UNITED NATIONS

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

Case No. IT-96-22-A

Date: 7 October 1997

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Gabrielle Kirk McDonald
Judge Haopei Li
Judge Ninian Stephen
Judge Lal Chand Vohrah

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

Judgement of: **7 October 1997**

PROSECUTOR

v.

DRA@EN ERDEMOVI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babi}

I. INTRODUCTION

1. The Appeals Chamber of the 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 ("the International Tribunal") is seised of an appeal lodged by Dra`en Erdemovi} ("the Appellant") against the Sentencing Judgement rendered by Trial Chamber I[1] on 29 November 1996 ("Sentencing Judgement")[2]. By this Sentencing Judgement, the Trial Chamber sentenced the Appellant to 10 years' imprisonment, following his guilty plea to one count of a crime against humanity, for his participation in the execution of approximately 1,200 unarmed civilian Muslim men at the Branjevo farm near the town of Pilica in eastern Bosnia on 16 July 1995, in the aftermath of the fall of the United Nations 'safe area' of Srebrenica.

2. The relevant facts, so far as this appeal is concerned, may be set out as follows. The Appellant was transferred into the custody of the International Tribunal on 30 March 1996 in connection with the Prosecutor's investigations into serious violations of international humanitarian law allegedly committed against the civilian population in and around Srebrenica in July 1995. Prior to his transfer, the Appellant had been detained since 2 March 1996 by the authorities of the Federal Republic of Yugoslavia in connection with their investigations into the same events. On 29 May 1996, Trial Chamber II requested the Federal Republic of Yugoslavia to defer to the International Tribunal all investigations and criminal proceedings respecting serious violations of international humanitarian law alleged to have been committed by the Appellant in and around Srebrenica in July 1995[3].

3. The Appellant was indicted on 29 May 1996 on one count of a crime against humanity and on an alternative count of a violation of the laws or customs of war. The Indictment alleged the following facts:

---

[1] Judges Jorda (Presiding), Odio Benito and Riad.
[2] Sentencing Judgement, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, T.Ch. I, 29 Nov. 1996 ("*Sentencing Judgement*").
[3] Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal addressed to the Federal Republic of Yugoslavia in the Matter of Dra`en Erdemovi}, Case No. IT-96-22-D, T. Ch. II, 29 May 1996.

1. On 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. Resolution 819 was reaffirmed by Resolution 824 on 6 May 1993 and by Resolution 836 on 4 June 1993.

2. On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through until 11 July 1995, when the first units of the Bosnian Serb army entered Srebrenica.

3. Thousands of Bosnian Muslim civilians who remained in Srebrenica during this attack fled to the UN compound in Poto~ari and sought refuge in and around the compound.

4. Between 11 and 13 July 1995, Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Poto~ari and in Srebrenica.

5. Between 12 and 13 July 1995, the Bosnian Muslim men, women and children, who had sought refuge in and around the UN compound in Poto~ari were placed on buses and trucks under the control of Bosnian Serb military personnel and police and transported out of the Srebrenica enclave. Before boarding these buses and trucks, Bosnian Muslim men were separated from Bosnian Muslim women and children and were transported to various collection centres around Srebrenica.

6. A second group of approximately 15,000 Bosnian Muslim men, with some women and children, fled Srebrenica on 11 July 1995 through the woods in a large column in the direction of Tuzla. A large number of the Bosnian Muslim men who fled in this column were captured by or surrendered to Bosnian Serb army or police personnel.

7. Thousands of Bosnian Muslim men who had been either separated from women and children in Poto~ari or who had been captured by or surrendered to Bosnian Serb military or police personnel were sent to various collection sites outside of Srebrenica including, but not limited to a hangar in Bratunac, a soccer field in Nova Kasaba, a warehouse in Kravica, the primary school and gymnasium of "Veljko Luki}-Kurjak" in Grbavci, Zvornik municipality and divers fields and meadows along the Bratunac-Mili}i road.

8. Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police at divers locations including, but not limited to a warehouse at Kravica, a meadow and a dam near La`ete and divers other locations.

> 9. On or about 16 July 1995, DRA@EN ERDEMOVI] and other members of the 10th Sabotage Detachment of the Bosnian Serb army were ordered to a collective farm near Pilica. This farm is located northwest of Zvornik in the Zvornik Municipality.
>
> 10. On or about 16 July 1995, DRA@EN ERDEMOVI] and other members of his unit were informed that bus loads of Bosnian Muslim civilian men from Srebrenica, who had surrendered to Bosnian Serb military or police personnel, would be arriving throughout the day at this collective farm.
>
> 11. On or about 16 July 1995, buses containing Bosnian Muslim men arrived at the collective farm in Pilica. Each bus was full of Bosnian Muslim men, ranging from approximately 17 to 60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10th Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing DRA@EN ERDEMOVI] and members of his unit.
>
> 12. On or about 16 July 1995, DRA@EN ERDEMOVI], did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians.[4]

4. At his initial appearance on 31 May 1996, the Appellant pleaded guilty to the count of a crime against humanity. The Appellant added this explanation to his guilty plea:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too". I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.[5]

The Trial Chamber accepted the Appellant's guilty plea and dismissed the second count of a violation of the laws or customs of war.

5. At the close of the initial appearance, the Trial Chamber ordered a psychiatric and psychological evaluation of the Appellant. The panel of three experts filed its report on 26 June 1996, concluding that the Appellant was suffering from post-traumatic stress disorder and that his

[4] Indictment, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22, 29 May 1996, pp. 1 – 3.
[5] Transcript, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, 31 May 1996, p. 9 ("*Trial Transcript")*.

mental condition at the time did not permit his trial before the Trial Chamber[6]. Consequently, the Trial Chamber postponed the pre-sentencing hearing and ordered a second evaluation of the Appellant to be submitted in three months' time. This second report was filed on 17 October 1996 and concluded that the Appellant's condition had improved such that he was now "sufficiently able to stand trial"[7].

6. In the meantime, the Appellant had been cooperating with the investigators of the Office of the Prosecutor and, in July 1996, testified at the hearing pursuant to Rule 61 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") in the case of *Prosecutor v. Radovan Karad`i} and Ratko Mladi}*[8]. The transcript of the Appellant's testimony in that case was added to the trial record with the consent of the parties[9].

7. The Trial Chamber held a pre-sentencing hearing on 19 and 20 November 1996, for which it had asked the parties to make submissions on "the general practice regarding prison sentences and mitigating and aggravating circumstances"[10].

8. In his testimony before the Trial Chamber, the Appellant described in detail the facts alleged in paragraphs 9 to 12 of the Indictment (*see* paragraph 3, *supra*). The Trial Chamber summed up his testimony on these facts as follows:

> On the morning of 16 July 1995, Dra`en Erdemovi} 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 Zvornik. 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 morning, members of the military police made the civilians in the first buses, all men, get off in groups of ten. The men were escorted

[6] *Sentencing Judgement, supra n. 2,* para. 5.
[7] *Ibid.*, para. 8.
[8] Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Radovan Karad`i} and Ratko Mladi},* Case Nos. IT-95-5-R61, IT-95-18-R61, T.Ch. I, 11 July 1996.
[9] *Trial Transcript, supra n. 5,* 19 Nov. 1996, p. 57.
[10] *Sentencing Judgement, supra n. 2,* para 9.

> 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 Dra`en Erdemovi}, who composed the firing squad then killed them. Dra`en Erdemovi} carried out the work with an automatic weapon. The executions continued until about 3 o'clock in the afternoon.
>
> 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 people. [11]

And further on:

> Dra`en Erdemovi} claims that he received the order from Brano Gojkovi}, 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 knowledge. 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 this 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." 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 obey. 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 Gojkovi} then told him that he did not want any surviving witness to the crime.
>
> Dra`en Erdemovi} 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 obey.[12]

8. The Appellant also testified as to his personal situation and circumstances leading up to[13] and following[14] the crime. In addition, two pseudonymed witnesses testified on behalf of the Defence as to the Appellant's character.

---

[11] *Ibid*., para. 78.
[12] *Ibid*., paras. 80 - 81.
[13] *Ibid*., para. 79.
[14] *Ibid*., para. 81.

9. The Prosecutor called one witness, Jean-René Ruez, an investigator in the Office of the Prosecutor, who testified as to the locations of several execution sites disclosed to him by the Appellant, information which was corroborated by the investigations of the Office of the Prosecutor. In particular, he testified that investigations had confirmed the existence of a mass grave at the Branjevo farm near Pilica, where the Appellant claimed he committed the crime in question. Investigations also confirmed that a massacre may have occurred in a public building in Pilica where, according to the Appellant's testimony, about 500 Muslims were executed on or about 16 July 1995[15].

10. The Trial Chamber, having accepted the Appellant's plea of guilty to the count of a crime against humanity, sentenced the Appellant to 10 years' imprisonment. This term of imprisonment was imposed by the Trial Chamber having regard to the extreme gravity of the offence and to a number of mitigating circumstances.

(a) The extreme gravity of the crime

The Trial Chamber took the view that the objective gravity of the crime was such that "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"[16].

It also took into account the subjective gravity of the crime, which was underscored by the Appellant's significant role in the mass execution of 1,200 unarmed civilians during a five-hour period, in particular, his responsibility for killing between 10 and 100 people[17].

It is to be noted that the Trial Chamber also took the view that no consideration could be given to any aggravating circumstances when determining the sentence to be imposed for these crimes because of the extreme gravity *per se* of crimes against humanity[18].

[15] *Ibid.*, para. 77.
[16] *Ibid.*, para. 31.
[17] *Ibid.*, para. 85.
[18] *Ibid.*, para. 45.

(b) The mitigating circumstances

As regards the mitigating circumstances contemporaneous with the crime, that is the "state of mental incompetence claimed by the Defence [and] the extreme necessity in which [the Appellant] allegedly found himself when placed under duress by the order and threat from his hierarchical superiors as well as his subordinate level within the military hierarchy"[19], the Trial Chamber considered that these were insufficiently proven since the Appellant's testimony in this regard had not been corroborated by independent evidence[20].

With regard to the mitigating circumstances which followed the commission of the crime, the Trial Chamber took into account the Appellant's feelings of remorse, his desire to surrender to the International Tribunal, his guilty plea[21], his cooperation with the Office of the Prosecutor[22], and "the fact that he now does not constitute a danger and the corrigible character of his personality"[23].

The Trial Chamber also accepted, as mitigating factors, the Appellant's young age, 23 years at the time of the crime, and his low rank in the military hierarchy of the Bosnian Serb army[24].

[19] *Ibid.*, para. 86.
[20] "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." *Ibid.*, para. 91.
[21] *Ibid.*, para. 96 - 98.
[22] *Ibid.*, para. 99 - 101.
[23] *Ibid.*, para. 111.
[24] *Ibid.*, paras. 92 - 95.

II. THE APPEAL

A. Grounds of Appeal

11. The Appellant, in the Appellant's Brief filed by Counsel for the Accused Dra`en Erdemovi} against the Sentencing Judgement, filed on 14 April 1997 ("Appellant's Brief"), asked that the Appeals Chamber revise the Sentencing Judgement:

(a) by pronouncing the accused Dra`en Erdemovi} guilty as charged, but excusing him from serving the sentence on the grounds that the offences were committed under duress and without the possibility of another moral choice, that is, in extreme necessity, and on the grounds that he was not accountable for his acts at the time of the offence, nor was the offence premeditated,

or, in the alternative,

(b) "[by upholding] the Appeal and, taking into consideration all the reasons stated in the Appeal and the mitigating circumstances stated in the Sentencing Judgement, [by revising] the Sentencing Judgement . . . by significantly reducing the sentence of the accused Dra`en Erdemovi}."[25]

12. The grounds of appeal invoked by the Appellant can be summarised as follows:

(a) The Trial Chamber committed an error of fact occasioning a miscarriage of justice when it asserted in the Sentencing Judgement that "[t]he 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

[25] Appellant's Brief, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 14 Apr. 1997, p. 24 ("*Appellant's Brief*").

Sabotage Unit"[26], of which the Appellant was a member[27]. There is no evidence that the 10th Sabotage Unit participated in this execution.

(b) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in believing the Appellant's statement "that he participated in the shooting of Muslims, but [in not believing] his assertion that he was acting under duress because of an uncompromising order from his military superiors, and that the other moral choice for him was death, his own and that of his family, so that his actions were not voluntary but the will of his commanding officers"[28].

In particular, the Trial Chamber erred in requiring corroboration of the Appellant's assertion that he was acting under duress, although it accepted his uncorroborated statement that he participated in the shooting of Muslims[29]. Thus, the Trial Chamber's assessment of the Appellant's testimony "is both inconsistent and unfair"[30].

(c) The Trial Chamber erred in law by not accepting the Appellant's argument that he committed the offence whilst under duress or in a situation of extreme necessity and, in particular, "that the order given to the accused Erdemovi} on 16 July 1995 by his superior officer had such an effect on his will that he objectively lost control over his behaviour and his personality was shattered"[31], such that the accused had no 'moral alternative' but to commit the offence "contrary to his will and intention"[32].

[26] *Sentencing Judgement, supra n. 2,* para. 77.
[27] *Appellant's Brief, supra n. 25,* p. 4.
[28] *Ibid., p.5.*
[29] *Ibid.*
[30] Appellant's Brief in Reply, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 21 May 1997, para. 2.
[31] *Appellant's Brief, supra n. 25,* p. 15.
[32] *Ibid.,* p. 17.

In light of this, the Appellant "should have been pronounced guilty of the acts committed, but a sentence should not have been handed down"[33] because of the law regarding a soldier's responsibility in the execution of superior orders, the duress exerted on the Appellant and the absence of moral choice available to him when he committed the offence, the credibility of his testimony, and the fulfilment of all the requirements of "extreme necessity as a generally accepted category in national legislations [and] international criminal law"[34].

(d) The Trial Chamber committed an error of fact occasioning a miscarriage of justice in finding that "no conclusions as to the psychological condition of the accused at the moment of the crime can be drawn"[35] from the two reports of the expert medical commissions on the psychiatric and psychological evaluation of the accused, submitted to the Trial Chamber on 26 June and 17 October 1996, nor from the accused's testimony[36]. Further, to the extent that there may have been insufficient evidence of the Appellant's mental state at the time the offence was committed, it was incumbent on the Trial Chamber, in the interests of justice, to request the expert panel to make such a determination and the Trial Chamber's failure to do so constitutes an error within the meaning of Article 25 of the Statute of the International Tribunal ("Statute").

13. The Prosecution's position in relation to the above grounds of appeal as set out in the Respondent's Brief filed on 28 April 1997 ("Respondent's Brief") and in the appellate hearings is, in brief, as follows:

(a) On the first ground, the Prosecution asserts that the Trial Chamber did not state at any point in the Sentencing Judgement that the Appellant had participated in the execution of 500 Muslims at the Pilica public building in the Zvornik municipality, that the Trial Chamber referred to this event as part of its description of the events that

[33] *Ibid.*, p. 19.
[34] *Ibid.*, p. 19.
[35] *Sentencing Judgement*, *supra n. 2,* para. 88.
[36] *Appellant's Brief, supra n. 25,* pp. 19 - 23.

followed the fall of the Srebrenica enclave, and further that this incident was considered by the Trial Chamber "in order to verify the authenticity of the Appellant's testimony, not as a means of aggravating his culpability"[37]. Thus, according to the Prosecution, the Trial Chamber did not take this incident into account as an aggravating circumstance in the determination of the sentence against the Appellant[38].

(b) On the second ground, the Prosecution asserts that the assessment of the probative value of the evidence is subject to broad discretionary appreciation of the Trial Chamber which it exercised in a fair and consistent manner[39]. In particular, the Prosecution submits that when the Trial Chamber stated that it required corroboration of the Appellant's statement by independent evidence[40], it was not stating an evidentiary rule but rather was expressing its "intimate conviction" as to its satisfaction with respect to the state of the evidence[41].

(c) On the third ground, the Prosecution submits that the Trial Chamber "was correct in holding that the Appellant did possess freedom of moral choice in the execution of Muslims at Branjevo farm and that his testimony did not satisfy the relevant elements for granting mitigating circumstances for extreme necessity arising from duress and superior orders. Further, the Trial Chamber did consider superior orders in mitigation of the sentence because of the subordinate level of the Appellant in the military hierarchy"[42].

(d) On the fourth ground, the Prosecution asserts that the burden was on the Appellant to adduce evidence in support of the claim that at the time of the crime he was suffering from diminished mental capacity. Since the Appellant did not submit any

---

[37] Respondent's Brief, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 28 Apr. 1997, s. B.1.2. ("*Respondent's Brief")*.
[38] *Ibid*., s. B. 1.
[39] *Ibid*., s. B. 2.
[40] *Sentencing Judgement*, *supra n. 2*, para. 87.
[41] Transcript, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, 26 May 1997, pp. 130 – 132 ("*Appeals Transcript")*.
[42] *Respondent's Brief*, *supra n. 37*, s. B. 3.

such evidence, the Prosecution claims, it is inappropriate for him to invoke an error of fact or of law as it was not a matter for the Trial Chamber to obtain such evidence[43].

(e) Finally, the Prosecution argues that the 10-year prison sentence imposed by the Trial Chamber is not manifestly excessive so as to justify interference by the Appeals Chamber, "having regard to the gravity of the offense, the circumstances of the Appellant's participation in the crime, and the helplessness of the victims of the crime"[44]. In particular, the Prosecution submits that the Appellant has not shown that the severity of the penalty handed down by the Trial Chamber is disproportionate in relation to other sentences handed down for this type of offence[45].

B. Application to Introduce Additional Evidence

14. The Appellant, in the Appellant's Brief, made a proposal that the Appeals Chamber "obtain the following additional evidence for the appeals hearing", ostensibly pursuant to Rule 115 of the Rules, by:

(a) appointing "a distinguished professor of ethics who shall give a scientific opinion and position regarding the possibility of the moral choice of an ordinary soldier who is faced with committing a crime when following the orders of a superior at time of war"; and

(b) receiving an additional mental evaluation of the accused by the same panel of experts which conducted the psychological examination prior to the sentencing hearing, this time on the question of the "mental condition of the accused Erdemovi} at the time the offence was committed, in line with the reasons stated in the appeal"[46].

[43] *Ibid.*, s. B. 4; *Appeals Transcript, supra n. 41,* p. 118.
[44] *Respondent's Brief, supra n. 37,* s. B. 5.
[45] *Ibid.*
[46] *Appellant's Brief, supra n. 25,* pp. 23-24.

15. Rule 115 reads:

> (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial.
> . . .
>
> (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Having regard to the provisions of Rule 115, the Appeals Chamber would reject the Appellant's motion to adduce the additional evidence for the following reasons. The evidence is not, in the view of the Appeals Chamber, relevant for the determination of this appeal and there is, therefore, no need to authorise the presentation of the additional material in the interests of justice. In any event, if the Defence believed that the evidence was of assistance to its case, it should have brought this evidence to the attention of the Trial Chamber for the purposes of the Sentencing Hearing. The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing. Further, the Appellant has filed no affidavit or other material to indicate the substance of any statement which either the "distinguished professor of ethics" or the panel of experts would present to the Appeals Chamber. So much then for this application.

C. The Scope of the Appeals Chamber's Judicial Review: Issues Raised Proprio Motu and Preliminary Questions

16. The Appeals Chamber has raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once seised of an appeal lodged by either party pursuant to Article 25 of the Statute. The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties. The preliminary issues revolve around the question of the validity of the plea of guilty entered by the Appellant. This is a question to be decided *in limine*. In pursuance of its *proprio motu* examination of the validity of the Appellant's

guilty plea, the Appeals Chamber addressed three preliminary questions to the parties in a Scheduling Order dated 5 May 1997:

> (1) In law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial, the accused is entitled to an acquittal?
>
> (2) If the answer to (1) is in the affirmative, was the guilty plea entered by the accused at his initial appearance equivocal in that the accused, while pleading guilty, invoked duress?
>
> (3) Was the acceptance of a guilty plea valid in view of the mental condition of the accused at the time the plea was entered? If not, was this defect cured by statements made by the accused in subsequent proceedings?[47]

[47] Scheduling Order, *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-A, A. C., 5 May 1997.

III. REASONS

17. In answering the preliminary questions surrounding the validity of the Appellant's plea, the members of the Appeals Chamber differ on a number of issues, both as to reasoning and as to result. Consequently, the views of each of the members of the Appeals Chamber on particular issues are set out in detail in Separate Opinions which are attached to this Judgement and merely summarised here.

18. The Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, unanimously finds that the Appellant's plea was voluntary.

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.

20. However, the Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, finds that the guilty plea of the Appellant was not informed and accordingly remits the case to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead. Judge Li dissents from this view for the reasons set out in his Separate and Dissenting Opinion.

21. Consequently, the Appellant's application for the Appeals Chamber to revise his sentence is rejected by the majority. The Appeals Chamber also unanimously rejects the Appellant's application for acquittal.

IV. DISPOSITION

THE APPEALS CHAMBER

(1) Unanimously **REJECTS** the Appellant's application that the Appeals Chamber should acquit him;

(2) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **REJECTS** the Appellant's application that the Appeals Chamber should revise his sentence;

(3) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **FINDS** that the guilty plea entered by the Appellant before Trial Chamber I was not informed;

(4) By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) **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 and that, consequently, the guilty plea entered by the Appellant before Trial Chamber I was not equivocal;

(5) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **HOLDS** that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to replead in full knowledge of the nature of the charges and the consequences of his plea; and

(6) **INSTRUCTS** the Registrar, in consultation with the President of the International Tribunal, to take all necessary measures for the expeditious initiation of proceedings before a Trial Chamber other than Trial Chamber I.

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

_____

Antonio Cassese
Presiding

Judges Cassese, Li and Stephen append Separate and Dissenting Opinions to this Judgement.

Judges McDonald and Vohrah append a Joint Separate Opinion to this Judgement.

Dated this seventh day of October 1997
At The Hague
The Netherlands

[Seal of the Tribunal]