

**SEMINARIO DI
DIRITTO INTERNAZIONALE PENALE**

LEZIONE 2

ELEMENTI COSTITUTIVI DEI CRIMINI INTERNAZIONALI:

- imputabilità: norme sui *core crimes* si dirigono solo agli individui, non agli Stati o alle persone giuridiche
- actus reus: i crimini internazionali sono caratterizzati dal fatto di prevedere sia dei requisiti generali (es. collegamento al conflitto armato, attacco contro la popolazione civile sistematico o su larga scala) sia specifiche categorie di condotte proibite
- mens rea: in base al principio di responsabilità personale occorre che l'accusato abbia volontariamente commesso il crimine

ESIMENTI:

- cause di non imputabilità
- cause di giustificazione
- scusanti

CAUSE DI NON IMPUTABILITÀ:

- classiche del diritto penale (minore età, infermità mentale ...) che escludono la capacità di intendere e di volere
- specifica del diritto internazionale: immunità *ratione materiae*

Immunità *ratione materiae* e crimini internazionali:

- differenza immunità *ratione materiae* – immunità *ratione personae*
- crimini commessi da organi statali: (*Israeli Supreme Court, Eichmann; House of Lords, Pinochet; Court de cassation belge, Sharon*)
- tesi della condotta privata (giurisprudenza americana)
- tesi delle norme di *jus cogens* (*House of Lords, Pinochet*)
- coordinamento tra le norma sull'immunità *ratione materiae* e la responsabilità penale in base al diritto internazionale
- coordinamento con le norme sull'immunità *ratione personae* e l'immunità degli Stati (*ICJ, Arrest Warrant Case*)

CAUSE DI GIUSTIFICAZIONE:

- legittima difesa
- stato di necessità

Legittima difesa:

- ratio della norma sulla legittima difesa: bilanciamento interessi (Fletcher)
- principio generale di diritto penale (norma esplicita nello Statuto di Roma)
- ICTY, caso Kordic and Cerkez (problema della legittima difesa come causa di giustificazione nel diritto internazionale penale)
- differenza tra legittima difesa nel diritto internazionale penale e nel diritto internazionale come causa di esclusione dell'illiceità di una condotta statale

SCUSANTI:

- caso fortuito
- forza maggiore
- errore di fatto
- errore di diritto
- costringimento (duress)
- ordini superiori

Duress:

- definizione dello Statuto di Roma
- principio generale di diritto penale
- *ICTY, caso Erdemovic* (problema della duress come scusante nel diritto internazionale penale)
- differenza tra duress nel diritto internazionale penale e distress, ovvero la corrispondente causa di esclusione della responsabilità nel regime tradizionale di responsabilità di Stato

Ordini superiori:

- definizione nella giurisprudenza (*Tribunale di Norimberga*)
- articolo 33 nello Statuto di Roma
- crimini internazionali e ordini “manifestamente illegittimi”
- ordini superiori come attenuante (*ICTY, casi Cesic e Mrdja*)
- irrilevanza dell’ordine superiore sia come scusante autonoma sia come fattore attenuante
- ordine superiore come fattore di riduzione della *mens rea* che può configurare un altro tipo di scusante o di fattore attenuante
- eccezione: il caso del crimine di aggressione

DOCUMENTAZIONE UTILE

ICJ, Arrest Warrant Case, 14 February 2002

“53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs.

He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d’affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity”, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals,

and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.

Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

Statuto del Tribunale internazionale militare di Norimberga

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Statuto del Tribunale internazionale penale per l'ex Jugoslavia

Article 6 - Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7 - Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Statuto del Tribunale internazionale penale per il Rwanda

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Statuto di Roma della Corte penale internazionale

Article 21 - Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 25 - Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

(omissis)

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26 - Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27 - Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 30 - Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31 - Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to

the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32 - Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33 - Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

GIURISPRUDENZA

ICTY, *Prosecutor v. Kordic and Cerkez*, Trial Chamber, 26 February 2001

“Self-Defence as a Defence.

448. In relation to many of the charges in the Indictment, the Defence argues that the Bosnian Croats were acting in self-defence. Thus, the Kordic Defence presented evidence of ABiH attacks and offensives in Central Bosnia and sought to demonstrate that the Bosnian Croats were victims of a policy of Muslim aggression in Central Bosnia.⁶²⁵ This argument raises the question whether defensive action or self-defence may amount to a ground for excluding criminal responsibility for the commission of serious violations of international humanitarian law.

449. The notion of ‘self-defence’ may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person’s property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack. The Trial Chamber notes that the Statute of the International Tribunal does not provide for self-defence as a ground for excluding criminal responsibility. “Defences” however form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it.

450. Paragraph (1)(c) of Article 31 of the Statute of the ICC, entitled “Grounds for excluding criminal responsibility”, which provides for the exclusion of criminal liability in situations where a person acts reasonably to defend himself or another person, or certain types of property, reads:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

[...]

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

451. The principle of self-defence enshrined in this provision reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law. Article 31(1)(c) of the ICC Statute sets forth two conditions which must be met in order for self-defence to be accepted as a ground for excluding criminal liability: (a) the act must be in response to “an imminent and unlawful use of force” against an attack on a “protected” person or property; (b) the act of defence must be “proportionate to the degree of danger”. In relation to the specific circumstances of war crimes, the provision takes into account the principle of military necessity.

452. Of particular relevance to this case is the last sentence of the above provision to the effect that the involvement of a person in a “defensive operation” does not “in itself” constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge. The Trial Chamber will have regard to this condition when deciding whether the defence of self-defence applies to any of the charges. The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law.”

ICTY, *Prosecutor v. Erdemovic*, 29 November 1996

“76. The Trial Chamber recalls that the acts for which Drazen Erdemovic stands accused are part of the events which followed the fall of the Srebrenica enclave. It notes, moreover, that those events were attested to during the Rule 61 hearings in the case *The Prosecutor v. Karadzic and Mladic*. On that occasion, they were corroborated by many testimonies, including that of the accused⁴². The Trial Chamber emphasises that Drazen Erdemovic did not contest these same events in his guilty plea⁴³.

On 6 July 1995, the Srebrenica enclave was the target of attacks by the Bosnian Serb army. At the time, the enclave was recognised by United Nations Security Council resolution 819⁴⁴ as a “safe area” which could not be the target of any armed offensive or other hostile act. The assault continued until 11 July 1995, the date when Srebrenica fell to the Bosnian Serb forces.

The fall of the enclave triggered the flight of thousands of Muslim civilians. Some sought refuge in the United Nations base at Potocari; others, about 15,000 people, fled across the woods towards Tuzla, an area under the control of the Bosnian government.

After having been separated from the women and children by members of the Bosnian Serb police and army, an undetermined number of Muslim men who had sought refuge in Potocari were transported by bus out of the enclave to various sites where they were to be executed. Many of the men who had fled towards Tuzla either surrendered or were arrested by the Bosnian Serb army or police. Some were summarily executed while others were grouped together and killed later at various locations.

77. During the hearing, a witness, an investigator in the Office of the Prosecutor, testified that several of those locations have been identified⁴⁵. His statement was based on the accused's own declarations which were corroborated by the investigations and observations of the Office of the Prosecutor⁴⁶.

The first location in question is the Branjevo farm in Pilica where, according to the statement of the accused at the hearing, about 1,200 Muslims were executed by the soldiers of the unit of which Drazen Erdemovic was a member. Erdemovic admitted to having participated in the massacres. Exhumations performed there permitted the discovery of about 153 bodies, approximately half of which had their hands tied behind their back, as well as identity papers which had belonged to the victims, Bosnian Muslims from the Srebrenica region. On-site observations also permitted the discovery of "some clothing, shoes, human debris, in other words, things indicating that a mass grave might be located nearby"⁴⁷. The existence of the mass grave, moreover, is attested to by aerial photographs taken on the date of the events which were presented to the Trial Chamber during the hearing of 19 November 1996⁴⁸.

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 10th Sabotage Unit. Members of the Office of the Prosecutor were able to visit the building, and observations confirm that massacres may have occurred there. Furthermore, photographs showing bullet marks, traces of blood, human remains and bits of hair were submitted to the Trial Chamber during the hearing⁴⁹.

78. The Trial Chamber will review the acts for which Drazen Erdemovic is charged as presented in the indictment, formally recognised by the accused in his guilty plea and then clarified during the hearings of 19 and 20 November 1996.

On the morning of 16 July 1995, Drazen Erdemovic and seven members of the 10th Sabotage Unit of the Bosnian Serb army were ordered to leave their base at Vlasenica and go to the Pilica farm north-west of Zvornik⁵⁰. When they arrived there, they were informed by their superiors that buses from Srebrenica carrying Bosnian Muslim civilians between 17 and 60 years of age who had surrendered to the members of the Bosnian Serb police or army would be arriving throughout the day.

Starting at 10 o'clock in the morning⁵¹, members of the military police made the civilians in the first buses, all men, get off in groups of ten. The men were escorted to a field adjacent to the farm buildings where they were lined up with their backs to the firing squad. The members of the 10th Sabotage Unit, including Drazen Erdemovic, who composed the firing squad then killed them. Drazen Erdemovic carried out the work with an automatic weapon⁵². The executions continued until about 3 o'clock in the afternoon⁵³.

The accused estimated that there were about 20 buses in all, each carrying approximately 60 men and boys. He believes that he personally killed about seventy people⁵⁴.

79. The Trial Chamber will review the specific circumstances which led the accused to commit the crime with which he is charged as he himself related them in his defence. The Trial Chamber will assess the probative value and possible mitigating character of these later in this decision.

Drazen Erdemovic testified that after he had completed his military service in the JNA military police in Belgrade, he was sent to Slavonia⁵⁵. He says that until March 1992⁵⁶, he served there beside soldiers of all origins, Slovenian, Hungarian, Serbian and Albanian⁵⁷.

According to his statements, in May⁵⁸ or July 1992⁵⁹, he received a summons to join the army of Bosnia and Herzegovina although he did not wish to participate in the war. He emphasised the fact that he had previously ignored a summons from the Tuzla barracks⁶⁰. He left that army in November of the same year⁶¹.

He states that he was mobilised into the military police of the Croatian Defence Council (HVO) at the time of its establishment and that he served there until 3 November 1993, the date he left that army⁶².

In fact, his position there became insecure specifically because he had been arrested and beaten by HVO soldiers for having helped Serbian women and children to return to their territory⁶³.

He explained that he then went to Republika Srpska in Bosnia where he was to meet with a man who would provide him with identity papers which would enable him to go to Switzerland with his wife⁶⁴.

The man failed to appear⁶⁵, however, and Drazen Erdemovic states that he wandered about in Republika Srpska and Serbia for about five months during which time he tried to avoid the war⁶⁶.

He asserted that in April 1994 he finally joined the Bosnian Serb army. The decision to serve in that army was based on his need for money to feed himself and his wife, his desire to obtain identity papers in order to travel freely⁶⁷ and "the assurance of some status as a Croat in Republika Srpska"⁶⁸. He says that he specifically chose the 10th Sabotage Unit because it was not comprised of Serbs only but also had "a few Croats, a Slovene and a Muslim"⁶⁹.

Regarding the unit's mission, he stated that he only carried out reconnaissance of the army of Bosnia and Herzegovina, made quick trips onto its territory and placed explosives in the midst of Bosnian artillery weapons⁷⁰.

He stated that he had the chance to save the life of a man who, in fact, testified about this event before the Trial Chamber⁷¹.

Drazen Erdemovic claimed that in the army of Bosnia and Herzegovina he was given the rank of lieutenant⁷² or sergeant⁷³ and that he was the commander of a small unit⁷⁴.

He declared that he experienced no difficulties before October 1994 which is when particularly nationalist soldiers joined the unit⁷⁵, and a new commander, Lieutenant Milorad Pelemis, was appointed leader⁷⁶. In addition, he stated that this lieutenant was placed under the authority of Colonel Salapura of the Bosnian Serb army intelligence centre⁷⁷.

The accused emphasised that he lost his rank two months after having received it⁷⁸, mainly because he had refused to carry out a mission likely to cause "civilian losses"⁷⁹. He asserted that after this demotion, he was no longer in a position to oppose the orders of his superiors⁸⁰.

80. On 16 July 1995, Drazen Erdemovic claims that he received the order from Brano Gojkovic⁸¹, commander of the operations at the Branjevo farm at Pilica, to prepare himself along with seven members of his unit for a mission the purpose of which they had absolutely no knowledge⁸². He claimed it was only when they arrived on-site that the members of the unit were informed that they were to massacre hundreds of Muslims. He asserted his immediate refusal to do this⁸³ but was threatened with instant death and told "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you"⁸⁴. He declared that had he not carried out the order, he is sure he would have been killed or that his wife or child would have been directly threatened. Regarding this, he claimed to have seen Milorad Pelemis ordering someone to be killed because he had refused to obey⁸⁵. He reported that despite this, he attempted to spare a man between 50 and 60 years of age who said that he had saved Serbs from Srebrenica. Brano Gojkovic then told him that he did not want any surviving witness to the crime⁸⁶.

81. Drazen Erdemovic asserted that he then opposed the order of a lieutenant colonel to participate in the execution of five hundred Muslim men being detained in the Pilica public building. He was able not to commit this further crime because three of his comrades supported him when he refused to obey⁸⁷.

He said that several days after those events, one of his colleagues, Stanko Savanovic, tried to kill him and two of his friends with a firearm. The accused claimed that this act was payment for having refused to participate in the executions⁸⁸. Moreover, he suspects that Stanko Savanovic was acting on orders from Colonel Salapura⁸⁹.

Seriously wounded, he was treated first in the hospital in Bijeljina and then in the hospital in Belgrade⁹⁰.

He declared that after having been released from the Belgrade military hospital where he had stayed for about one month⁹¹, still traumatised by everything that had happened to him, he contacted a journalist in whom he confided.

Two days later, he said he was arrested by the State Security Services of the Republic of Serbia and then transferred to the court in Novi Sad to stand trial⁹².

He arrived in The Hague on 30 March 1996 and immediately confessed to the members of the Office of the Prosecutor as he had previously done to the court in Novi Sad⁹³.

In his statements at the hearing, he continuously reiterated his loathing of war⁹⁴ and nationalism⁹⁵ and how deeply he regretted his criminal act⁹⁶. He repeated several times that he had always had friends of all origins - Serbs, Croats and Bosnians⁹⁷.”

ICTY, *Prosecutor v. Erdemovic*, Appeals Chamber, 7 October 1997

“19. For the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah and in the Separate and Dissenting Opinion of Judge Li, the majority of the Appeals Chamber 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. Consequently, the majority of the Appeals Chamber finds that the guilty plea of the Appellant was not equivocal. Judge Cassese and Judge Stephen dissent from this view for the reasons set out in their Separate and Dissenting Opinions.”

International Military Tribunal, Nuremberg, October 1946

“The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these facts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

" The official position of defendants, whether as Heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specially provides in Article 8:

"The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."

The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war this never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”