

Press Information Memorandum

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ERDEMOVIĆ CASE: APPEAL **SUMMARY OF THE BRIEFS FILED BY THE PARTIES**

International
Criminal Tribunal
for the Former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

The Defence counsel of Dražen ERDEMOVIĆ (the Appellant), sentenced on 29 November 1996 to ten years imprisonment by Trial Chamber I for a crime against humanity, filed a notice of appeal on 23 December 1996. Pursuant to Rule 111, the Appellant filed a brief "*of arguments and authorities*", in his original language, on 26 March 1997. The Prosecutor (the Respondent) responded to it on 28 April 1997.

THE PROCEDURE

Appellate proceedings are governed by Article 25 of the Statute and Part Seven of the Rules of Procedure and Evidence.

According to Article 25, the Appeals Chamber may hear an appeal from a person convicted by the Trial Chambers or from the Prosecutor, in the case of: (a) an error of law, invalidating a decision; (b) an error of fact, which has occasioned a miscarriage of justice.

Rule 108 provides that any party seeking to appeal a judgement or sentence shall file a notice of appeal with the Registrar not later than 30 days after the judgement is rendered.

Under Rule 111, the Appellant shall file his brief of arguments and authorities with the Registrar within 90 days of the certification of the record. The Respondent's brief shall be filed within 30 days of the filing of the Appellant's brief (Rule 112). Rule 113 provides that the Appellant may file a brief in reply not later than 15 days after the filing of the Respondent's brief.

The Appeals Chamber shall set a date for the hearing after the expiry of the time-limits for filing the briefs (Rule 114).

Pursuant to Rule 115, a party may apply by motion, not later than 15 days before the hearing, to present before the Appeals Chamber "*additional evidence that was not available to it at the trial*". The Appeals Chamber may authorise the presentation of such evidence if it considers that "*the interests of justice so require*".

THE APPELLANT'S BRIEF

- The reasons for the appeal, as stated in the Appellant's brief, are the following:
- the facts were "*erroneously and insufficiently established*" and "*have resulted in an erroneous application of the law*";
 - "*an erroneous application of the law (...) affected the validity of the judgement*";
 - finally, the Appellant contests "*the ruling on the punishment*".

The Appellant's arguments:

1. He reiterates the **claims stated in the Notice of appeal** (see PR 144):

- that the assertion contained in the judgement according to which *“about 500 Muslims were executed by the 10th Sabotage Unit [in the public building in Pilica]”* is *“incorrect”* and that in this regard, *“the judgement (...) exceeded the charges, since Erdemovic was found guilty of something with which he was not even charged”*. According to the brief, this *“was a significant factor in the erroneous judgement of the Trial Chamber in regard to the degree of the accused Erdemovic's guilt ...”*;
- that the Trial Chamber's evaluation of the accused's statements *“reflects an inconsistent evaluation of the testimony of Erdemovic”*. The Defence counsel stated that the Chamber *“believed the accused Erdemovic's statements that he participated in the shooting of Muslims, but did not believe 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 voluntarily but the will of his commanding officers”*. According to him, *“it was precisely the accused Erdemovic's confession that demonstrated so much self-sacrifice, by which Erdemovic exposed himself to the repercussions of criminal responsibility and possible punishment, and produced the switch for his own beating...”*.

2. The Appellant then presents his view regarding **“[t]he responsibility of military personnel for criminal offences committed at the orders of a superior”**. The Defence counsel is of the opinion that *“the contested Judgement did not discuss nor consider the question of the possibility of moral choice of the accused (...) from the point of view of ethics as a science”*.

In the Defence counsel's view,

- *“the accused (...) could not avoid in any way the situation he found himself in on the critical occasion;*
- *he was faced with a compulsory order that he could not avoid, although he tried to oppose it;*
- *not only the life of the accused but also the lives of his family were endangered;*
- *the danger was real and imminent;*
- *the danger arose through no fault of his own, and*
- *the accused (...) had no other moral choice”*. According to him *“this fulfills all the requirements of extreme necessity”*, and the accused *“should have been pronounced guilty of the acts committed, but a sentence should not have been handed down”*.

3. The Appellant then examines **“[t]he mental condition of the accused (...) at the time of the offence”**. According to his Defence counsel, he *“was tempore criminis in a state of significantly diminished responsibility”*. It is his submission that (1) the accused *“already suffered from post-traumatic stress disorder in July 1995 since he had by then already been an active participant in a civil war for three years”*; (2) the mental capacities of the accused were *“reduced”* at the time the crime was committed; (3) *“an emotionally immature person with a low tolerance for frustrations is not capable of controlling his behavior at critical moments in a satisfactory way”*. He is of the opinion that *“expert's answers to the questions about mental responsibility and premeditation will be of great importance for reducing the sentence of the accused”*.

The Appellant's proposals:

1. The Defence counsel proposes that "*the Appeals Chamber **obtains the following additional evidence***":
 - "*that the Tribunal appoint 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*".
 - that the "*previously employed expert commission of psychiatrists and psychologists provides an additional report on the mental condition of the accused (...) at the time the offence was committed*".
2. As regards the **Sentencing Judgement**, the Defence counsel of the accused proposes:
 - that the Appeals Chamber "*revise the Sentencing Judgement (...) by pronouncing the accused Drazen Erdemovic 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*".
 - **in the alternative** he proposes that the Appeals Chamber "*revise the Sentencing Judgement (...), by significantly **reducing the sentence** of the accused*".

THE RESPONDENT'S BRIEF

The Prosecution submits that the Appellant's brief "*is ambiguous and fails to set out in clear and concise terms the basis for the Appeal*", as it does not "*establish either an error on a question of law invalidating the Decision of the Trial Chamber, or an error of fact which has occasioned a miscarriage of justice*", as required by Article 25 of the Statute.

The Respondent's arguments

The Prosecution's response to the Appellant's submissions is based on the following arguments:

1. Regarding **the Appellant's interpretation of the Sentencing Judgement**, the Prosecution submits that "[t]he Trial Chamber did not assert at any point in the Decision that the Appellant participated in the execution of 500 Muslims at the Pilica public building in the Zvornik municipality. This event did not aggravate the circumstances which the Trial Chamber took into account in the determination of the sentence against him". According to the Prosecution, the interpretation given by the Appellant "*constitute a misreading of the Decision*", as the "*incident at the Pilica public building*" was not mentioned "*as part of the acts for which the Appellant is charged*".
2. With regard to **the Trial Chamber's evaluation of Erdemovic's statements**, the Prosecution stated: "*In order to arrive at a just decision of facts based on the free assessment of the evidence and the need for an 'intimate conviction' as to the guilt of the Appellant, the Trial Chamber enjoyed a broad discretion to decide what evidence is sufficient to support the Appellant's assertion that he was acting under duress accompanying superior orders. In the exercise of this discretion, the assessment by the Trial Chamber of the Appellant's testimony was consistent and fair.(...) Whether all or part of the Appellant's testimony was intrinsically credible or whether it*

required verification was entirely a matter for the subjective appreciation of the Trial Chamber". According to the Prosecution, the Trial Chamber accepted the guilty plea of the Appellant, and some factors as mitigating circumstances "because relevant supportive evidence existed. By contrast there was no additional evidence whatsoever to support the Appellant's testimony concerning the plea of extreme necessity."

3. As to **the Appellant's request regarding the appointment of a professor of ethics**, the Prosecution stated: "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. Since the Tribunal can form its own opinion on the existence of such mitigating circumstances, an expert opinion on the science of ethics (...) is inadmissible because it is unnecessary for the determination of the relevant facts." In the Prosecution's view, such an expert opinion "does not constitute" additional evidence, which was not available to it at the trial, that either party can apply to present before the Appeals Chamber under Rule 115. Further, according to it, the Appellant "has not established that such exceptional circumstances [that would authorise the presentation of such evidence] exist in the present case".

4. With respect to **the Appellant's request that the previous commission of medical experts provide an additional report**, the Prosecution submits that such an assertion "does not constitute 'evidence' under Rule 115". According to it, "[t]he object and purpose of Rule 115 is not to allow a party to 'reopen' the trial or sentencing hearing at will, but only to allow for the admission of additional evidence in exceptional circumstances where the Appeals Chamber considers that 'the interests of justice so requires'". In its view, the Appellant "has failed to show cause for the admission of such additional evidence, and (...) the purely speculative nature of the request is not an appropriate grounds for application of Rule 115". It is the Prosecution's submission that "in any event" such an application to present additional evidence "must be by separate motion prior to the Appeal in order to allow the Respondent to prepare an appropriate rebuttal".

5. Finally, regarding **the sentence**, the Prosecution states: "The Appellant (...) is responsible for the killing of between 10 to 100 people. [He] is uncertain about the precise number but he believes he killed about 70 people. The victims were defenseless and innocent of any wrongdoing. The Appellant has pleaded guilty to one of the most serious crimes known to humanity." Thus, in its view, "[h]aving regard to the gravity of the offense, [and] the circumstances of the Appellant's participation in this crime, (...), a sentence of 10 years imprisonment is not manifestly excessive, so as to justify interference by the Appeals Chamber with the sentence imposed by the Trial Chamber."

The Respondent's proposals

The Prosecution concluded that "the Appeals Chamber should affirm the decision of the Trial Chamber and deny the request for suspension or reduction of the sentence imposed by the Trial Chamber against the Appellant".

The Appellant's and Respondent's briefs are available upon request from the Press and Information Office.