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Comparison of the Guilty Plea Process of the International  
Criminal Tribunal for the Former Yugoslavia and the  
Courts of the United States of America

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## MEMORANDUM

To: Deputy Prosecutor of the International Criminal Tribunal for Rwanda

From: Julie K. Fowler

Date: May 15, 1998

Re: Comparison of the Guilty Plea Process of the International Criminal Tribunal for the Former Yugoslavia and the Courts of the United States of America

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### I. Introduction and Summary of Conclusions

The issue of entering a valid guilty plea arises in the context of upholding a criminal conviction. A valid guilty plea, as a prerequisite to a valid conviction, is necessary for several reasons. The interests of justice cannot be served where an innocent defendant unknowingly waives his right to a fair trial. Nor are the interests of justice served where a guilty criminal goes free on a technicality due to an invalid guilty plea.

This memorandum sets out the standards and procedures for entering a valid plea of guilty used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the courts of the United States of America. The authorities relied on in this analysis are the Erdemovic case<sup>1</sup> and American case law. This paper is intended to outline the prerequisites for the entry of a valid guilty plea, which will survive a post-judgment challenge, in both systems. The paper compares the standards applied in the Erdemovic

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<sup>1</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

decision and U.S. practice concerning the standards and procedures for entering a valid guilty plea.

## **II. Overview Comparison of U.S. and ICTY Guilty Plea Standards and Procedures**

The standards for the entry of a guilty plea in the ICTY and the courts of the United States are similar. The ICTY Appeals Chamber interpreted the law, in the Erdemovic case, to require three conditions for entry of a valid guilty plea.<sup>2</sup> The guilty plea must be voluntary, informed and unequivocal.<sup>3</sup> American law requires that a guilty plea must be voluntary, knowing and intelligent in order to be valid.<sup>4</sup> The difference in validity between the two standards is found in the ICTY's third requirement that the plea be unequivocal; this is considered a procedural issue in the United States.

Procedurally, the ICTY and the courts of the United States are very similar. The significant differences are found in the requirements of Rule 11 of the United States Federal Rules of Criminal Procedure. Rule 11 sets forth the technical procedures a federal court follows for accepting a guilty plea, as well as the methods of pleading guilty a defendant may choose. While the standards and procedures are essentially the same as those of the ICTY, American procedure permits entry of a guilty plea by a defendant who does not formally concede guilt. It also permits the invalidating of incorrectly entered

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<sup>2</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>3</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>4</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

guilty pleas. The Tribunal has no such procedural option for the entry of a plea, and lacks any similar procedural remedy for an allegedly invalidly entered plea.

A significant difference between the standards and procedures of the United States and the Tribunal is that the American procedures have been much more fully developed. The ICTY has only one such case to date. The Appeals Chamber in the Erdemovic case established the standards and procedural guidelines for entering a plea of guilty. In this decision, the Appeals Chamber relied, in large part, on American rules of criminal procedure.

It is imperative to emphasize that all discussions and analysis of the ICTY's standards and procedures are based solely on the judicial opinions of the Erdemovic case. To date, Erdemovic is the only Tribunal case that has dealt with the issue of entering valid guilty pleas. It is also important to note that the Court in the Erdemovic case was divided as to the correct interpretation and application of the standards as they apply to the procedures. It has thus been difficult to interpret and understand much of the reasoning used in the Court's holdings.

### **III. ICTY Guilty Plea Standards and Procedures**

The standard and procedures relied upon in Erdemovic were based on the Appeals Chamber's interpretation of the Statute and Rules of the Tribunal.<sup>5</sup> The Appeals Chamber had the duty of determining the validity of a guilty plea according to the Statute and

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<sup>5</sup> It is important to note that the ICTY standards and procedures used in the comparison of this paper come solely from the Appellate holding in the Erdemovic case.

Rules of the ICTY.<sup>6</sup> In construing the validity of a guilty plea, the Appeals Chamber relied on sources of international law and American criminal procedure.<sup>7</sup>

The Appeals Chamber wrote in its majority opinion that it had the duty of interpreting the meaning of the guilty plea as it was stated in the Statute of the International Tribunal (Statute) and the Rules of Procedure and Evidence (Rules).<sup>8</sup> It started by interpreting the Statute and Rules “according to their plain and ordinary meaning.”<sup>9</sup> The Appeals Chamber then examined sources of international law and national law.<sup>10</sup> The international and national law authorities were derived from member states of the United Nations.<sup>11</sup> The Appeals Chamber found no international authority that could help it interpret the meaning of “entering a valid guilty plea.”<sup>12</sup> The Appeals Chamber then looked to the history of the Rules and found that the basis for entering a guilty plea, Rule 62, was substantially patterned after suggested rules of procedure given by the United States to the ICTY.<sup>13</sup>

The Rules of the ICTY appear to be a proposal of how the court should act in trial proceedings. There is no absolute rule stating that the court must follow the procedures to

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<sup>6</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 2, U.N. Doc. IT-96-22-A (1997).

<sup>7</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 2,3, U.N. Doc. IT-96-22-A (1997).

<sup>8</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 1, U.N. Doc. IT-96-22-A (1997).

<sup>9</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 1, U.N. Doc. IT-96-22-A (1997).

<sup>10</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 1, U.N. Doc. IT-96-22-A (1997).

<sup>11</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 1, U.N. Doc. IT-96-22-A (1997).

<sup>12</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 3, U.N. Doc. IT-96-22-A (1997).

<sup>13</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 3, U.N. Doc. IT-96-22-A (1997).

ensure a fair and just trial. The closest the Tribunal comes to establishing such a rule is Rule 5, the non-compliance rule. Rule 5 states that, “any objection by a party to an act of another party on the ground of noncompliance with the Rules or Regulations shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.” Note that the rule only mentions non-compliance of the “parties,” but not of the court. In the United States, the procedures governing the entry of a valid guilty plea are required to be followed by the court. The penalty for not following procedure in an American court could result in the overturning of the conviction or allowing the accused the opportunity to replead.

A. Erdemovic case

Drazen Erdemovic was brought before the International Criminal Tribunal for the former Yugoslavia in connection with its investigation into the killing of civilians in an area that was designated by the United Nations as a “safe area” in Srebrenica.<sup>14</sup> Erdemovic was indicted on one count of a crime against humanity and on an alternative count of a violation of the laws or customs of war.<sup>15</sup> The indictment alleged that Erdemovic participated, along with his military unit, the 10<sup>th</sup> Sabotage Detachment of the Bosnian Serb Army, in the execution by firing squad of hundreds of unarmed Bosnian Muslim men at the Pilica collective farm.<sup>16</sup>

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<sup>14</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>15</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>16</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

At his first appearance before Trial Chamber I, Erdemovic pleaded guilty to the charge of a crime against humanity.<sup>17</sup> The Trial Chamber accepted his plea and dismissed the alternative charge of a violation of the laws or customs of war.<sup>18</sup> After the plea was entered, but before the formal pronouncement of judgment and entry of the sentence, the Trial Chamber became concerned about Erdemovic's health and ordered psychiatric and psychological examinations.<sup>19</sup> Medical examiners who evaluated Erdemovic's health reported that he was suffering from post-traumatic stress to such a degree that he was unfit to stand trial.<sup>20</sup> At a status conference a month later, Erdemovic reaffirmed his plea of guilty.<sup>21</sup> After a second medical examination, Erdemovic was found fit to stand trial and a sentencing judgement was then entered against him.<sup>22</sup> Erdemovic was sentenced to ten years' imprisonment for the charge of a crime against humanity.<sup>23</sup>

Erdemovic appealed the Trial Chamber's decision asking that the sentencing judgment be revised.<sup>24</sup> Counsel for Erdemovic and the Prosecution raised several issues on appeal, none of which the Appeals Chamber chose to address. Instead, the Appeals Chamber addressed 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."<sup>25</sup> The preliminary issues raised by the Appeals Chamber involved the

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<sup>17</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>18</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>19</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>20</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>21</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>22</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>23</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 4, U.N. Doc. IT-96-22 (1997).

<sup>24</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 4, U.N. Doc. IT-96-22 (1997).

<sup>25</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 7, U.N. Doc. IT-96-22 (1997).

guilty plea entered by Erdemovic.<sup>26</sup> The Appeals Chamber also dealt with the issues of Erdemovic's mental competency and whether he could use duress as a complete defense.

The issue of duress was raised due to the fact that Erdemovic pleaded guilty to the charge of a crime against humanity, but defended his actions claiming that he had been forced to commit the act by his military superior.<sup>27</sup> His use of the defense of duress to mitigate or reduce his sentence suggested a lack of understanding of the meaning of the offense to which he had plead guilty.<sup>28</sup> Erdemovic also claimed that he was under such stress and anxiety that he was mentally incompetent when he committed the alleged offenses.<sup>29</sup>

The majority of the Appeals Chamber stated in its opinion that, "duress does not afford a complete defense to a soldier charged with a crime against humanity or a war crime involving the killing of innocent human beings."<sup>30</sup> Because it did not recognize duress as a defense to a crime against humanity, the majority of the Appeals Chamber found that the guilty plea of the Appellant was not equivocal.<sup>31</sup> The Appeals Chamber also held that Erdemovic's guilty plea was not informed.<sup>32</sup> The Appeals Chamber justified this decision by holding that Erdemovic did not understand the nature of the

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<sup>26</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 8, U.N. Doc. IT-96-22 (1997).

<sup>27</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 3, U.N. Doc. IT-96-22 (1997).

<sup>28</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 5, U.N. Doc. IT-96-22 (1997).

<sup>29</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 4, U.N. Doc. IT-96-22 (1997).

<sup>30</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 8, U.N. Doc. IT-96-22 (1997).

<sup>31</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 8, U.N. Doc. IT-96-22 (1997).

<sup>32</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Appeals Judgement, at 8, U.N. Doc. IT-96-22 (1997).

charges and the consequences associated with pleading guilty to the charge of a crime against humanity.<sup>33</sup>

The Appeals Chamber thus held Erdemovic's guilty plea to be invalid. It then remanded the case to a new Trial Chamber, which permitted Erdemovic to replead with the full understanding of what constitutes a crime against humanity and a war crime. The standard of a valid guilty plea, as established by the Appeals Chamber, is set out below.

#### B. ICTY Guilty Plea Standard

The Appeals Chamber sets out three conditions that must be satisfied before a valid guilty plea can be entered.<sup>34</sup> The guilty plea must be voluntary, informed, and unequivocal.<sup>35</sup> The Appeals Chamber defines a voluntary plea as one made by someone who is competent to understand the consequences of pleading guilty and who is not acting under threats, inducements or promises.<sup>36</sup> An informed plea is one made with an understanding of the nature of the charges alleged and the consequences of admitting guilt to them.<sup>37</sup> An unequivocal plea is defined as a plea that is unaccompanied by contradictory statements of criminal responsibility.<sup>38</sup>

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<sup>33</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 8, U.N. Doc. IT-96-22-A (1997).

<sup>34</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>35</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>36</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>37</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>38</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

## 1. Voluntary

In determining whether Erdemovic's plea of guilty was voluntary, Judges McDonald and Vohrah, the authors of the majority opinion of the Appeals Chamber, studied the reasoning by which the first Trial Chamber reached its decision. Judges McDonald and Vohrah stated that voluntariness was derived from two elements. First, an accused must competently understand the consequences of pleading guilty.<sup>39</sup> Second, the plea must be made free from threats, inducements or promises of leniency.<sup>40</sup>

As part of determining the voluntariness of Erdemovic's plea, the Trial Chamber noted that Erdemovic reaffirmed his guilty plea on several occasions.<sup>41</sup> Based on Erdemovic's medical reports stating that his "conscience was clear" and that he showed "no signs of memory loss," and his consistency in maintaining his plea of guilty, the Appeals Chamber held that Erdemovic was competent to enter his plea of guilty, thus rendering it a "voluntary" plea.<sup>42</sup>

Evidence that Erdemovic's plea was made free from threats, inducements or promises is shown by the fact that Erdemovic voluntarily surrendered himself to the authorities and that he confessed his involvement in the massacres before it was known to the investigating authorities.<sup>43</sup> He also volunteered valuable information about crimes of

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<sup>39</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>40</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>41</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 5, U.N. Doc. IT-96-22-A (1997).

<sup>42</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 6, U.N. Doc. IT-96-22-A (1997).

<sup>43</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 10, U.N. Doc. IT-96-22 (1998).

which the investigators were unaware, and he testified against other war criminals without any expectation of leniency.<sup>44</sup>

## 2. Informed

Under ICTY standards, a valid guilty must have been “informed.” The definition of informed means more than just comprehending the consequences of pleading guilty; it also means understanding the nature of the guilty plea and the charge to which one is pleading guilty.<sup>45</sup> According to the Appeals Chamber an informed plea consisted of Erdemovic understanding:

“(a) the nature of the charges against him and the consequences of pleading guilty generally; and

(b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.”<sup>46</sup>

Before Erdemovic entered his plea, The Presiding Judge of the Trial Chamber explained the outcome of pleading guilty.<sup>47</sup> Based on the Presiding Judge’s questioning

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<sup>44</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 10, U.N. Doc. IT-96-22 (1998).

<sup>45</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 6, U.N. Doc. IT-96-22-A (1997).

<sup>46</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 6, U.N. Doc. IT-96-22-A (1997).

<sup>47</sup> “**The Presiding Judge:** Are you prepared to plead, given the fact that the Tribunal would like to recall to you that you can plead either guilty or not guilty? This is the procedure which was adopted in this Tribunal with it being understood, of course, that the consequences are not the same. I will explain them to you.

If you plead not guilty, you are entitled to a trial during which, of course, with your lawyer you will contest the charges and the allegations presented against you by the Prosecutor, as I will remind you. Alternatively, either one or the other violations, crime against humanity or war crime, violations of laws or customs of war.

If you plead guilty, the trial will continue but completely differently, which I am sure you understand but which I have to explain to you. At that point you will have the opportunity during another hearing at a date which we will set at that point in agreement with everybody, you will plead guilty but you will plead under other circumstances, that is, that there were attenuating circumstances, mitigating circumstances, or aggravating circumstances. Then there will be a discussion between your attorney and the Prosecution which will not be the same.

of Erdemovic, the Appeals Chamber held that Erdemovic was not “adequately informed of the consequences of pleading guilty by the explanation offered during the initial hearing.”<sup>48</sup>

As further evidence that the plea was uninformed, Erdemovic’s counsel consistently asserted arguments that contradicted Erdemovic’s admission of guilt and criminal responsibility that is inherent in a guilty plea.<sup>49</sup> When Erdemovic’s counsel asserted contradictory arguments to the court, it stood to reason that not only was counsel misinformed, but his client, Erdemovic, must also have been misinformed as to the nature and consequences of entering a guilty plea.<sup>50</sup> It was on these facts that the Appeals Chamber held Erdemovic’s plea uninformed and invalid.<sup>51</sup>

Based on a conversation between the Presiding Judge and Erdemovic’s counsel, Mr. Babic, the Appeals Chamber determined that Erdemovic did not understand the nature of the charges against him, nor the difference in pleading guilty to one or the other of the alternative charges alleged in the indictment.<sup>52</sup> The verbal exchange between the

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Having explained this to you, the Tribunal must now ask whether you are prepared to plead guilty and do you plead guilty or not guilty?

**The Accused Erdemovic:** Your Honor, I have told my counsel that I plead guilty.” Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 7, U.N. Doc. IT-96-22-A (1997).

<sup>48</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 7, U.N. Doc. IT-96-22-A (1997).

<sup>49</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 7, U.N. Doc. IT-96-22-A (1997).

<sup>50</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 7, U.N. Doc. IT-96-22-A (1997).

<sup>51</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 8, U.N. Doc. IT-96-22-A (1997).

<sup>52</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 9, U.N. Doc. IT-96-22-A (1997):

“**The Presiding Judge:** ....First of all, I would like to turn to Mr. Babic: Mr. Babic, have you received a copy of the indictment in a language which you understand and which, of course, the accused understands?...

Presiding Judge, Erdemovic and Mr. Babic in no way suggests that either Erdemovic or his counsel understood the nature of the charges against him. Nor does the Presiding Judge explain in any way that the law differs in either charge. In a later exchange between the Presiding Judge and Mr. Babic, it is clearly apparent that Mr. Babic did not understand the nature of pleading guilty to one or the other of the alternative charges of a war crime or a crime against humanity.<sup>53</sup>

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**Mr. Babic:** Yes...We have received the text of the indictment in Serbo-Croatian and both the accused and myself have understood it.

**The Presiding Judge:** ...Have you deliberated a long time about the contents of this indictment with the accused and explained what defense strategy can be used, which you are going to use with him?

**Mr. Babic:** ...With my client, I spent some time, several hours, studying the indictment and studying his rights according to the Statute and Rules of the Tribunal. I think that he had enough time to comprehend what he is charged with by this indictment and to understand his rights in that basis.”

The Presiding Judge is now speaking directly to Erdemovic regarding the indictment:

**The Presiding Judge:** ...You have heard what your counsel has just said. On behalf of my colleagues and on behalf of the International Tribunal, I would like to ask you the same question, the one that I asked your attorney: Have you read the indictment, have you had the opportunity, have you had the time, to speak about it with Mr. Babic? Have the facts in that indictment been presented to you, have they been presented to you in a language which you understand, that is, Serb-Croat?

**The Accused Erdemovic:** Yes, your Honor. Yes.”

The Registrar read the indictment and the Presiding Judge again began questioning Erdemovic:

**The Presiding Judge:**...Mr. Erdemovic...According to what you said before, you understood what is contained in this indictment as well as the charges against you, those charges which the Prosecution has made against you. Have you spoken about these charges with your counsel, Mr. Babic? I am asking you a question now.

**The Accused Erdemovic:** Yes.”

<sup>53</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 8, U.N. Doc. IT-96-22-A (1997):

**Mr. Babic:**...We did not have the option of war crime, but the elements – all the elements of the criminal offense of the war crime were not present. So we discussed that.

**President Cassese:** Sorry. May I ask you – I did not understand you correctly. You said that some elements of war crimes were not present. Which elements of war crimes were not present?

**Mr. Babic:** Yes.

**President Cassese:** Which ones?

**Mr. Babic:** The presence of the civilian population is not an element of the war crime; it is an element of the crime against humanity.

This conversation is confusing. It appears that neither Erdemovic nor Mr. Babic, understood the nature of pleading guilty to either a war crime or a crime against humanity. At this point The Presiding Judge should have carefully explained the differences in each charge, in a manner in which Erdemovic and Mr. Babic could understand.

### 3. Equivocal

A plea is equivocal when the accused presents a defense contradicting criminal responsibility while simultaneously entering the plea of guilty.<sup>54</sup> The court is required to determine whether the plea is unequivocal.<sup>55</sup> If the court has doubts as to the defendant's understanding of the guilty plea, then it must enter a plea of not guilty on the defendant's behalf.<sup>56</sup>

A determination of the unequivocal nature of a plea where a court has doubts concerning the defendant's understanding of the plea may require a legal analysis of what could constitute a defense to the charge. In the Erdemovic case, for example, the court conducted a legal analysis of duress as a defense to a crime against humanity. Erdemovic repeatedly asserted his plea of guilty, yet simultaneously maintained a defense of duress. The Tribunal held that a plea is equivocal if the defendant pleads guilty but has a valid

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**President Cassese:** Do you mean to say that in an armed conflict, whatever its classification, whether it is classified as internal or international, the killing of civilians may not be regarded as a war crime? I mean, if you go through the case law of—

**Mr. Babic:** During combat operations, yes, during combat operations.

**President Cassese:** All right. Thank you.”

<sup>54</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 4, U.N. Doc. IT-96-22-A (1997).

<sup>55</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

<sup>56</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

defense.<sup>57</sup> If the accused has a valid defense, then the case must go to trial.<sup>58</sup> The Appeals Chamber held that duress does not afford a complete defense to a crime against humanity, so Erdemovic raising it while simultaneously pleading guilty to a crime against humanity presented no legal denial of criminal responsibility. Because there was no contradiction, the guilty plea was held to be unequivocal.<sup>59</sup>

The majority of the Appeals Chamber found that Erdemovic's plea was unequivocal for the reasons stated in the previous discussion and not due to duress. Judge Stephen, in his separate and dissenting opinion agreed that Erdemovic's plea was unequivocal, but argued that Erdemovic's plea was also equivocal because duress could be a complete defense. Judge Stephen determined that there was sufficient evidence of duress to require the court to enter a plea of not guilty and take the case to trial, where evidence could be entered and a defense asserted.

The differences in opinion between the majority and Judge Stephen were based on the recognition by international law authorities of duress as a defense to the killing of innocent persons. Neither international law nor the Tribunal recognize obedience to superior orders as a defense to a charge of a war crime or a crime against humanity. Obedience to superior orders is, however, a fact the court considers when determining whether the elements for a defense of duress have been made out.<sup>60</sup> The United Nations War Crimes Commission stated that "duress may prove a defense if (a) the act charged

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<sup>57</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

<sup>58</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

<sup>59</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>60</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 16, U.N. Doc. IT-96-22-A (1997).

was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; and (c) the remedy was not disproportionate to the evil.”<sup>61</sup> Given these requirements, the generally accepted opinion by most international law authorities is that duress does not afford a defense to acts committed in obedience to superior orders.<sup>62</sup> The United Nations War Crimes Commission, however, did not specifically address duress as a defense to the killing of innocent persons.<sup>63</sup>

After a lengthy examination of international legal authorities on the issue of duress, the Appeals Chamber held duress to be a mitigating factor in punishment, not a complete defense.<sup>64</sup> The Appeals Chamber held that duress was not a defense to the killing of innocent human beings because national law does not recognize duress as a defense.<sup>65</sup> It concluded that because national law did not recognize it, international law could not hold defendants to a lower standard of conduct.<sup>66</sup> The Appeals Chamber noted that its duty was to uphold international humanitarian law.<sup>67</sup> In maintaining that duress did not afford a complete defense to acts committed by order of a military superior, it held that Erdemovic’s guilty plea could not be found equivocal.

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<sup>61</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 18, U.N. Doc. IT-96-22-A (1997).

<sup>62</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 18, U.N. Doc. IT-96-22-A (1997).

<sup>63</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 18, U.N. Doc. IT-96-22-A (1997).

<sup>64</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

<sup>65</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 38, U.N. Doc. IT-96-22-A (1997).

<sup>66</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 38, U.N. Doc. IT-96-22-A (1997).

<sup>67</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 43, 44, U.N. Doc. IT-96-22-A (1997).

The fundamental disagreement between the majority's position and Judge Stephen's position regarding the use of duress as a defense can be found in the wording, or lack thereof, of the ICTY's Statute and Rules. The Tribunal's Statute and Rules specifically prohibited the defense of duress when argued as a defense against acts committed in obedience to superior orders. There was no provision in the Statute or Rules that allowed or prohibited the defense of duress as applied to the killing of innocent people. Judge Stephen based his dissent, in part, on this ambiguity. He asserted that the killing of innocent people was in effect murder, and argued that the Tribunal's statute and Rules do not prohibit duress to be used as a defense to murder.<sup>68</sup> Thus, it cannot bar Erdemovic from using duress as a complete defense to the charge of killing innocent people.

The Appeals Chamber justified its holding on the basis that international law did not uniformly *recognize* duress as a defense to killing innocent people. In his dissenting opinion, Judge Stephen argued that international law did not provisionally *reject* the defense of duress, therefore, it must be made available to the accused. He argued that since there was no "satisfied and reasoned principle governing the exclusion of duress," it should not have been excluded as a defense option.<sup>69</sup> Judge Stephen stated that it was the right of the individual Tribunal trial chambers to apply international humanitarian law in the absence of strict provisional guidance.

Judge Stephen reasoned that Erdemovic's plea of guilty, coupled with his statement of duress, was sufficiently ambiguous to force the court to enter a plea of not

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<sup>68</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Separate and Dissenting Opinion of J. Stephen, at 8, N. 23, N. 24.

<sup>69</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Separate and Dissenting Opinion of J. Stephen, at 10, N. 29.

guilty on Erdemovic's behalf and order a trial where evidence could be entered to establish a defense of duress.<sup>70</sup>

### C. ICTY Guilty Plea Procedure

The procedure governing the entry of a guilty plea before the Tribunal is founded on Articles 20 and 21 of the Statute of the International Tribunal and Rule 62 of the Rules of Procedure and Evidence. Article 20 paragraph 3 of the Statute sets out the procedure by which an accused enters a guilty plea.<sup>71</sup> Article 21 generally defines the rights of the accused.<sup>72</sup> Rule 62 sets out a more detailed procedure for entering a guilty plea.<sup>73</sup>

Article 20 of the Statute governs the conduct of the trial proceedings. It states that the Trial Chamber has the responsibility to ensure that the trial is speedy and fair, the rights of the accused are respected and that the proceedings are conducted according to the rules of procedure.<sup>74</sup> Article 20 section 3 states that the Trial Chamber should read the indictment to the accused and ensure that he understands it, then instruct the accused to enter a plea.<sup>75</sup>

Article 21 establishes the rights of the accused. This article affords the accused equality before the law, the right to a fair trial and the presumption of innocence until proven guilty.<sup>76</sup> The article also grants the accused the opportunity to be "informed

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<sup>70</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Separate and Dissenting Opinion of J. Stephen, at 4, N. 12.

<sup>71</sup> Statute of the International Tribunal art. 20 (ICTY).

<sup>72</sup> Statute of the International Tribunal art. 21 (ICTY).

<sup>73</sup> Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, U.N. Doc. ICTY Rule 62.

<sup>74</sup> Statute of the International Tribunal art. 20 §1 (ICTY).

<sup>75</sup> Statute of the International Tribunal art. 20 (ICTY).

<sup>76</sup> Statute of the International Tribunal art. 21 §1-3 (ICTY).

promptly and in detail in a language which he understands of the nature and cause of the charge against him.”

Relevant to this case Rule 62 states that the Trial Chamber shall:<sup>77</sup>

1. satisfy itself that the right of the accused to counsel is respected;
2. read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;
3. call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;
4. in case of a plea of guilty, instruct the Registrar to set a date for trial.

In comparing the difference in guilty plea procedures, it is important to look closely at three procedural requirements that are the same for both the Tribunal and the United States. Even though these procedures are the same, American courts interpret their meaning and their significance very differently than does the Tribunal.

1. Sub-paragraph (a): The Right to Counsel

The Tribunal’s first procedural guideline requires the Trial Chamber to ensure that the accused is represented by counsel. However, the Rules of Procedure do not specify that the accused be *effectively* represented by counsel. Erdemovic did not appear to have adequate legal representation during his trial or his appeal, although this issue was never directly addressed by the Appeals Chamber. The majority opinion specifically noted

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<sup>77</sup> Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, U.N. Doc. ICTY Rule 62.

several times, however, that Erdemovic's counsel did not appear to understand the law and criminal procedure.

American criminal procedure requires that an accused in a criminal prosecution be effectively and adequately represented by counsel. The Supreme Court of the United States has held that the right to counsel is needed to protect an accused's fundamental right to a fair trial.<sup>78</sup> In the case of United States vs. Cronic, the Supreme Court held that "the presence of attorneys are essential because they are the means through which the other rights of the person on trial are secured." 466 U.S. 648, 652, 104 S.Ct. 2039, 2043 (1984). The Sixth Amendment states that not only is the accused entitled to counsel, the accused is entitled to the "*assistance* of counsel," whose presence is necessary to ensure a fair trial.<sup>79</sup> The Supreme Court set the standard for attorney performance as that of reasonably effective assistance in the case of Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The measure of an attorney's performance is reasonableness under the prevailing professional standard.<sup>80</sup>

Erdemovic was not effectively represented by competent counsel at his trial. As stated in United States v. Ash, "the core purpose of the counsel guarantee was to assure "assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). An accused cannot have a fair trial if the attorney representing him does not know the intricacies of the law and legal proceedings in that jurisdiction. The

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<sup>78</sup> Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 2062 (1984).

<sup>79</sup> Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984).

<sup>80</sup> Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 (1984).

following comments made by the Appeals Chamber show that Erdemovic's counsel, Mr. Babic, did not understand the nature of the charges brought against Erdemovic, nor did he understand the sentencing process of entering a guilty plea:

“From the passage of the transcript ...it is apparent that defense counsel himself did not appreciate either the true nature of the offenses at international law or the true legal distinction between them.”<sup>81</sup>

“Defense counsel's statements would indicate a lack of understanding of the offense of a war crime.”<sup>82</sup>

Though the Appeals Chamber noted in its opinion that Mr. Babic did not understand important aspects of the law while representing Erdemovic, it never once questioned his ability to competently represent Erdemovic. American law guarantees an accused the right to a fair trial where counsel will effectively represent them. The United States Constitution guarantees an accused the right to a fair trial in the Due Process clauses of the Fifth and Fourteenth Amendments.<sup>83</sup> The elements of a fair trial are set out in the Sixth Amendment counsel clause:<sup>84</sup>

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *assistance of counsel* for his defense.” [Emphasis added]

The Supreme Court recognized in Strickland v. Washington, that “the right to counsel is the right to the effective assistance of counsel.” 466 U.S. 668, 685, 104 S.Ct.

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<sup>81</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 10, U.N. Doc. IT-96-22-A (1997).

<sup>82</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 9, U.N. Doc. IT-96-22-A (1997).

<sup>83</sup> U.S. Const. amend. V, XIV.

<sup>84</sup> Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984).

2052, 2063 (1984). An attorney can deprive an accused of the effective assistance of counsel by failing to provide competent legal assistance.<sup>85</sup>

The Supreme Court in Strickland required that a defendant claiming ineffective assistance of counsel show that counsel's assistance was inadequate, and that the inadequate performance prejudiced the defense.<sup>86</sup> A showing of inadequate assistance requires "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>87</sup> A showing of prejudice requires that the defendant show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable."<sup>88</sup>

Mr. Babic's errors were serious enough to show, according to American law, that his counsel was inadequate. Examples of these errors follow:

"...There is nothing on the record to show that anyone, either defense counsel or the Trial Chamber, had explained to the Appellant that a crime against humanity is a more serious crime and that if he had pleaded guilty to the alternative charge of a war crime he could expect a correspondingly lighter punishment."<sup>89</sup>

"...Defense counsel did not seem to appreciate that a guilty plea had finally decided the issue of a conviction or acquittal. Defense counsel was apparently advancing arguments asserting insufficiency of evidence to convict Appellant and urging for an acquittal during a sentencing hearing after the Appellant had pleaded guilty."<sup>90</sup>

The purpose of providing counsel to a defendant is to provide the defendant with an assistant who has knowledge of the law and the skill to use that knowledge as it

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<sup>85</sup> Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

<sup>86</sup> 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

<sup>87</sup> *Id.* at 686, 2064.

<sup>88</sup> *Id.* at 686, 2064.

<sup>89</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at13, U.N. Doc. IT-96-22-A (1997).

<sup>90</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at13, U.N. Doc. IT-96-22-A (1997).

pertains to a particular defendant's case.<sup>91</sup> Mr. Babic did not have that skill or knowledge. He did not understand that once Erdemovic pleaded guilty to a crime against humanity, the trial was over and that the time for defense arguments had passed. Mr. Babic did not understand (and presumably then, did not explain to his client) that he was pleading guilty to a more serious charge, a crime against humanity, even though he had the option of pleading to a less serious charge. These errors in judgement by Mr. Babic were serious enough to deprive Erdemovic of a fair trial. The Supreme Court held in Strickland that if a defendant can show that his counsel was inadequate and that the inadequate performance of counsel deprived defendant of a fair trial, then the conviction is unreliable.<sup>92</sup>

## 2. Sub-paragraph (b): Understanding the Indictment

Rule 62 also requires the Trial Chamber to satisfy itself that the accused understands the indictment. In the Erdemovic case there was no evidence that the first Trial Chamber followed this procedure. The Trial Chamber should have clarified the legal differences in the charge of a war crime or a crime against humanity. This element of the procedure is critical, especially in this case, because a crime against humanity is a more serious charge than a war crime.<sup>93</sup> It was this issue that caused the Appeals

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<sup>91</sup> "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to the counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled." Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 2063 (1984).

<sup>92</sup> 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

<sup>93</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 11, U.N. Doc. IT-96-22-A (1997).

Chamber to remand Erdemovic's case for a new trial based on the fact that his plea was not informed.<sup>94</sup>

When the case was remanded to a new Trial Chamber, Erdemovic was allowed to replead, having been instructed with the full knowledge of the nature of the charges against him and the consequences of pleading guilty to one or the other of the alternative charges.<sup>95</sup> Erdemovic entered a plea of guilty for the charge of a violation of the laws or customs of war.<sup>96</sup> He was then sentenced for this crime.<sup>97</sup> As stated previously, there was no indication that Erdemovic understood the indictment against him when he first entered his plea of guilty. The instructions Erdemovic was given on remand should have been given to him by the original Trial Chamber.

### 3. Sub-paragraph (d): Setting a Date for Trial

The last thing necessary to clarify in the Tribunal's procedures is the confusion surrounding Rule 62 sub-paragraph (d). Subparagraph (d) states that a trial date will be set after the accused enters a plea of guilty. Holding a trial after the entry of a guilty plea would appear to be contradictory. The Appeals Chamber clarified this issue by reading Article 15 of the Tribunal's Statute. Article 15 states that after an accused enters a plea of guilty there must be a date set for the pre-sentencing hearing rather than a trial.<sup>98</sup>

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<sup>94</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 14, U.N. Doc. IT-96-22-A (1997).

<sup>95</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

<sup>96</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 3, U.N. Doc. IT-96-22 (1998).

<sup>97</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 3, U.N. Doc. IT-96-22 (1998).

<sup>98</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Joint Separate Opinion of JJ. McDonald and Vohrah, at 3, U.N. Doc. IT-96-22-A (1997).

Though American guilty plea procedures are similar to the Tribunal's, there is a different legal interpretation as to the necessity of following the procedures. But even as there are similarities, there are also three significant differences in American procedure that the Tribunal does not recognize or require. These are discussed under the heading of United States guilty plea procedures.

#### IV. United States Guilty Plea Standards and Procedures

The foundation of American law is the United States Constitution. No federal or state law can survive if it violates any provision of the Constitution. The Federal Rules of Criminal Procedure, which govern the entry of a valid guilty plea in American federal courts require courts to adhere to the United States Constitution through specific standards and procedures they set out.

##### A. United States Guilty Plea Standards

The American standard for entering a valid guilty plea was set out in the case of Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970). The Supreme Court of the United States held that a valid plea of guilty must be voluntary, knowing and intelligent.<sup>99</sup>

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<sup>99</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

## 1. Voluntary

A voluntary plea is a clear reasoned choice made by the defendant without threat, force or promises.<sup>100</sup> It is important that a plea be voluntary because admitting guilt is incriminating, therefore making the defendant a witness against himself.<sup>101</sup> The United States Constitution protects against compelled self-incrimination in the Fifth Amendment. A plea is voluntary when the defendant understands the charges against him and the consequences of entering the guilty plea.<sup>102</sup>

## 2. Knowing and Intelligent

Guilty pleas must also be knowing and intelligent.<sup>103</sup> A knowing and intelligent plea is a plea made “with sufficient awareness of the relevant circumstances and likely consequences.”<sup>104</sup> A plea must be knowing and intelligent because the accused is waiving constitutionally protected rights.<sup>105</sup> As will be discussed later on, by pleading guilty a defendant waives the right to a jury trial and all the benefits accompanying a jury trial. When a defendant pleads guilty he is not only waiving the right to a trial and his opportunity to defend himself, he is consenting to judgment and conviction.<sup>106</sup> A knowing and intelligent guilty plea is a plea entered after due consideration of all the alternative courses open to the defendant.<sup>107</sup>

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<sup>100</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>101</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>102</sup> Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970).

<sup>103</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>104</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>105</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>106</sup> Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

<sup>107</sup> North Carolina v. Alford, 400 U.S. 25, 30, 91 S.Ct. 160, 164 (1970).

### 3. Mental Competency to Stand Trial

Although not specifically defined as a standard, it is nonetheless required that a defendant on trial be mentally competent. The Appeals Chamber stated that a voluntary, informed and unequivocal guilty plea can only be made by one who is competent to understand the proceedings. However, there is no provision in the Statute or Rules that defines competency to stand trial. In the United States, a defendant is not competent to stand trial if the defendant in his present mental condition, “lacks a rational as well as factual understanding of the charges and proceedings, or lacks sufficient present ability to consult with his lawyer with a reasonable degree of understanding.”<sup>108</sup> Under this definition of incompetence, Erdemovic probably would not have been found competent to stand trial in an American court because he did not appear to understand the factual nature of the charges against him, nor did he appear capable of consulting with his attorney with a reasonable degree of understanding.

The Trial Chamber, upon becoming concerned with Erdemovic’s health, on its own motion ordered a mental health evaluation for Erdemovic. American courts may also *sua sponte* require defendant’s to undergo a medical evaluation when there is concern about the defendants mental health. In fact, American courts are constitutionally required to inquire into a defendant’s mental health, if the court in any way suspects that the defendant is incompetent.<sup>109</sup> Title 18 of the United States Code §4241, sets out the procedure the court must follow when determining the competency of a defendant. It also

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<sup>108</sup> Dusky v. United States, 271 F.2d 385, 397 (1959).

<sup>109</sup> Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed. 2d 815 (1966).

gives the length of time the court must allow before it can determine if and when the defendant's mental condition has improved.

The Trial Chamber never explained its criterion for finding Erdemovic's mental health improved enough to continue the trial, after he had been found incompetent to stand trial. The Trial Chamber continued to take a plea of guilty from Erdemovic even during the time he was declared incompetent and before his health had been pronounced improved.<sup>110</sup>

Mental Competency to stand trial is a serious issue that the Appeals Chamber did not address. In fact, it is a serious issue that neither the Statute nor the Rules address. A strong argument could be made that Erdemovic was not competent to stand trial during any phase of the first proceedings. This lack of competence would significantly explain Erdemovic's lack of understanding of the charges brought against him and the guilty plea process in general.

The ICTY requires a valid guilty plea to be unequivocal, while the United States does not. As will be discussed in detail in the American procedures portion of this paper, a defendant in an American court may plead guilty to a criminal charge while simultaneously protesting his innocence to the charge. This is called a nolo contendere plea. A nolo contendere plea is not a standard under American law, it is a procedure. Nor is a nolo contendere plea viewed as "equivocal." American courts recognize that, for their own intelligent, valid reasons, defendants may find it in their best interest to plead guilty to a criminal charge, without actually admitting guilt or innocence.

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<sup>110</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 2, U.N. Doc. IT-96-22 (1998).

## B. United States Guilty Plea Procedure

The procedure for entering a plea in a federal court is based on the Federal Rules of Criminal Procedure, specifically Rule 11.<sup>111</sup> This rule establishes the elements necessary to enter a valid guilty plea in federal court. Rule 11 was established to ensure that the constitutional rights of defendants were protected in American guilty plea proceedings. When a court fails to follow the required procedures for entering a valid guilty plea, a defendant's constitutional rights are being violated. Federal statutes provide a remedy for defendants whose constitutional rights have been violated in this way: setting aside the conviction and giving the defendant a new trial (an opportunity to enter a new plea).

In a federal criminal proceeding, a defendant may plead not guilty, guilty, or nolo contendere.<sup>112</sup> A defendant may only plead guilty or nolo contendere with the permission of the court.<sup>113</sup> The court may only accept a plea of guilty or nolo contendere after it has given due consideration to the intent of each party and has considered the interest of the public in the effective administration of justice.<sup>114</sup> Before accepting a guilty plea or a plea of nolo contendere the court must first personally address the defendant, then advise the defendant to ensure that the defendant understands the nature of the charge brought against him.<sup>115</sup> The court must also advise the defendant that he has the right to

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<sup>111</sup> State procedures governing criminal proceedings are created by the individual states, though they are patterned after the federal model.

<sup>112</sup> Fed. R. Crim. P. 11 (a)(1).

<sup>113</sup> Fed. R. Crim. P. 11 (b).

<sup>114</sup> Fed. R. Crim. P. 11 (b).

<sup>115</sup> Fed. R. Crim. P. 11 (c)(1)(2).

representation by counsel.<sup>116</sup> If a defendant enters a plea of not guilty, then the defendant has the right to a jury trial, assistance of counsel (court appointed if necessary), the right to confront and cross-examine witnesses and the right against self-incrimination.<sup>117</sup> If the defendant enters a plea of guilty or nolo contendere, there will be no further trial and as a result the defendant waives all the rights inherent in a jury trial.<sup>118</sup>

The court cannot accept a plea of guilty or nolo contendere without first determining that the plea is entered voluntarily and that it is not the result of threats, force or promises.<sup>119</sup> The court must also determine if the willingness to plead guilty or nolo contendere is the result of prior discussions between the defense and prosecution.<sup>120</sup> Also, a verbatim record of the entire proceedings must be made.<sup>121</sup> If the court accepts a plea of guilty or nolo contendere, then the record must show the court's advice to the defendant, the inquiry into the voluntariness of the plea and the inquiry into the accuracy of the plea.<sup>122</sup> The court cannot accept a plea of guilty or nolo contendere without first establishing that there is a factual basis for entering the plea.<sup>123</sup>

If the procedures defined in Rule 11 are not followed exactly, the decision reached by the court is open to subsequent attack and reversal.<sup>124</sup> The Supreme Court reinforced the importance of following Rule 11 in the case of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709. When a defendant enters a plea of guilty or nolo contendere the

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<sup>116</sup> Fed. R. Crim. P. 11 (c)(1)(2).

<sup>117</sup> Fed. R. Crim. P. 11 (c)(3).

<sup>118</sup> Fed. R. Crim. P. 11 (c)(4).

<sup>119</sup> Fed. R. Crim. P. 11 (d).

<sup>120</sup> Fed. R. Crim. P. 11 (d).

<sup>121</sup> Fed. R. Crim. P. 11 (g).

<sup>122</sup> Fed. R. Crim. P. 11 (g).

<sup>123</sup> Fed. R. Crim. P. 11(f).

<sup>124</sup> McCarthy v. United States, 394 U.S. 459, 464, 89 S.Ct. 1166, 1169 FN6 (1969).

defendant is waiving constitutional rights. The Supreme Court has held that for a waiver to be valid “it must be an intentional relinquishment of a known right.”<sup>125</sup>

The procedure that governs American criminal trials is similar to that of the Tribunal with three exceptions. First, the United States allows a defendant to accept criminal responsibility, therefore punishment, without actually admitting factual guilt. Second, the United States commonly recognizes and utilizes plea bargain agreements. Third, American rules of criminal procedure specifically require the court to keep a verbatim record of the plea hearing.

#### 1. Plea of Nolo Contendere

The first exception to the Tribunal’s procedures is the nolo contendere plea. A plea of nolo contendere is “a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.”<sup>126</sup> A plea of nolo contendere is equal to a plea of guilty for sentencing purposes.<sup>127</sup>

As stated in North Carolina v. Alford, “an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”<sup>128</sup> A defendant who has intelligently examined his options and possible defenses could reasonably choose to accept criminal responsibility in the face of

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<sup>125</sup> Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

<sup>126</sup> North Carolina v. Alford, 400 U.S. 25, 35, 91 S.Ct. 160, 166 (1970).

<sup>127</sup> Fed. R. Crim. P. 11 advisory’s committee notes.

<sup>128</sup> 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970).

overwhelming evidence of his guilt.<sup>129</sup> The reason a defendant may want to enter a plea of nolo contendere would be to avoid use of the guilty plea in subsequent litigation.<sup>130</sup> A guilty plea can be used against a defendant in later criminal and civil trials, a plea of nolo contendere cannot.<sup>131</sup>

Though the plea of nolo contendere is accepted as a valid plea in American courts, there is still much debate about whether a guilty plea should be accepted when it is entered with a protestation of innocence.<sup>132</sup> Some courts hold that without a showing a guilt, a court must reject the plea of nolo contendere.<sup>133</sup> Another view is that the decision to accept criminal responsibility should be the defendant's to make for his own reasons.<sup>134</sup>

## 2. Plea Bargain Agreements

The second procedural difference between the United States and the Tribunal is the acceptance of a plea agreement. There are no provisions in the Statute or Rules of the Tribunal that provide for the acceptance of plea agreements.<sup>135</sup> Rule 11(e) of the Federal Rules of Criminal Procedure specifies the procedures the court must follow before accepting a plea agreement. American trial courts may accept a plea of guilty or nolo contendere based on an agreement between the defense and the prosecution.<sup>136</sup>

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<sup>129</sup> North Carolina v. Alford, 400 U.S. 25, 35, 91 S.Ct. 160, 166 (1970).

<sup>130</sup> Fed. R. Crim. P. 11 advisory's committee notes.

<sup>131</sup> Fed. R. Crim. P. 11 advisory's committee notes.

<sup>132</sup> North Carolina v. Alford, 400 U.S. 25, 33, 91 S.Ct. 160, 165 (1970).

<sup>133</sup> North Carolina v. Alford, 400 U.S. 25, 33, 91 S.Ct. 160, 165 (1970).

<sup>134</sup> North Carolina v. Alford, 400 U.S. 25, 33, 91 S.Ct. 160, 165 (1970).

<sup>135</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>136</sup> Fed. R. Crim. P. 11(e)(1).

Contingent upon accepting the plea of guilty or nolo contendere, the prosecution must:<sup>137</sup>

1. move for dismissal of charges; or
2. make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
3. agree that a specific sentence is the appropriate disposition of the case.

On March 5, 1998, the final sentencing decision was handed down on the Erdemovic case. Part of the consideration for that sentencing decision was based on a plea agreement reached between Erdemovic and the prosecutor.<sup>138</sup> The agreement in effect stated that Erdemovic pleaded guilty to the charge of a war crime "in full understanding of the distinction between that charge and the alternative charge of a crime against humanity, and the consequences of his plea."<sup>139</sup> As part of the plea bargain he also acknowledged responsibility for the crime committed.<sup>140</sup> The agreed upon sentence would be seven years' imprisonment in consideration of mitigating factors.<sup>141</sup>

As noted above, there is no provision for the acceptance of a plea bargain stated in the Statute or Rules of the Tribunal. This was the first time a plea bargain agreement had ever been presented to the Tribunal.<sup>142</sup> The plea agreement had no binding effect on the Tribunal, but the Trial Chamber did take it into consideration when determining the

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<sup>137</sup> Fed. R. Crim. P. 11(e)(1)(a-c).

<sup>138</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>139</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>140</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>141</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>142</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

sentence to impose on Erdemovic.<sup>143</sup> Though this was the first time the Tribunal had been presented with a plea agreement between the prosecution and the defense, it will undoubtedly not be the last.

Plea bargaining is a well known and accepted practice in American courts because it is a time effective and administratively efficient method of settling cases. Because it is a common practice among American courts, it is a highly regulated practice as well. Rule 11, which governs the entry of a valid guilty plea in federal court, also governs the proper entry and acceptance of a plea agreement. If the Tribunal chooses to accept plea bargaining as method of settling cases, it will need to establish its own regulations. For example, in the United States, a plea bargain agreement is not binding on an American court. However, if the judge in an American court rejects a plea agreement, that judge must personally inform the defendant why the plea is being rejected and provide the defendant an opportunity to withdraw the plea and replead.<sup>144</sup> While the plea agreement is not binding on the judge, it is binding on the parties who agree to it. If the prosecutor offers a reduced sentence in exchange for a guilty plea, then the prosecutor must honor that agreement. Plea bargaining is a cost effective and efficient means of disposing of cases provided it is well regulated and the rights of the accused are protected at all times.

### 3. Record of the Guilty Plea Proceedings

The third difference between the Tribunal's procedure and that of the United States is the American requirement that the court make a verbatim record of the guilty

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<sup>143</sup> Prosecutor v. Erdemovic, Judgements U.N. ICTY, Sentencing Judgement, at 13, U.N. Doc. IT-96-22 (1998).

<sup>144</sup> Fed. R. Crim. P. 11(e)(4).

plea proceedings.<sup>145</sup> Rule 11 of the Federal Rules of Criminal Procedure states that if a plea of guilty or nolo contendere is entered, the record must disclose the court's inquiry into the voluntariness and accuracy of the defendant's plea.<sup>146</sup> The record is required to "affirmatively disclose that [the] defendant understandingly and voluntarily plead guilty."<sup>147</sup>

The Supreme Court in Boykin held that if there is no record that explicitly shows the defendant's knowing and voluntary waiver of constitutional rights, it cannot be presumed.<sup>148</sup> If the record does not affirmatively disclose that the defendant voluntarily and intelligently entered a plea, then the conviction can be reversed.<sup>149</sup>

The three significant procedural differences between the ICTY and the United States were the court's recognition of a plea of nolo contendere, plea bargaining, and the requirement that the court make a complete record of the guilty plea proceedings. These differences are significant because they affect the outcome of the proceeding. Rule 11 of the Federal Rules of Criminal Procedure was written for the purpose of establishing guidelines that the court must follow to insure fair and just criminal convictions that could withstand post-conviction attack. The three procedural guidelines just discussed further this endeavor.

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<sup>145</sup> Fed. R. Crim. P. 11(g).

<sup>146</sup> Fed. R. Crim. P. 11(g).

<sup>147</sup> Brady v. United States, 397 U.S. 742, 747, 90 S.Ct. 1463, 1468 FN4 (1970).

<sup>148</sup> 395 U.S. 238, 243, 89 S.Ct. 1709, 1712 (1969).

<sup>149</sup> Boykin v. Alabama, 395 U.S. 238, 244, 89 S.Ct. 1709, 1713 (1969).

V. Comparison Between U.S. and ICTY Guilty Plea Standards and Procedures

The essential similarities between the United States and the ICTY's standards are that a valid guilty plea must be voluntary, informed and intelligent. The difference in standards is the ICTY's requirement that the plea be unequivocal. The United States does not require a plea to be "unequivocal," American law specifically recognizes pleas of nolo contendere as a procedurally valid method of entering a guilty plea.

As part of the guilty plea process, the United States recognizes plea bargaining as integral to the process of pleading guilty. The United States recognizes that with a plea agreement the defendant is subject to the discretion of the court, and may withdraw his plea should the court refuse to accept the plea agreement. Another part of the guilty plea process is the right afforded to the defendant and the court to challenge the validity of a plea. American law has established the procedures for a court and a defendant to follow when challenging the validity of a plea.

American procedure differs from ICTY procedure in several aspects, namely, accepting pleas of nolo contendere, protecting a defendant's right to the effective assistance of counsel, and requiring that a record be made of the guilty plea proceedings. The United States places significant emphasis on these last three requirements, specifically, the right of counsel and the record of the proceedings. These two procedures directly affect the fairness of the proceedings.

When all is said and done though, the most significant difference in standards and procedures between the United States and the ICTY is the length of time the laws of the United States have been established. The Tribunal is a new governing body that is

creating laws as the need arises. It is difficult to adequately adjudicate a matter of first impression, and the Erdemovic case consisted of many issues with which the Tribunal had not yet dealt.

As a final note to this paper, had the Erdemovic case been tried in an American court the majority of the issues with which the Appeals Chamber dealt would have been adjudicated in a trial court. The Erdemovic case would never have reached the appellate stage in an American court. A case cannot be appealed in an American court until it has been finally adjudicated as to the entering of a valid guilty plea. Under American law, there were too many questions regarding the validity of Erdemovic's guilty plea. An American court most likely would have entered a plea of not guilty on his behalf and then addressed the issues at trial.