for the United States to drop the first atomic bomb on the Japanese city of Hiroshima, resulting in the deaths of an estimated total of 140 000 civilians, and the second on August 9 on the city of Nagasaki, killing another estimated 70 000 civilians.
    - Top leaders of Hamas, Islamic Jihad, the al-Aqsa Martyr's Brigades, and the Popular Front for the Liberation of Palestine (PLPF) have openly espoused, endorsed, and encouraged suicide bombing attacks against Israeli civilians. More than 250 civilians have been killed, and 2000 injured. President Yasir Arafat has failed to undertake effective preventive action or to punish the perpetrators of the suicide bombings.
    - In response to attacks upon its soldiers, and retaliation for suicide bombings, the Israeli government has killed an estimated 2680 Palestinians, and ordered the destruction of more than 20 000 homes of family members and relatives connected with suicide bombers, and assassinated leaders of organizations it considers terrorist.

- (iv) In April 1994 the Rwanda government—supported by the members of the country's majority ethnic group, the Hutu—went on a domestic killing campaign against the Tutsi, the country's minority group that had long been dominant in Rwandan politics. Within four months an estimated 800 000 Tutsis and moderate Hutu civilians were slaughtered by Hutu extremists.

### **Communication**

1. Assume an *International Criminal Tribunal* has been convened. You have been assigned the task of investigating and documenting alleged war crime activities committed by either Saddam Hussein, former president of Iraq, or Slobodan Milosevic, former president of Yugoslavia. In small groups, research, draft, and submit a 5-page comprehensive International Report on Charges of War Crimes.

#### ***Report Structure***

- (a) General historical overview of events prior to the trial.
  - (b) Identification and list of specific war crime activities linked to the accused.
  - (c) A determination of which Nuremberg category of war crimes your accused should be indicted under, and justification for the charges.
  - (d) Recommendation on the sentence to be imposed, and explanation of the rationale based on general principles articulated in the *Obrenovic* case.
2. Research and write a 500-word report on the purpose and international significance of one of the following: *Hague Convention* (1907), *Geneva Conventions* (1949), *Nuremberg Charter* (1946), *Additional Protocol 1* (1977), *Rome Statute of the International Court* (1998), Canada's *Crimes Against Humanity and War Crimes Act* (2000).