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APPEALS CHAMBER
CHAMBRE D'APPEL

CC/PIO/247-E
The Hague, 7 October 1997

ERDEMOVIĆ CASE:

THE APPEALS CHAMBER RULES THAT DRAZEN ERDEMOVIĆ SHOULD ENTER A NEW PLEA

The majority of the Judges consider that the initial plea "was not informed" and that "duress does not afford a complete defence" to a soldier who has killed innocent human beings

On Tuesday 7 October 1997, the Appeals Chamber (consisting of Judge Cassese, presiding, Judge McDonald, Judge Li, Judge Stephen and Judge Vohrah) handed down its Judgement on the appeal lodged by Drazen Erdemović against the Sentencing Judgement rendered by Trial Chamber I on 29 November 1996.

The Judges differred on a number of the issues raised, both as to reasoning and as to result, and consequently wrote Separate and Dissenting Opinions, of which summaries are attached to this Press Release.

The Appeals Chamber's Judgement:

In its Judgement, the Appeals Chamber decided the following:

1. The Appeals Chamber unanimously found that *"the Appellant's plea was voluntary"*. The Trial Chamber's findings are thus upheld.

2. However, a majority of four Judges of the Appeals Chamber (Judge Li dissenting) found 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"*.

The Trial Chamber had considered that the accused was *"fully cognisant of the nature of the charge and its implications"*.

3. Furthermore, a majority of three Judges of the Appeals Chamber (President Cassese and Judge Stephen dissenting) found 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"*.

.../...

The Trial Chamber for its part had *"not ruled out absolutely"* the complete defence based on duress.

4. A majority of four Judges of the Appeals Chamber (Judge Li dissenting) rejected the Appellant's application that his sentence be revised.

5. The Appeals Chamber unanimously rejected the Appelant's application for acquittal.

The Judgement's implications:

Drazen Erdemović will have to enter a new plea before a new Trial Chamber, consisting of Judge Jan, Judge Karibi-Whyte and Judge Shahabuddeen.

The Accused was precisely informed of this decision and of the options available to him by the President after the summary of the Appeals Judgement had been read out. These comments are reproduced here below, apart from the summaries of the Separate and Dissenting Opinions.

Comments addressed to Mr. Erdemović by the Presiding Judge

Presiding Judge: Mr. Erdemović, you have now heard, in summary, the Judgement of the Appeals Chamber. The Judges have deliberated for many months in this matter because your situation raises issues of the greatest importance for law and morality. Let me assure you, however, that we have not ignored your obvious distress at the situation in which you find yourself. We have not lost sight of your Counsel's strong avowal on your behalf, at the close of the appellate hearings in May this year, when he said that, not only do you not *wish* to endure a trial, but indeed that you feel psychologically unable to stand the rigours which such a trial might entail.

Let me then make it very clear - to you and to your counsel - that the further resolution of this matter now lies in your hands. You have a choice before you. That choice will be made from three options available to you when the matter is remitted to a Trial Chamber, as we have decided it should be - a new Trial Chamber, I should add, the composition of which has already been decided and which stands ready to hear your case with all due expedition.

Your options are as follows:

(1) you may change your plea of guilty to crimes against humanity, for the acts you confessed to committing at Srebrenica, to one of guilty to war crimes. In this case, the new Trial Chamber will not conduct a trial but will simply proceed to sentence you, and it might decide to take into mitigation your claim to have acted only because of a threat to your life;

(2) you may again enter a plea of guilty to crimes against humanity. Again, the new Trial Chamber will then simply proceed to sentence, without conducting a trial, and again it might take into account the duress from which you claim to have acted as a mitigating circumstance;

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(3) you may enter a plea of not guilty before the new Trial Chamber. In this case, only, will there be a trial on the evidence, to determine whether or not you are guilty as charged. It may be, however - and I cannot speak for that Trial Chamber on this matter - that such a trial could at least be based in part on the evidence you presented before the other Trial Chamber, which has been recorded on audio and visual-tape. In any event, as a result of the decision of the majority of the Appeals Chamber, the fact that you were allegedly compelled by a threat to your life to act as a member of the firing squad will not in itself constitute a defence leading to your acquittal. However, as in all trials before this Tribunal, you will be presumed innocent and only convicted and sentenced if the Chamber is satisfied, on the evidence presented, of your guilt beyond reasonable doubt.

These are your choices. They may be difficult, but they are, at least, clear. I do not ask you to take any decision now but to consult with your Counsel and weigh the matter deeply - it will be for you to plead anew before the new Trial Chamber.

The majority of this Appeals Chamber has found that on the first occasion your plea of guilty was not informed - our only concern now is that you enter an **informed** plea, that is, one made with an understanding by you of the nature of the charges pending against you and the consequences of your plea. We ask, and expect of you and your counsel, that you consider all this very carefully and that you enter an **informed** plea before the new Trial Chamber when the matter is remitted to it for its consideration.

That is all.

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Attached are the summaries of the Separate and Dissenting Opinions

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The full text of the Judgement and of the Opinions are available upon request at the Press and Information Office

Summary of the Opinion of Judges McDonald and Vohrah

The Appellant, Drazen Erdemović, had challenged the Judgement handed down by Trial Chamber I on 29 November 1996 sentencing him to 10 years' imprisonment after he had pleaded guilty to a charge of having committed a crime against humanity in July 1995 in the territory of the former Yugoslavia.

The issues considered by the Appeals Chamber comprised not only those raised formally by the Parties, but also issues concerning the guilty plea of the Appellant and raised by the Appeals Chamber itself. By addressing three preliminary questions regarding the validity of the Appellant's guilty plea to the Parties in a Scheduling Order, the Appeals Chamber ensured that the Parties were given the opportunity to make submissions in relation to these additional issues.

A substantial portion of the opinion of Judge McDonald and Vohrah is devoted to an examination of the validity of the Appellant's guilty plea. They note that the concept of the guilty plea *per se* is the product of the adversarial system of the common law and justifies the existence of the guilty plea within the procedure of this Tribunal. The advantages provided by the guilty plea in minimising costs, saving court time and avoiding the inconvenience of trial to many, are equally applicable to trials in an international criminal tribunal.

In their interpretation of the concept of the guilty plea in the procedure of the International Tribunal, Judges McDonald and Vohrah propound the methodology for the proper construction of terms and concepts in the Statute of the International Tribunal and in the Rules of Procedure and Evidence. The first step requires an examination of the provisions of the Statute and the Rules themselves and an elucidation of the words used therein according to their plain and ordinary meaning. Regard may also be had to the preparatory work of the Statute and the Rules. The second step involves a consideration of international law authorities which may assist in the determination of the meaning of terms used in the Statute and the Rules. However, no credence may be given to such international authorities if they are inconsistent with the spirit, object and purpose of the Statute and the Rules. In the event that international authority is lacking or insufficient, recourse may then be had to national law where the terms used in the Statute and the Rules necessarily imply a reference to national law concepts, and where such national law authorities are not inconsistent with the spirit, purpose and object of the Statute and the Rules.

Accordingly, Judges McDonald and Vohrah construe the guilty plea in the procedure of the International Tribunal primarily by reference to the Statute and the Rules. They then draw guidance from common law authorities to shed further light on the concept of the guilty plea and its proper procedural safeguards.

Judges McDonald and Vohrah set out the following three minimum pre-conditions which must be satisfied before a plea of guilty can be accepted as valid. Firstly, the guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises. Secondly, the guilty plea must be informed, that is, the accused must understand the nature of the charges

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against him and the consequences of pleading guilty to them. Finally, the guilty plea must not be ambiguous or equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.

The findings of Judges McDonald and Vohrah in relation to each of the pre-conditions are as follows. The guilty plea of the Appellant was voluntary. However, the guilty plea of the Appellant was not informed. The Appellant did not understand the nature and consequences of pleading guilty in general, nor did he understand the nature of the charges against him and the distinction between the alternative charges. These matters were never adequately explained to the Appellant by the Trial Chamber or by Defence Counsel and as a result, the Appellant elected to plead guilty to having committed a crime against humanity rather than the alternative charge of a war crime. Upon examining the distinction between these two offences, Judges McDonald and Vohrah hold that "all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime". Rules proscribing war crimes address merely the criminal conduct of a perpetrator against an immediate protected object. Rules proscribing crimes against humanity, in contrast, address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind. Consequently, in electing to plead guilty to a crime against humanity instead of a war crime, the Appellant pleaded guilty to the more serious offence and the one entailing a heavier penalty. As the Appellant's plea "was not the result of an informed choice", the Appellant must be afforded the opportunity to replead with full knowledge of the nature of the charges, the distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.

Judges McDonald and Vohrah then address the question whether the plea of the Appellant was equivocal. A plea is equivocal when the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence. The court is then obliged to reject the plea and to enter a plea of not-guilty. In the present is case, the Appellant pleaded guilty but then claimed to have acted under duress. Accordingly, the question whether the Appellant's plea was equivocal depends upon whether duress can afford a complete defence to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons.

Judges McDonald and Vohrah reject the finding of the Trial Chamber that there is a customary rule which allows duress to be pleaded as a complete defence to murder. They could discern only one authority of international standing in which it was clearly held that duress could constitute a complete defence to the killing of innocent human beings. This was a decision of a United State military Tribunal constituted under Control Council No.10. This decision is not good authority because it was insupportable at its time; it neglected the contrary view of British and Canadian military tribunals; it was widely criticised as being erroneous; and it is now redundant in the light of the development of the law.

However, Judges McDonald and Vohrah also reject the submissions of the Prosecution that "under [customary] international law duress cannot afford a complete defence to a charge of crimes against humanity and war crimes when the underlying offence is the killing of an innocent human being." They find that there is <u>no</u> customary international rule at all which can be derived on the question of duress as a defence to the killing of innocent persons. The reasoning underlying this view is as follows. .../...

Firstly, a number of the cases cited as supporting a customary rule that duress is a complete defence to murder are of questionable relevance and authority. Several dealt only with

complicity in murder and not murder in the first degree. There was also a decision which had subsequently been overturned and a decision dealing with offences other than murder.

Secondly, the international character of the tribunals which decided the cases alleged to support a customary rule are questioned. Judges McDonald and Vohrah note that a majority of the cases were decided by national military tribunals or national courts which applied national, not international law. They also question whether the tribunals constituted under Control Council Law No.10 were truly international in character. In so far as these tribunals considered the issue of duress, for which there was no guidance in international law, they invariably drew upon the jurisprudence of their own national jurisdictions. In other words, British military tribunals followed British law and the United States military tribunals followed United States law.

Finally, Judges McDonald and Vohrah hold that to the extent that domestic decisions and national laws of States relating to the issue of duress as a defence to murder may be regarded as evidence of state practice, this practice is neither consistent nor uniform, nor underpinned by *opinio juris*. They note the clear division between the jurisdictions of the world's legal systems on the issue of duress as a defence to murder. Duress is generally recognised as a complete defence to murder in those jurisdictions following the civil law tradition. By contrast, common law jurisdictions categorically reject duress as a complete defence to murder.

The absence of any customary rule on the question of duress as a defence to murder in international law leads Judges McDonald and Vohrah to examine "general principles of law recognised by civilised nations" as a source of international law under Article 38(1)(c) of the Statute of the International Court of Justice. They are satisfied that underlying the specific rules on duress in each of the surveyed jurisdictions is the general principle that a person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress.

Judges McDonald and Vohrah observe, however, that a general principle must be distinguished from a specific rule applicable to the concrete facts of a case. The specific rules of the various legal systems of the world are largely inconsistent regarding the specific question whether duress constitutes a complete defence to unlawful killing. On the one hand, the civil law systems generally would allow duress as a complete defence, in theory, to all crimes including murder. However, there are the laws of numerous other legal systems, including most common law jurisdictions of the world, which would definitively reject duress as a defence to murder and only allow the circumstance of duress to be taken into account in mitigation of punishment. In light of this irreconcilable inconsistency between the rules regarding duress in the legal systems of the world, Judges McDonald and Vohrah adopt the settled practice of international judicial bodies of employing the general principle in order to derive a legal rule applicable to the facts of the particular case.

They find that the rule is: **Duress is no complete defence for a soldier charged with a crime against humanity or war crime involving the killing of innocent human beings.**

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In reaching this conclusion, they attach great weight to the proposition that international criminal law has a normative purpose and must guide the conduct of soldiers in armed conflict in an effort to deter the commission of breaches of international humanitarian law and protect

those who are vulnerable and weak in armed conflict scenarios. In rejecting duress as a complete defence to murder, they take into consideration the following factors.

Firstly, a central rationale behind the rejection of duress as a defence to murder in national systems lies in the effort to avoid the dangers to which society would be exposed if duress were made a complete defence to murder. Criminals must not be allowed to confer impunity upon their agents by threatening them with death or violence if they refuse to carry out their criminal orders. Associations of terrorists must not be encouraged by the possibility of immunity from criminal prosecution. Although Judges McDonald and Vohrah do not, of course, consider themselves bound by national law authorities, they are more than satisfied that the arguments in favour of avoiding the harm which recognition of duress as a complete defence to murder would bring upon society are all the more compelling in the context of international humanitarian law. As expressed by them:

> "It is noteworthy that the [national law] authorities issued their cautionary words in respect of domestic society and in respect of a range of ordinary crimes including kidnapping, assault, robbery and murder. ...We cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. Our purview relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions.... We are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon commanders who control them in armed conflict situations...If national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of a far greater magnitude..."

Secondly, one of the purposes of international criminal law is to protect the weak and vulnerable in armed conflict situations. Judges McDonald and Vohrah, therefore, seek to facilitate the development and effectiveness of international humanitarian law and not to impede it. Thus, they "give[s] notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives."

Thirdly, Judges McDonald and Vohrah were of the view that the issue regarding duress should be framed narrowly. The issue, therefore, is confined to whether a <u>soldier</u> may rely upon duress as a complete defence to the killing of innocent persons. Accordingly, Judges McDonald and Vohrah hold that it would be "unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons". Soldiers, in other words, may be expected to exercise a greater measure of resistance to threats to their own lives than ordinary civilians.

Finally, in cases where an offender was indeed subject to duress, justice may be done in other ways than by allowing duress to operate as a complete defence. The law employs mitigation of punishment as a "sophisticated and flexible tool for the purpose of doing justice in an .../...

individual case". This would comport with the general principle that a person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. As the Statute and the Rules do not prescribe mandatory terms of imprisonment for any offence in respect of which the International Tribunal has jurisdiction,

the law may recognise the human frailty of the offender and the threat which he was subject and reduce his penalty to whatever extent it considers just. In appropriate cases, the offender may even receive no punishment at all.

For the above reasons, Judges McDonald and Vohrah hold that the Appellant's plea was voluntary and that it was not equivocal because duress is not a complete defence to the killing of innocent persons by soldiers under international humanitarian law. They find, however, that the Appellant's guilty plea was not informed and thus remit the case to another Trial Chamber for the Appellant to be given an opportunity to replead.

Summary of the Separate and Dissenting Opinions of President Cassese and Judge Stephen and the Dissenting Opinion of Judge Li

President Cassese attaches a Separate Opinion in which he dissents from the views of the majority of the Appeals Chamber on two questions: (i) the extent to which the International Tribunal may rely on national law for the elucidation of the notion of "guilty plea" and (ii) the question whether duress can be urged and admitted as a defence in case of war crimes and crimes against humanity whose underlying offence involves the killing of innocent persons.

Concerning the first question, President Cassese considers that one need not rely on the national legislation and case law of common law countries to construe the notion of a not guilty plea. According to President Cassese, that notion should, under international law, be construed in light of the object, purpose and setting of the International Tribunal. This question, he argues, is of overriding importance because it concerns the extent to which an international criminal court may or should draw upon national law concepts and transpose these concepts into international criminal proceedings. In the result, however, President Cassese agrees with the majority that the conditions to be met are that a guilty plea be voluntary, informed, non-equivocal and have a factual basis.

The second point on which President Cassese dissents from the majority - and on which point he is joined by Judge Stephen who also attaches a Dissenting Opinion - is on the question of whether duress, namely acting under a threat to life or limb, might constitute a complete defence to a charge of unlawful killing. The majority holds that duress can never be a defence to such a charge.

In his Dissenting Opinion President Cassese reaches the opposite conclusion. He contends - on the basis of a survey of copious international case-law - that, contrary to the submissions of the Prosecutor, no special rule excluding duress in case of murder has evolved in international criminal law. Judge Cassese maintains that the only logical conclusion to be drawn from the absence of such special rule is that the general rule on duress must apply. Consequently, duress may also be admitted - subject to various stringent requirements - for crimes involving the killing of innocent persons. In his Opinion Judge Cassese emphasises that the Appellant, when he pleaded guilty, urged at the same time duress (he contended that he took part in the execution of civilians because of the threat that otherwise he himself would be killed). This guilty plea was therefore equivocal, in the opinion of Judge Cassese: the Appellant in the same breath pleaded guilty and invoked a defence excluding guilt. Consequently, the matter should be remitted to the Trial Chamber for entry of a plea of not guilty and trial, to see whether the conditions for duress are met.

Judge Stephen, while agreeing with the majority of the Appeals Chamber that the Appellant's plea was voluntary but was not informed, disagrees with the majority on the issue of the plea's ambiguity, holding that it was ambiguous because the Appellant, while pleading, raised what might amount to a defence of duress. Thus he agrees with President Cassese that duress is available as a defence to all offences, including unlawful killing, under international law, when the strict conditions, enumerated by President Cassese, are met. He also agrees with President Cassese regarding the consequences of this finding, namely that the Appellant's plea was equivocal, that accordingly a plea of not guilty should have been entered and the matter remitted for trial.

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Judge Stephen reaches this conclusion by the following reasoning, in summary. Not being wholly convinced that as a matter of customary international law duress is accepted as a defence to unlawful killing he turns to the general principles of law recognised by nations. Here it is apparent that while most legal systems recognise duress as a defence, with no exception for murder, common law systems generally make an exception for murder. At the heart of that exception, however, is the notion to be found in the old English authorities of the evil involved in balancing one life against another - better, they say, for an accused "to die himself, than kill an innocent". The situation where an accused would not be able to save the victims, no matter what he did, was not, however, addressed by these authorities. This was the situation, however, in which the Appellant, in this case, on his account, found himself. Whatever he chose, the lives of the innocent would be lost and he had no power to avert that consequence. Hence, since the common law authorities - but for which one could say that the general principles of law favoured duress as a defence to all crimes - did not address the issue at stake, and since their underlying rationale did not justify excluding duress as a defence to unlawful killing in circumstances such as those facing the Appellant, the general principles of law would allow duress to be raised as a defence even to a charge of unlawful killing.

Judge Li's dissenting opinion deals with two issues: 1) whether duress, or obedience to superior orders under threats of death, can be a complete defence to a charge of murdering innocent civilians; and 2) whether this case should be remitted to Trial Chamber I for trial.

With regard to the first issue, Judge Li concurs with the majority decision in denying duress as a complete defence in the cases involving murder of innocent civilians, while accepting that duress can only be a mitigating circumstance in the consideration of the sentence.

In respect of the second issue, Judge Li dissents from the majority, suggesting that the Appeals Chamber should re-evaluate the case of the accused and reach a decision on whether the trial chamber's sentence is fair and just. The reason is that the guilty plea is not ambiguous in relation to the plea of duress, and that the plea remains valid, because a charge of war crimes is no less serious than that of crimes against humanity.

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