UNITED NATIONS

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

Case No.: IT-94-1-A and IT-94-1-A*bis*

Date: 26 January 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Vice-President Florence Ndepele Mwachande Mumba
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia

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

Judgement of: **26 January 2000**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT IN SENTENCING APPEALS

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of two appeals lodged by Du{ko Tadi} ("Appellant") against Sentencing Judgements rendered by Trial Chambers of the International Tribunal on 14 July 1997 and 11 November 1999, respectively. The relevant background, as far as these appeals are concerned, may be set out as follows.

2. The Appellant was arrested on 12 February 1994 in the Federal Republic of Germany, where he was then living, on suspicion of having committed offences at the Omarska camp in the former Yugoslavia in June 1992, including torture and abetting the commission of genocide, which constitute crimes under German law.

3. Proceedings at the International Tribunal relating to the Appellant commenced on 12 October 1994 when the Prosecutor of the International Tribunal filed an application seeking a formal request to the Federal Republic of Germany for deferral by the German courts to the competence of the International Tribunal. Such a request was issued by a Trial Chamber on 8 November 1994.[1] The Appellant was transferred to the International Tribunal on 24 April 1995, where he has remained in detention at the United Nations detention unit in The Hague until the present time.

4. The Indictment, as amended, charged the Appellant with 34 crimes within the jurisdiction of the International Tribunal. At his initial appearance on 26 April 1995, the Appellant pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial.

5. On 7 May 1997, Trial Chamber II (Judges Gabrielle Kirk McDonald, Ninian Stephen and Lal Chand Vohrah) found the Appellant guilty on nine counts, guilty in part on two counts and not guilty on 20 counts. Specifically, the Trial Chamber convicted the

[1] "Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-D, T.Ch. I, 8 Nov. 1994.

Appellant of violations of the laws or customs of war pursuant to Article 3 of the Statute of the International Tribunal ("Statute") under Counts 10, 13, 16, 22 and 33 of the Indictment. It further found the Appellant guilty pursuant to Article 5 of the Statute for having committed crimes against humanity in the form of "persecution" under Count 1 of the Indictment and "inhumane acts" under Counts 11, 14, 17, 23 and 34. With respect to those counts charging the Appellant with grave breaches of the Geneva Conventions, the Trial Chamber, by majority, acquitted the Appellant on the basis that Article 2 of the Statute was inapplicable as it had not been proven that the victims at any relevant time were protected persons within the meaning of the Geneva Conventions.[2] With respect to certain other counts of the Indictment the Trial Chamber found that the evidence did not support a finding of guilt beyond reasonable doubt.[3]

6. Thereafter, in its Sentencing Judgment issued on 14 July 1997 ("Sentencing Judgment of 14 July 1997"), Trial Chamber II imposed sentence for each Count on which the Appellant had been convicted. The penalties imposed ranged from 6 to 20 years' imprisonment, and the Trial Chamber ordered that each of the sentences was to run concurrently *inter se*. The Trial Chamber recommended that, unless exceptional circumstances applied, the Appellant's sentence should not be commuted or otherwise reduced to a term of imprisonment less than ten years from the date of the Sentencing Judgment "or of the final determination of any appeal, whichever is the" later.[4] In calculating the credit to which the Appellant was entitled for time spent in custody "pending his surrender to the Tribunal or pending trial or appeal", the Trial Chamber held that the Appellant was entitled to such credit only from the point in time when a request was issued to the Federal Republic of Germany to defer to the jurisdiction of the International Tribunal.[5] The Trial Chamber also ordered that the minimum sentence imposed was not to be subject to any entitlements to credit.[6]

7. Following appeals by both parties against the Opinion and Judgment ("Appeals Against Opinion and Judgment"), Du{ko Tadi} on 11 August 1997 filed a further appeal

[2] "Opinion and Judgment", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-T, T.Ch. II, 7 May 1997, pp. 227-228, paras. 607-608 and page 300.
[3] *Ibid.,* pp. 300-301.
[4] "Sentencing Judgment", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-T, T.Ch. II, 14 July 1997, p. 41, para. 76.
[5] *Ibid.,* para. 77.
[6] *Ibid*.

against the Sentencing Judgment of 14 July 1997 ("Appeal against the Sentencing Judgment of 14 July 1997").[7] Upon the completion of lengthy procedures relating *inter alia* to the admissibility of new evidence, during which repeated extensions were sought by both parties,[8] oral arguments relating to all three appeals were heard before the Appeals Chamber in April 1999.

8. The Appeals Chamber entered its Judgement on the Appeals Against Opinion and Judgment on 15 July 1999.[9] The Appeals Chamber found, *inter alia*, that the victims referred to in the relevant parts of the Indictment were protected persons within the meaning of the applicable provision of the Fourth Geneva Convention. Further, the Appeals Chamber concluded that the Trial Chamber had erred when it held that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant was criminally liable for the offences charged in Counts 29, 30 and 31 of the Indictment. Reversing the Trial Chamber's verdict in this part, the Appeals Chamber accordingly found the Appellant guilty on Counts 8, 9, 12, 15, 21, 29, 30, 31 and 32 of the Indictment ("Additional Counts").[10] The Appeals Chamber, with the agreement of the parties, deferred sentencing on the Additional Counts to a further stage of sentencing procedure. The Appeals Chamber further deferred its judgement on the Appeal Against the Sentencing Judgment of 14 July 1997 until the completion of this subsequent sentencing procedure.[11]

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[7] "Notice of Appeal by the Defence Against Sentencing Judgment of 14 July 1997", 11 August 1997.
[8] See "Motion to Extend the Time Limit", 10 September 1997; "Motion for the Extension of the Time Limit" (Confidential), 6 October 1997; "The Motion for the Extension of Time", 17 March 1998; "Application for Extension of Time to File Additional Evidence on Appeal", 1 May 1998; "Motion for Extension of Time to File Reply to Cross-Appellant's Response to Appellant's Submissions since 9th March 1998 on the Motion for the Presentation of Additional Evidence under Rule 115", 15 June 1998; "Request for an Extension of Time to File a Reply to the Appellant's Motion Entitled 'Motion for the Extension of the Time Limit'", 9 October 1997; "Request for a Modification of the Appeals Chamber Order of 22 January 1998", 13 February 1998; "Request for a Modification of the Appeals Chamber Order of 2 February 1998", 7 May 1998. The following orders were made in relation to these applications: "Scheduling Order", Case No.: IT-94-1-A, 24 November 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 23 March 1998; "Order Granting Requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 10 June 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 17 June 1998; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 9 October 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 19 February 1998; "Order Granting requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998.
[9] "Judgement", *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, 15 July 1999 ("Appeals Judgement").
[10] *Ibid.*, p. 144, para. 327.
[11] *Ibid.* p. 11, para. 27 and p. 144, para. 327.

9. Following oral and written submissions,[12] in which both parties expressed a preference for such a course, the Appeals Chamber subsequently remitted the matter of sentencing in respect of the Additional Counts to a Trial Chamber to be designated by the President of the International Tribunal.[13]

10. On 11 November 1999, a Trial Chamber composed of Judges Gabrielle Kirk McDonald, Lal Chand Vohrah and Patrick Lipton Robinson issued its Sentencing Judgment on the Additional Counts ("Sentencing Judgment of 11 November 1999").[14] The Trial Chamber imposed sentences ranging from 6 to 25 years for each of the counts of which the Appellant had been found guilty by the Appeals Chamber, and stipulated that the new sentences were to run concurrently both *inter se* and in relation to each of the sentences imposed by the Sentencing Judgment of 14 July 1997.[15]

11. The Trial Chamber noted that the Appellant had provided the Prosecutor with certain material and found that this action of the Appellant constituted a degree of co-operation with the Prosecutor. Having regard to the nature and content of the material, however, the Trial Chamber held that this act did not constitute "substantial co-operation" within the meaning of Sub-rule 101(B)(ii) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") and that it accordingly would not be taken into account in the determination of the Appellant's sentence. In calculating the credit to which the Appellant was entitled for time during which he was detained in custody "pending his surrender to the Tribunal or pending trial or appeal", the Trial Chamber further held that the Appellant was not entitled to such credit from the point in time on which he was originally arrested in the Federal Republic of Germany, but only from the subsequent date when a

[12] "Prosecution's Submissions on the Appropriate Venue for Additional Sentencing Proceedings", 25 August 1999; "Further Brief on Sentence Pursuant to the Judgment of the Appeal Chamber Dated 15th July 1999", 25 August 1999, p. 7, para. 12; Transcript of hearing in *Prosecutor v Duško Tadic*, Case No.: IT-94-1-A ("T") 30 August 1999, pp. 361, 366, 368 and 370. 307. (All transcript page numbers referred to in the course of this Sentencing Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).
[13] "Order Remitting Sentencing to a Trial Chamber", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-A, 10 September 1999, p. 3.
[14] "Sentencing Judgment", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-T*bis*-R117, 11 November 1999.
[15] *Ibid.,* p. 17.

request was issued to the Federal Republic of Germany to defer to the jurisdiction of the International Tribunal.[16]

12. On 25 November 1999, the Appellant filed a Notice of Appeal against the Sentencing Judgment of 11 November 1999 ("Appeal against the Sentencing Judgment of 11 November 1999"), wherein he requested, *inter alia*, that it be joined with the Appeal against the Sentencing Judgment of 14 July 1997.[17] By Order of 3 December 1999, the Appeals Chamber ordered that the two appeals be joined.[18]

13. Following the submission of written briefs by the parties,[19] oral arguments on the Appeal against the Sentencing Judgment of 11 November 1999 were heard on 14 January 2000.

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[16] *Ibid.,* p. 12, para. 22 and p. 17.
[17] "Notice of Appeal Against Sentencing Judgment of 11th November 1999", 25 November 1999, p. 4, para. 8.
[18] "Order", *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-A and IT-94-1-A*bis*, 3 December 1999, p. 3.
[19] "Appellant's Brief on Appeal Against Sentencing Judgment of 11th November 1999", 15 December 1999 ("Appellant's Brief Against Sentencing Judgment of 11 November 1999"); "Response to Appellant's Brief on Appeal Against Sentencing Judgment of 11 November 1999", 22 December 1999 ("Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999").

B. Grounds of Appeal

1. The Appeal against the Sentencing Judgment of 14 July 1997

14. The Appellant submits the following grounds of appeal against the Sentencing Judgment of 14 July 1997:

Ground (1): The total sentence of 20 years decided by the Trial Chamber is unfair.[20]

(i) The sentence is unfair, as it was longer than the facts of the case required.[21]

(ii) The Trial Chamber erred by failing to take sufficient account of the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal ("Statute").[22]

(iii) The Trial Chamber erred by giving insufficient attention to the Appellant's personal circumstances.[23]

Ground (2): The Trial Chamber erred in proposing that the calculation of the recommended minimum sentence should commence "from the date of this Sentencing Judgment or of the final determination of any appeal, whichever is the" later.[24]

Ground (3): The Trial Chamber erred by not giving the Appellant credit for the time spent in detention in Germany prior to the issuance of a request for deferral by the International Tribunal.[25]

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[20] "Appellant's Brief Against Sentencing Judgement", 12 January 1998 ("Appellant's Brief Against Sentencing Judgement of 14 July 1997"), pp. 1-9, paras. 1-5; T. 303 (21 April 1999).
[21] *Ibid.,* pp. 3-4, para. 5 ((a)-(d)); T. 303 (21 April 1999).
[22] *Ibid.,* pp. 4-6; T. 304, 311 (21 April 1999).
[23] *Ibid.,* pp. 9-10, para. 7 ((a)-(d)); T. 305 (21 April 1999).
[24] *Ibid.,* p. 10, para. 8; T. 306-308 (21 April 1999).
[25] *Ibid.*, p. 14; T. 308-309 (21 April 1999).

2. The Appeal against the Sentencing Judgment of 11 November 1999

15. The Appellant submits six principal grounds of appeal against the Sentencing Judgment of 11 November 1999:

Ground (1): The Trial Chamber erred in placing excessive weight on deterrence in the assessment of the appropriate sentence for violations of international humanitarian law.[26]

Ground (2): The Trial Chamber erred in failing to have sufficient regard to the need to develop a range of sentences which properly reflects the relative position of different accused and their role in the events in which they were involved.[27]

Ground (3): The Trial Chamber erred in determining that the Appellant's act of submitting certain material to the Prosecutor did not constitute substantial co-operation within the meaning of Sub-rule 101(B)(ii) of the Rules.[28]

Ground (4): The Trial Chamber erred in holding that, all other things being equal, crimes against humanity should attract a higher sentence than war crimes.[29]

Ground (5): The Trial Chamber erred in placing insufficient weight on the general practice regarding prison sentences in the courts of the former Yugoslavia.[30]

Ground (6): The Trial Chamber erred in not giving the Appellant credit for the period of his detention in Germany prior to the issuance of a request for deferral by the International Tribunal.[31]

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[26] Appellant's Brief Against Sentencing Judgement of 11 November 1999, pp. 1-15, paras. 1-8; T. 482-485 (14 January 2000).
[27] *Ibid*., pp. 15-18, paras. 9-13; T. 477-482 (14 January 2000).
[28] *Ibid*., pp. 18-19, paras. 14-15; T. 489-490 (14 January 2000).
[29] *Ibid*., pp. 19-20, para. 16; T. 485-489 (14 January 2000).
[30] *Ibid*., pp. 20-21, para. 17; T. 490 (14 January 2000).
[31] T. 476 (14 January 2000).

C. Relief Requested

1. The Appeal against the Sentencing Judgment of 14 July 1997

16. By the Appeal against the Sentencing Judgment of 14 July 1997 the Appellant seeks the following relief:[32]

(i) That the sentence imposed by the Trial Chamber be reduced.

(ii) That the calculation of the minimum sentence imposed by the Trial Chamber be altered to run from the commencement of the Appellant's detention in Germany.

(iii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal.

2. The Appeal against the Sentencing Judgment of 11 November 1999

17. By the Appeal against the Sentencing Judgment of 11 November 1999 the Appellant seeks the following relief:[33]

(i) That the sentence imposed by the Trial Chamber be reduced.

(ii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal.

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[32] "Notice of Appeal by the Defence Against Sentencing Judgment of 14 July 1997", 11 August 1997; T. 303, 306, 309 (21 April 1999).
[33] "Notice of Appeal Against Sentencing Judgment of 11th November 1999", 25 November 1999; T. 476 (14 January 2000).

II. APPEAL AGAINST SENTENCING JUDGMENT OF 14 JULY 1997

A. First Ground of Appeal: That the Sentence Imposed by the Trial Chamber is Unfair

1. Submissions of the Parties

(a) The Appellant

18. In the first ground of the appeal against the Sentencing Judgment of 14 July 1997, the Appellant alleges that the 20-year sentence imposed by Trial Chamber II is unfair.[34]

(i) The Appellant avers that the sentence was longer than the facts of the case required. Specifically, the Appellant contends that the Trial Chamber erred in failing to have regard to any "hierarchy of relative criminal culpability". The Appellant notes that, as a general sentencing principle, heavier penalties should be imposed on those who commit the gravest crimes and whose responsibility for those crimes is highest, and submits that it was incumbent upon the Trial Chamber in determining sentence to have in mind the development of an appropriate tariff reflecting the varying culpability of different accused. The Appellant submits that his rank, activities and position in the hierarchy ought to have placed him at the very bottom of such a list of culpability, and that this fact was not reflected in the Trial Chamber's decision to impose a sentence of 20 years' imprisonment.[35]

(ii) As a second aspect of this ground of appeal, the Appellant avers that the Trial Chamber, in imposing sentence, failed to take sufficient account of the sentencing practice of the courts of the former Yugoslavia, as required by Article 24(1) of the Statute. While acknowledging that the Statute does not make this sentencing practice binding on the Trial Chambers, the Appellant notes in this respect that, in the absence of the death penalty, the most severe punishment that could be imposed under the law of the former Yugoslav was a prison term of 20 years.[36]

(iii) The Appellant further argues that the Trial Chamber gave insufficient weight to his personal circumstances. He submits that at the time of the offences he was the subject of a

[34] Appellant's Brief Against Sentencing Judgement of 14 July 1997, pp. 1-4; T. 303 (21 April 1999).
[35] *Ibid.*, pp. 3-4, paras. 5((a)-(d)); T. 303 (21 April 1999).
[36] *Ibid.,* pp. 4-6; T. 304, 311 (21 April 1999).

campaign of deliberate propaganda encouraging participation in ethnic cleansing. The Appellant also notes that he is currently imprisoned and will serve his sentence in a foreign country away from his spouse and family, and isolated from persons of his own nationality. The Appellant further contends that upon his release he will suffer from the notoriety of being the first war criminal convicted by the International Tribunal and that this, combined with other factors, will render return to his native region impossible.[37]

(b) The Respondent

19. The Prosecutor ("Respondent") submits that the Appellant in relation to the first ground of appeal has failed to meet the burden which is to be placed upon him, namely, to show that the Trial Chamber incorrectly stated the law relating to its sentencing options or abused its discretion in arriving at its sentence.[38] The Respondent maintains that the sentence imposed was both in accordance with the law and appropriate in respect of the crimes committed and the circumstances of the offender. The Respondent further submits that the Trial Chamber, in determining its sentence, considered all the relevant factors as required by the Statute and the Rules. It is, accordingly, the Respondent's position that the 20-year sentence imposed by Trial Chamber II on the Appellant should not be disturbed on appeal.[39]

(i) The Respondent submits that the Trial Chamber, in determining its sentence, considered the notion of relative criminal culpability and applied it to the Appellant's position as compared to others at the time of the commission of the offences. The Respondent notes that the Trial Chamber in its Sentencing Judgment of 14 July 1997 expressly referred to the "relative unimportance" of the Appellant as a mitigating factor.[40] Moreover, the Respondent notes that under the Statute, the Trial Chamber had the option of imposing on the Appellant a sentence of life imprisonment, as well as that of imposing consecutive sentences upon him. Instead, the Trial Chamber chose, as the most severe punishment imposed on the Appellant, to sentence him to imprisonment for 20 years and ordered that his sentences run concurrently. The Respondent submits that this indicates that

[37] *Ibid.,* pp. 9-10; T. 305 (21 April 1999).
[38] "Response to Appellant's Brief on Appeal Against Sentencing Judgement Filed on 12 January 1998", 16 November 1998 ("Response to Appellant's Brief Against Sentencing Judgement of 14 July 1997"), pp. 4-6; T. 314 (21 April 1999).
[39] *Ibid.,* pp. 11-13, paras. 5.4, 5.8; T. 312 (21 April 1999).
[40] *Ibid.,* p. 7.

the Trial Chamber did consider the Appellant's individual situation and culpability, and contends that the sentence arrived at by the Trial Chamber was not inappropriate. The Respondent accordingly submits that the Appellant has failed to discharge his burden in relation to this point.[41]

(ii) The Respondent observes that, although Article 24 of the Statute provides that Trial Chambers, in passing sentences, shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, a Trial Chamber in sentencing must ultimately exercise its own discretion. The Respondent notes that the Trial Chamber expressly stated that it had had recourse to the sentencing practice of the former Yugoslavia, and submits that the Appellant has not satisfied his burden of demonstrating that the Trial Chamber abused its discretion by not giving this factor even greater weight in the determination of the Appellant's sentence.[42]

(iii) As regards the personal circumstances of the Appellant, the Respondent asserts that the Trial Chamber noted not only the existence of the propaganda campaign and its impact on people in the region, but also considered the role of the Appellant in the campaign. The Respondent contends that, in assessing the circumstances relevant to the Appellant, the Trial Chamber also considered the brutality of the acts in which he personally engaged and his willingness to take part in the ethnic cleansing which occurred in the area. Thus, the Respondent submits that, given the Appellant's willing participation in the entire scope of the ethnic cleansing campaign in the area, the 20-year sentence is not excessive, and does not amount to an abuse of discretion by the Trial Chamber.[43]

2. Discussion

20. Insofar as the Appellant argues that the sentence of 20 years was unfair because it was longer than the facts underlying the charges required, the Appeals Chamber can find no error in the exercise of the Trial Chamber's discretion in this regard. The sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute

[41] *Ibid.,* p. 14 para. 5.12; T. 313-314 (21 April 1999).
[42] *Ibid.,* p. 9 para. 4.7; T. 314-315 (21 April 1999).
[43] T. 315-316 (21 April 1999).

and the Appeals Chamber will not, therefore, quash the sentence and substitute its own sentence instead.

21. The Appeals Chamber finds no merit in the Appellant's contention that the Trial Chamber failed to sufficiently consider the sentencing practice and in particular the maximum sentences in the former Yugoslavia. The jurisprudence of this Tribunal has consistently held that, while the law and practice of the former Yugoslavia shall be taken into account by the Trial Chambers for the purposes of sentencing, the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system. The Appeals Chamber is not satisfied that the Trial Chamber, in imposing a sentence of 20 years, erred in the exercise of its discretion. Accordingly, the reliance by the Appellant on the law of the former Yugoslavia which prescribed a maximum sentence of 20 years as an alternative to the death penalty is misplaced, and more especially having regard to the fact that, at the time when the offences were committed, a death penalty could have been imposed under that law for similar offences.

22. With respect to the Appellant's final challenge to his sentence, namely, that the Trial Chamber failed to adequately consider his personal circumstances, the Appeals Chamber is unable to find support for this contention. The Trial Chamber's decision addressed the issue of public indoctrination, and there is no discernible error in the exercise of discretion with regard to the remainder of the Trial Chamber's analysis that would permit the Appeals Chamber to substitute its own decision for that of the Trial Chamber.

3. Conclusion

23. For the reasons set out above, the first ground of appeal fails and is accordingly dismissed.

B. Second Ground of Appeal: Error in Deciding that the Calculation of the Recommended Minimum Sentence Should Commence "from the date of this sentencing judgement or of the final determination of any appeal, whichever is the" later

1. Submissions of the Parties

(a) The Appellant

24. The Appellant submits that, notwithstanding that the authority for the Trial Chamber's recommendation of a minimum sentence is not immediately apparent, he does not challenge the Trial Chamber's competence in this regard. Instead, the Appellant submits that the alleged unfairness arises from the Trial Chamber's recommendation that the minimum sentence should not begin to run until after the conclusion of the appeal process. The Appellant contends that this would effectively penalise him for exercising his right of appeal, for the delays caused by the obstruction of Republika Srpska, and for the procedural delays that are inevitable in any proceedings of this kind.[44]

25. The Appellant contends that it is fundamentally unfair to impose a penalty on the exercise of the right to appeal and that such a punitive disposition is inconsistent with the purposes of the Statute. Thus, in the Appellant's view, justice can only be achieved if the minimum sentence begins to run from the time the Appellant first lost his liberty.[45]

(b) The Respondent

26. The Respondent contends that the minimum sentence recommended by the Trial Chamber is appropriate and that, since the Appellant has failed to demonstrate that the imposition of a minimum sentence constitutes an abuse of the Trial Chamber's discretion, the recommendation should not be disturbed on appeal. The Respondent avers that the Trial Chamber's recommendation is based on its first-hand observation of the accused and the witnesses, which led it to consider that the minimum the Appellant owes to society for his

[44] T. 306-308 (21 April 1999).
[45] T. 307 (21 April 1999).

wrongs and the circumstances of his offences is ten years' imprisonment in addition to the time he spent in confinement awaiting trial and appeal.[46]

2. Discussion

27. The sentences imposed by the Trial Chamber in its Sentencing Judgment of 14 July 1997 ranged from 6 to 20 years. In view of the fact that the sentences imposed on the Appellant are to run concurrently, the Appeals Chamber will consider the question of the recommended minimum sentence, and the credit to be given pursuant to Rule 101 of the Rules, only in relation to the higher sentence of 20 years.

28. Neither the Statute nor the Rules provide guidance for judicial discretion with respect to the recommendation of a minimum sentence. The discretion of a Trial Chamber to recommend a minimum sentence flows from the powers inherent in its judicial function and does not amount to a departure from the Statute and the Rules. However, the judicial discretion of Trial Chambers to attach conditions to sentences is subject to the limitations imposed by fundamental fairness.

29. An individual's right to appeal a judgement of a Trial Chamber resulting in conviction is established under Article 25 of the Statute and must be accorded substantial weight. The right to appeal so established reflects the position in the general corpus of international human rights law. (See, in particular, the International Covenant on Civil and Political Rights, Article 14(5), the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 7, Article 2, and the American Convention on Human Rights, Article 8(2)(h)). In light of the fundamental importance of this right, a Trial Chamber should not impose undue encumbrances that could deter a convicted person from pursuing an appeal.

30. Generally, fairness requires that an accused or a convicted person not be punished for the exercise of a procedural right. The Appeals Chamber accepts the view of the United States Supreme Court that "[a] court is 'without right to … put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered… [I]t is unfair to use

[46] Response to Appellant's Brief Against Sentencing Judgement of 14 July 1997, pp. 16-17; T. 317-318 (21 April 1999).

the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.'"[47]

31. In this regard, the Trial Chamber's recommendation that the ten-year minimum sentence begins to run "from the date of this Sentencing Judgment or of the final determination of any appeal, whichever is the" later raises legitimate concerns. Such a condition could suggest to prospective appellants that the exercise of the right to appeal could result in enhanced penalties. The consequential discouragement of appeals may deprive the Appeals Chamber of the opportunity to hear appeals on substantial questions of law.

32. Accordingly, the Appeals Chamber finds that the Trial Chamber erred insofar as it ordered that the recommended minimum term take as its starting point the final determination of any appeal. However, the Appeals Chamber is not satisfied, and the Appellant has put forward no supporting argument, that the Trial Chamber erred in the exercise of its discretion insofar as it ordered that the recommended minimum term begin to run from the date of the Sentencing Judgment of 14 July 1997, nor that it so erred in ordering that the Appellant not be entitled to credit pursuant to Rule 101 in respect of the minimum term. To preserve that part of the recommendation, the Appeals Chamber recommends that the Appellant should serve a term of imprisonment ending no earlier than 14 July 2007.

3. Conclusion

33. The Appeals Chamber finds in favour of the minimum term recommendation of the Trial Chamber as preserved in paragraph 32 above. The Appellant is not entitled to credit pursuant to Rule 101 in respect of the minimum term. Consequently, unless exceptional circumstances apply, the Appellant should serve a term of imprisonment ending no earlier than 14 July 2007.

[47] *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (quoting *Worcester v. Commissioner*, 370 F.2d. 713, 718).

C. Third Ground of Appeal: Error in Not Giving the Appellant Credit for Time Spent in Detention Prior to the Issuance of a Request for Deferral by the International Tribunal

1. Submissions of the Parties

(a) The Appellant

34. The Appellant submits that Trial Chamber II erred in principle by not giving him credit for the time he spent in custody in Germany between 12 February 1994 and 8 November 1994. The Appellant contends that since the Trial Chamber found that both sets of investigations (i.e., those in Germany and before the Tribunal) involved the same crimes, he should in fairness have been given credit for the entire time he spent in custody in Germany.[48] He notes that he was deprived of his liberty in Germany for a total of 14 months and submits that, notwithstanding the content of Rule 101 and the fact that he was in custody in a separate jurisdiction prior to his transfer to the United Nations detention facilities, the impact of his detention remains the same whether in Germany or The Hague. The Appellant accordingly requests that the Appeals Chamber revise the sentence and give him credit for the whole period served in detention.[49]

(b) The Respondent

35. The Respondent contends that the Trial Chamber gave the Appellant appropriate credit for time spent in detention in Germany, as required under Sub-rule 101(D) (then Sub-rule 101(E)). The Respondent also submits that Sub-rule 101(D) requires that credit be given only for the period during which the convicted person was detained in custody pending surrender to the Tribunal, and that Appellant has not established any error of law or abuse of discretion by the Trial Chamber in its decision to award credit for the more limited period.[50]

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[48] Appellant's Brief Against Sentencing Judgement of 14 July 1997, p. 14, para. 9; T. 308-309 (21 April 1999).
[49] *Ibid.*
[50] Response to Appellant's Brief Against Sentencing Judgement of 14 July 1997, p. 18, para. 7.3; T. 318 (21 April 1999).

36. Arguing that the Appeals Chamber has the authority to change the Rule in the event that it is unjust, the Respondent submits that this power should, however, only be exercised if the application of the Rule would deprive the Appellant of fundamental fairness. The Respondent contends that the Rule is not contrary to existing rules of criminal law and that, as the Trial Chamber applied the Rule appropriately, its application should not be disturbed on appeal.[51]

2. Discussion

37. The question before the Appeals Chamber is whether Trial Chamber II erred in its application of Sub-rule 101(E), which has since been amended and renumbered as Sub-rule 101(D).[52] Sub-rule 101(D) states that:

> Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

38. Under Sub-rule 101(D) the Appellant is entitled to credit for the time spent in custody in the Federal Republic of Germany only for the period pending his surrender to the International Tribunal. However, the Appeals Chamber recognises that the criminal proceedings against the Appellant in the Federal Republic of Germany emanated from substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal. Hence, fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal's formal request for deferral.

39. The Appeals Chamber accordingly finds that this ground of appeal succeeds.

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[51] T. 319-320 (21 April 1999).

[52] The distinction between the language of Sub-rule 101(E) and Sub-rule 101(D) resides in the deletion in Sub-rule 101(D) of the pronoun "his" [surrender to the Tribunal]. Concerning the effect of such an amendment, Sub-rule 6(D) provides as follows:

> An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

In view of the nature of the amendment, the Appeals Chamber considers that the rights of the Appellant are not prejudiced by the application of the Rule as amended.

3. Conclusion

40. For the reasons stated above, the Appeals Chamber considers that the interests of justice require that the Appellant be granted credit for the entire time he spent in detention in the Federal Republic of Germany. The time for which the Appellant is entitled to credit should therefore be calculated from 12 February 1994. Consequently, the Appellant is entitled to credit for five years, eleven months and fourteen days as at the date of this Judgement.

III. APPEAL AGAINST SENTENCING JUDGMENT OF 11 NOVEMBER 1999

A. First Ground of Appeal: Error in Placing Excessive Weight on Deterrence as a Factor in the Assessment of Appropriate Sentences for Violations of International Humanitarian law

1. Submissions of the Parties

(a) The Appellant

41. In the first ground of appeal, the Appellant submits that the Trial Chamber erred by placing excessive weight on the factor of deterrence in assessing the sentence to be imposed upon him.[53] Specifically, the Appellant suggests that the Trial Chamber was in error in agreeing with the views expressed in the *^elebi}i*[54] and *Furund`ija*[55] cases regarding the effect of deterrence and questions the Trial Chamber's approval of the proposition that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[56] Citing the works of legal commentators on the question of deterrence, the Appellant submits that the most potent deterrent against violations of international humanitarian law is not the length of the prison sentence itself, but the subjective assessment of the offender as to the likelihood of his being indicted, arrested, tried and convicted.[57]

42. The Appellant further submits that deterrent sentencing is not required either to combat impunity or to contribute to the restoration and maintenance of peace in the former Yugoslavia. The Appellant contends that these two goals are best achieved by the imposition of a punishment which is deserved for the offence committed, having regard to

[53] Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 1-15; T. 482-485 (14 January 2000).
[54] "Judgement", *Prosecutor v. Zejnil Delali} et al.*, Case No.: IT-96-21-T, 16 November 1998, ("*^elebi}i* Judgement").
[55] "Judgement", *Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-T, 10 December 1998.
[56] Sentencing Judgment of 11 November 1999, p. 6, para. 7, quoting the ^elebi}i Judgement, para. 1234. See Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 2.
[57] *Ibid.*, p. 3; T. 482-485 (14 January 2000).

the seriousness of the harm caused by the offender, his degree of culpability and any extenuating circumstances.[58]

43. The Appellant further argues that, even if deterring future violations of humanitarian law did warrant the imposition of lengthy terms of imprisonment, it may be questioned whether that goal can be achieved where the offenders are not high-ranking officials or military officers. In this context, the Appellant also emphasises that his offences were committed at a time when the ordinary Serb population was being bombarded by potent and cogent nationalist propaganda in the media.[59]

(b) The Respondent

44. The Respondent rejects the Appellant's arguments on this point, and contends that the Appellant ignores the actual findings of the Trial Chamber as to the factors it considered in reaching its sentencing determination.[60]

45. The Respondent argues that the Appellant focuses solely upon the issue of deterrence, rather than recognising the clear language of the Sentencing Judgment of 11 November 1999 wherein the Trial Chamber stated that it "shares the opinion expressed in the above-mentioned cases [^elebi}i and Furund`ija] in respect of retribution and deterrence serving as the primary purposes of sentence. Accordingly, the Trial Chamber has, in its determination of the appropriate sentence, taken these purposes into account as one of the relevant factors".[61]

46. The Respondent further submits that the Appellant disregards the finding of the Trial Chamber that "while the purpose of criminal law sanctions include such aims as just punishment, deterrence, incapacitation of the dangerous and rehabilitation, the Trial

[58] *Ibid.,* p. 4, para. 2(f).
[59] *Ibid.,* pp. 4-6, paras. 2(g) and (h).
[60] Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 3-6, paras. 2-5.
[61] Sentencing Judgment of 11 November 1999, p. 6, para. 9. See Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 3-4, para. 2.

Chamber accepts that the 'modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime'".[62]

47. The Respondent argues that this finding demonstrates that the Trial Chamber was indeed guided by the very factors the Appellant urges the Appeals Chamber to consider, and submits that the Appellant has failed to provide any clear indication from the Sentencing Judgment of 11 November 1999 that the Trial Chamber accorded undue weight to the factor of deterrence.[63]

2. Discussion

48. In determining the sentences to be imposed on the Appellant, the Trial Chamber took into account, as one of the relevant factors, the principle of deterrence. The Appeals Chamber accepts that this is a consideration that may legitimately be considered in sentencing, a proposition not disputed by the Appellant. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal. In the circumstances of the present case, the Appeals Chamber is not satisfied that the Trial Chamber gave undue weight to deterrence as a factor in the determination of the appropriate sentence to be imposed on the Appellant.

49. The first ground of appeal accordingly fails.

3. Conclusion

50. The first ground of appeal is dismissed.

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[62] Sentencing Judgment of 11 November 1999, p. 13, para. 25 (footnote omitted). See Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 3-4, para. 2.
[63] *Ibid*.; T. 498-499 (14 January 2000).

B. Second Ground of Appeal: Error with Respect to the Need to Develop a Range of Sentences Based Upon the Relative Position of an Accused

1. Submissions of the Parties

(a) The Appellant

51. In the second ground of appeal, the Appellant submits that the Trial Chamber failed to have regard to the need to develop a recognisable sentencing tariff, or range of sentences, which properly reflects the relative position of different accused and their role in the events underlying the charges against them. Emphasising the need to adopt a consistent approach to sentencing in the different Trial Chambers, the Appellant submits that there is a significant disparity between his sentence of 25 years and sentences imposed in other cases decided by the International Tribunal. In this respect, the Appellant specifically contends that his role, responsibility and position in the hierarchy cannot justify a sentence of the length he now faces.[64]

52. The Appellant further contends that, in developing an appropriate range of sentences, the Chambers of the International Tribunal should be guided by the level of sentences imposed by the Military Tribunals sitting at Nuremberg after the Second World War, and should take into account the fact that the International Tribunal now has a number of high-ranking figures, including military officials, in custody awaiting trial. The Appellant cites various examples of sentences imposed, *inter alia,* by Military Tribunals following the Second World War, where the defendants, although holding much higher positions of responsibility and committing offences on a much larger scale, all received shorter sentences than he. The Appellant submits that, as he was neither a high-ranking official nor a military officer, he should not be sentenced on a level appropriate to such individuals. Accordingly, the Appellant submits that the decided cases demonstrate that the sentence imposed upon him was manifestly excessive.[65]

[64] Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 15-16, paras. 9-11; T. 477-482 (14 January 2000).
[65] *Ibid.,* pp. 16-18, paras. 12-13; T. 479-481 (14 January 2000).

(b) The Respondent

53. The Respondent submits that the Appellant has failed to provide any basis in fact or law to support his contention that the Trial Chamber erred in its determination of an appropriate sentence or that the sentence was manifestly excessive. Specifically, the Respondent contends that the Appellant has failed to offer any real comparison between the circumstances of his own case and those of other cases determined by the International Tribunal, or to provide any indication from the Sentencing Judgment of 11 November 1999 to demonstrate that the Trial Chamber did not give appropriate consideration to the full range of sentences available. Contrary to the Appellant's submissions, the Respondent contends that the sentence imposed upon the Appellant is entirely consistent with the sentences given to other persons convicted by the International Tribunal.[66]

54. The Respondent further argues that the Appellant's reference to the case law of the Second World War is inapposite, as the sentences handed down by those tribunals were imposed in an entirely different context, and reflect the views on sentencing of that time. The Respondent submits that the appropriate sentence in respect of the Appellant must reflect the values and principles of the international community as they exist today.[67]

2. Discussion

55. In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda,[68] fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.

56. Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when

[66] Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 9, para. 11; T. 494 (14 January 2000).
[67] *Ibid.,* p. 9, para. 11; T. 496-497 (14 January 2000).
[68] More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.

57. In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.

3. Conclusion

58. The Appeals Chamber, revising the Sentencing Judgment of 11 November 1999, imposes a sentence of 20 years for each of Counts 29, 30 and 31 of the Indictment.

C. Third Ground of Appeal: Error in the Determination that the Material Submitted by the Appellant to the Prosecutor did not Constitute Substantial Co-operation Within the Meaning of Sub-rule 101(B)(ii)

1. Submissions of the Parties

(a) The Appellant

59. In the third ground of appeal, the Appellant avers that the Trial Chamber erred in finding that his act of providing the Prosecutor with certain material, while constituting "some degree of co-operation", did not meet the standard of "substantial co-operation" within the meaning of Sub-rule 101(B)(ii) of the Rules. The Appellant requests the Appeals Chamber to re-examine the relevant material and submits that, on a proper analysis, it meets the standard established by the Rules. The Appellant argues, *inter alia*, that the relevant rule does not simply call for an assessment of the utility of the material provided in the work of the Prosecutor, but is directed to the action of the Appellant in providing material of this kind to the Prosecutor. The Appellant submits that, from his standpoint, the material represents all the co-operation he can give the Prosecutor.[69]

60. The Appellant also requests the Appeals Chamber to take into consideration as a matter of general mitigation certain assistance provided by him to the German prosecuting authorities following the issuance of the Sentencing Judgment of 11 November 1999.[70]

(b) The Respondent

61. The Respondent submits that the Appellant presents no direct argument or facts that would indicate that the Trial Chamber committed an error of fact that occasioned a

[69] Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 18-19, paras. 14-15; T. 489-490 (14 January 2000); Transcripts of proceedings in *Prosecutor v Duško Tadic*, Case No.: IT-94-1-T*bis*-R117, T.Ch. T*bis*, 441-442 (15 October 1999).
[70] Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 19, para. 15.

miscarriage of justice or erred as a matter of law in its evaluation of the material submitted by the Appellant or the weight to be given to it.[71]

62. The Respondent suggests that a mere invitation to the Appeals Chamber to undertake a review should not be a sufficient basis to justify a ground of appeal. Accordingly, the Respondent requests that this ground of appeal be dismissed for failure on the part of the Appellant to satisfy the burden of persuasion that must be placed upon him.[72]

2. Discussion

63. The Appeals Chamber is not satisfied that any basis in law or fact has been disclosed in support of the appeal in this part. This ground of appeal accordingly fails.

3. Conclusion

64. The third ground of appeal is dismissed.

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[71] Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 7, para. 7.
[72] *Ibid.*

D. Fourth Ground of Appeal: Error in the Determination that Crimes Against Humanity Should Attract a Higher Sentence than War Crimes

1. Submissions of the Parties

(a) The Appellant

65. The Appellant contends that the Appeals Chamber should reconsider this issue (which has been raised only in relation to the Appeal against the Sentencing Judgment of 11 November 1999) in the light of the Separate Opinion of Judge Robinson at first instance.[73] He submits that the sentence imposed on a defendant should reflect the seriousness of the actual acts committed and the defendant's level of culpability for them, and that he should not be exposed to a higher sentence for the same acts simply because of the legal description attached to them.[74]

66. At the oral hearing on 14 January 2000, the Appellant added that no distinction between the seriousness of a war crime and that of a crime against humanity was apparent either in the Statute of the International Criminal Court or in the jurisprudence of the trials held at Nuremberg after the Second World War.[75]

(b) The Respondent

67. At the oral hearing on 14 January 2000, the Respondent argued that the seriousness of crimes was determined by society based on particular interests that also distinguished the crimes.[76] The Respondent also argued that, "in many national jurisdictions", different penalties accrue for one act by reference to the nature of the victim.[77] The Respondent relied for its submission in this regard on the position of the Trial Chamber following the *Erdemovi}*[78] decision, that all things being equal, a crime against humanity was a more

[73] Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 19-20, para. 16.
[74] *Ibid*.
[75] T. 487-488 (14 January 2000).
[76] T. 499 (14 January 2000).
[77] T. 499-500 (14 January 2000).
[78] "Judgement", *Prosecutor v. Dra`en Erdemovi}*, Case No.: IT-96-22-A, App.Ch., 7 October 1997.

serious offence than an ordinary war crime.[79] Referring to the possibility that the original notion of crimes against humanity might relate to the humaneness of certain acts for the purposes of the Nuremberg trials arising from the Second World War, the Respondent nonetheless submitted that the international community had since the trials come to regard such acts as crimes against humanity in the sense that they affected the community as a whole, and that this changed vision therefore did warrant a determination in our times that a crime against humanity was a more serious crime than an ordinary war crime.[80]

(c) The Appellant in Response

68. At the hearing of 14 January 2000, the Appellant made a brief reply to the submissions of the Respondent in this regard. He argued that no authorities had been cited by the Respondent in support of its submission that customary international law had developed in respect of the distinction between war crimes and crimes against humanity, and that the societal interests which protected the Jews of Europe in 1945 were not less than the societal interests which protected the victims in the former Yugoslavia in the 1990s. [81]

2. Conclusion

69. The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgments of the Trial Chambers and the Appeals Chamber of the International Tribunal. After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference. The Appeals Chamber therefore upholds this ground of appeal.

[79] T. 500-501 (14 January 2000).
[80] T. 501-502 (14 January 2000).
[81] T. 508 (14 January 2000).

E. Fifth Ground of Appeal: Error by Placing Insufficient Weight on the General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia

1. Submissions of the Parties

(a) The Appellant

70. In the fifth ground of appeal the Appellant submits that the Trial Chamber, in imposing sentence, failed to take sufficient account of the sentencing practice of the courts of the former Yugoslavia, as required by Article 24(1) of the Statute. Whilst accepting that the Chambers of the International Tribunal are not bound by this practice, the Appellant suggests that there is a certain "moral fairness"[82] in sentencing someone in accordance with the laws of the place where the crimes were committed. In this respect, the Appellant notes that his crimes were committed in Bosnia in 1992, and that he could, therefore, normally have expected to be tried in Bosnia according to the laws applicable there at the time of his trial. The Appellant observes that, had he been so tried, the maximum sentence he could have received at the relevant time would have been one of 20 years' imprisonment, as an alternative to the death penalty, and otherwise 15 years' imprisonment. Re-emphasising his low-ranking position and the fact that the crimes of which he stands convicted were committed on a much smaller scale than those with which the cases following the Second World War were concerned, the Appellant submits that according to the laws of the former Yugoslavia he would have received a sentence well below the maximum possible sentence.[83]

(b) The Respondent

71. The Respondent contends that the Appellant presents no direct argument or facts in relation to the fifth ground of appeal that would indicate that the Trial Chamber committed an error of fact that occasioned a miscarriage of justice or erred as a matter of law in its

[82] Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 20-21, para. 17.
[83] *Ibid*.

evaluation of the weight to be given to the sentencing practice of the courts of the former Yugoslavia.

72. In particular, the Respondent notes that had the Appellant been tried under the laws of the former Yugoslavia existing at the time of the offences, the death sentence could have been imposed. The Respondent further dismisses the Appellant's reference to the sentences imposed by Military Tribunals following the Second World War as speculative and inapposite. Consequently, the Respondent requests that this ground of appeal be dismissed.[84]

2. Discussion

73. In this ground of appeal, the Appellant merely sets forth in greater detail, but with no greater force of persuasion, issues raised as part of the first ground of appeal against the Sentencing Judgment of 14 July 1997. Adopting the reasoning set out above, the Appeals Chamber cannot find any error in the exercise of discretion on the part of the Trial Chamber with respect to its treatment of the sentencing practice of the courts of the former Yugoslavia. Accordingly, this ground of appeal fails.

3. Conclusion

74. The fifth ground of appeal is dismissed.

[84] Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 7-8, para. 8.

F. Sixth Ground of Appeal: Error in Not Giving the Appellant Credit for Time Spent in Detention Prior to the Issuance of a Formal Request for Deferral

1. Conclusion

75. The Appellant's sixth ground of appeal is identical to the third ground of appeal against the Sentencing Judgment of 14 July 1997. For the reasons set out above, the Appeals Chamber considers that the interests of justice require that the Appellant be granted credit for the entire time he spent in detention in the Federal Republic of Germany. The time for which the Appellant is entitled to credit should therefore be calculated from 12 February 1994. Consequently, the Appellant is entitled to credit for five years, eleven months and fourteen days as at the date of this Judgement.

IV. DISPOSITION

76. For the foregoing reasons, **THE APPEALS CHAMBER**

(1) DENIES the first ground of Appeal against the Sentencing Judgment of 14 July 1997 and AFFIRMS the sentences imposed upon the Appellant by the Sentencing Judgment of 14 July 1997;

(2) DENIES the first, third and fifth grounds of Appeal against the Sentencing Judgment of 11 November 1999;

(3) ALLOWS the second and fourth grounds of Appeal against the Sentencing Judgment of 11 November 1999, Judge Cassese dissenting with respect to the fourth ground, REVISES the Trial Chamber's Sentencing Judgment of 11 November 1999 with respect to Counts 29, 30 and 31 of the Indictment, and SENTENCES Du{ko Tadi} to twenty years' imprisonment for each of said Counts;

(4) AFFIRMS the sentences imposed in the Sentencing Judgment of 11 November 1999 with respect to Counts 8, 9, 12, 15, 21 and 32;

(5) ORDERS that the sentences imposed in sub-paragraph (3) above, as well as the sentences imposed by the Sentencing Judgments of 14 July 1997 and 11 November 1999 and affirmed in sub-paragraphs (1) and (4) above, shall begin to run as of today's date;

(6) ORDERS that each of the sentences imposed in sub-paragraph (3) above be served concurrently both *inter se* and in relation to the sentences imposed in the Sentencing Judgments of 14 July 1997 and 11 November 1999 and affirmed in sub-paragraphs (1) and (4) above;

(7) ALLOWS the second ground of Appeal against the Sentencing Judgment of 14 July 1997 insofar as it now REVISES the Sentencing Judgment of 14 July 1997 by recommending that, unless exceptional circumstances apply, Du{ko Tadi} should serve a term of imprisonment ending no earlier than 14 July 2007;

(8) ALLOWS the third ground of Appeal against the Sentencing Judgment of 14 July 1997 and the sixth ground of appeal against the Sentencing Judgment of 11 November 1999, REVISES the Sentencing Judgment of 14 July 1997 and the Sentencing Judgment of 11 November 1999 by FINDING, as it now does, that Du{ko Tadi} is entitled to credit for five years, eleven months and fourteen days in relation to the sentences referred to in subparagraph (5) above, provided that such credit shall not affect the minimum term recommendation contained in sub-paragraph (7) above.

Accordingly, the Appeals are allowed in part, dismissed in part.

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

_____ _____

Mohamed Shahabuddeen
Presiding

Florence Ndepele Mwachande Mumba

_____ _____ _____

Antonio Cassese Wang Tieya Rafael Nieto-Navia

Dated this twenty-sixth day of January 2000
At The Hague,
The Netherlands.

Judge Shahabuddeen and Judge Cassese append Separate Opinions to this Judgement.

[**Seal of the Tribunal**]

V. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

In respectful support of the judgment of the Appeals Chamber, I would say something on one point raised by the appeals. This is the question whether crimes against humanity are more serious than war crimes, "all things being equal". On the view that the former are the most serious of all infringements of international humanitarian law and merit to be punished accordingly, the penalty imposed by the Trial Chamber in this case in respect of the former for the same act is heavier than that imposed in respect of the latter. The appellant submits "that he should not be exposed to a higher sentence for the same acts merely because of the legal description attached to them".[1] Is he right?

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The view challenged by the appellant was first adopted by the *Tadi}* Trial Chamber on 14 July 1997.[2] It was sustained by the Appeals Chamber in the decision which it rendered in *Erdemovi}* on 7 October 1997.[3] On a remit from the Appeals Chamber for a fresh plea to be taken on that basis, sentence was pronounced on 5 March 1998 by a Trial Chamber of which I was a member.[4] In a separate opinion which I appended to the decision, I noted certain difficulties in implementing the remit and reserved my position on the view of the law on which it rested.

When the present matter, at an earlier stage, was before the Appeals Chamber on 15 July 1999, I asked the parties to submit "briefs ... as to the relative seriousness in law of the crimes" in question.[5] The matter was, on some points, thereafter remitted to a Trial Chamber for sentencing. On 11 November 1999, that Trial Chamber pronounced sentence on the basis of the view in question. In a separate opinion which Judge Robinson appended to the sentencing judgment (a subject of this appeal), he expressed the view that there is no basis for "the conclusion that, as a matter of principle, crimes against humanity are more

[1] Appellant's Brief on Appeal Against Sentencing Judgment of 11th November 1999, para. 16.
[2] IT-94-1-T.
[3] IT-96-22-A.
[4] IT-96-22-T*bis*, reported in André Klip and Göram Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for the former Yugoslavia 1993-1998*, Vol. 1 (Antwerp, 1999), p. 657.
[5] *Tadi}* Appeal Transcript, 15 July 1999, pp. 582-583.

serious violations of international humanitarian law than war crimes ...".[6] Judge Robinson noted that a recent survey[7] showed that the tribunals established immediately after the Second World War did not treat crimes against humanity as being graver offences than war crimes. I support that view and give the following reasons.

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The reasoning underlying the view that crimes against humanity were more serious than war crimes was put this way in the sentencing judgement pronounced by the Trial Chamber in this case on 14 July 1997:

> "A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole."[8]

As indicated above, a similar approach was adopted by the Appeals Chamber a few months later in *Prosecutor* v. *Erdemovi}*.[9] The holding of the Appeals Chamber in that case was made by a majority, the reasoning being set out in a joint opinion of Judges McDonald and Vohrah ("Joint Opinion").[10] President Cassese and Judge Stephen concurred. Judge Li dissented.

The Joint Opinion put the proposition this way: " ... 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".[11] Later, reference was made to crimes against humanity "as injuring a broader interest than that of the immediate victim and therefore as being of a more serious

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[6] IT-94-1-T*bis*-R117, p. 10.
[7] Judge Robinson cited Bing Bing Jia, "The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law", being chapter 11 of Guy Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law, Essays in Honour of Ian Brownlie* (Oxford, 1999).
[8] Sentencing Judgement in *Tadi}*, IT-94-1-T, para. 73. The position so taken was in substance repeated in para. 28 of the Sentencing Judgment in *Tadi}*, 11 November 1999, IT-94-1-T*bis*-R117.
[9] Case No. IT-96-22-A, 7 October 1997.
[10] See para. 20 of the judgment of the Appeals Chamber in *Erdemovic*.
[11] *Erdemovic* , IT-96-22-A, 7 October 1997, para. 20, underlining as in the original.

nature than war crimes"[12]; to the Appellant (Erdemovi}) as having "pleaded guilty to the more serious charge"[13]; and to there being "nothing on the record to show that anyone, either defence counsel or the Trial Chamber, had explained to the Appellant that a crime against humanity is a more serious crime..."[14]. These statements were made under the heading "Crimes against humanity intrinsically more serious than war crimes"[15] and this would seem to be their jurisprudential underpinning.

That position does not rest on the circumstance that the facts in one case may differ from those of another; it rests on the view that, as a matter of legal characterisation of offences, a crime against humanity is more serious than a war crime - "intrinsically", as mentioned in the Joint Opinion. It can be only for this reason that, "all things being equal", a punishable offence "ordinarily" entails a heavier penalty when charged and proven as a crime against humanity than when charged and proven as a war crime - and correspondingly that a war crime is more lightly punished than a crime against humanity in respect of the same act. In short, in considering that a crime against humanity is more serious than a war crime in relation to the same act, the Joint Opinion conceives of greater seriousness in concrete terms of greater punishment. Problems arising from that view are discussed under three branches below.

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First, the matter may be regarded at the level of principle. A distinction may be drawn between what may be called material seriousness and what may be called juridical seriousness. As to material seriousness, looking at the character of the acts proscribed by a crime, it is generally possible to say that one crime is more serious than another. But that does not always translate into the proposition that the former is legally more serious than the latter. It may be that in some systems the penalty for murder is the same as that for rape; if so, there could be difficulty in saying that one offence is legally more serious than the other, even though there could be a view (varying from society to society) that, from a material standpoint, there is a difference in seriousness. Unless some other method of juridical ranking is prescribed, what is significant is the scale of penalties provided. A crime against humanity may be viewed as the most heinous of all crimes; but, as between it

[12] Ibid., para. 21.
[13] Ibid., para. 26.
[14] Ibid., para. 26.

and a war crime, the law of the Tribunal stipulates no ranking and provides for a common penalty.

It is helpful to consider the ground on which the Joint Opinion held that a crime against humanity is the more serious crime. It was this: to establish a crime against humanity, as distinguished from a war crime, it would be necessary to prove that the acts "(a) must have been committed as part of the widespread or systematic perpetration of such acts, not necessarily by the accused person himself: but certainly (b) in the knowledge that the acts are being or have been committed in pursuance of an organised policy or as part of a widespread or systematic practice against a certain civilian group".[16] These things show that a crime against humanity is serious indeed; and there could be argument that they represent not merely a legal ingredient of the offence but that they go to the legal status of the offence itself, equating it, as it were, with the position which murder has in relation to assault in the hierarchy of norms of criminal responsibility. However, I am not persuaded that the necessity to prove them means that a crime against humanity is legally more serious than a war crime in respect of the same act.

The use of specified grounds to criminalise an act not otherwise within the pale of criminality has to be distinguished from use of the grounds of criminalisation to define the seriousness of the newly created crime in relation to other crimes. Before the notion of a crime against humanity crystallised in international humanitarian law, an act which could now be punished as such a crime was not punishable at international law unless it also happened to be a war crime, which could but need not be the case. Thus, there could be atrocious acts which were not punishable at international law. To make them punishable at international law, it was necessary to identify a juridical criterion linking them to the legitimate interests of the international community in a manner that could rationally overcome an objection that, under international law as it then existed, the acts fell within the exclusive competence of the state in which they were done or whose subjects were victims of the acts.[17] Skipping interesting stages of textual formulation connected with the work of the Nuremberg Trials and the subsequent proceedings, that link was found in the concept of

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[15] Ibid., p. 17.
[16] Joint Opinion, paragraph 21.
[17] See the definition, quoted below, of a crime against humanity as given by the United Nations War Crimes Commission.

a crime against humanity, which could be perpetrated, *inter alia,* by servants of the state even against its own citizens and whether or not it was at war.[18]

As was implicit in the cases decided after World War II and as has been identified in more recent jurisprudence, the link evidencing the interest of the international community is provided, in substance, by proof that the act was committed in pursuance of an organized policy or as part of a widespread or systematic practice against a civilian group.

A war crime can in fact be committed for the same purposes, but proof that it was so committed is not a required ingredient of that crime. True, Article 20 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that any of certain "war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale". But the word "when" shows that the specified circumstances are not required to be proved as an ingredient of the war crime but merely refer to a case in which the war crime is in fact so committed, in which event a crime against the peace and security of mankind is deemed to have been also committed.

In general, there is a difference between saying that an "act" becomes a certain crime "when" committed in specified circumstances and saying that a "crime" becomes another crime "when" committed in specified circumstances. In the former case, the specified circumstances are an ingredient of the only crime referred to; in the latter case, the specified circumstances are not an ingredient of the first crime but merely a situation in which it can be committed, such that, if it is in fact committed in that situation, the other crime is deemed to have been also committed.[19]

What is important is that, even if the idea of a war crime can cover some part of the territory covered by the idea of a crime against humanity, it cannot cover all. This is because the act which constitutes a war crime may be committed otherwise than in pursuance of an organized policy or as part of a widespread or systematic practice against a civilian group. This gap was filled by the new concept of a crime against humanity.

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[18] As to the narrowing effect of the nexus element of an 'armed conflict' required by Article 5 of the Tribunal's Statute, see *Tadi},* Appeals Chamber, 2 October 1995, (1994-1995) I ICTY JR 357, at 503, paras. 140-141.

[19] Article 20 of the ILC Draft Code of Crimes against the Peace and Security of Mankind has been referred to in part in the text. Article 18 states that a "crime against humanity means any of the following *acts* when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group ...". (Emphasis added).

The reasoning behind the creation of the new crime is to be found in various places. It was put this way by Sir Hartley Shawcross in his closing address at Nuremberg in 1946: "International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind".[20] As it was elsewhere formulated, the idea was that "il existe dans la sphère des nations civilisées certaines normes de conduite humaine, liées à la valeur et à la dignité de la personne humaine, et qui sont tellement essentielles pour la coexistence des hommes et l'existence de tout individu qu'aucun Etat appartenant à cette sphère ne saurait avoir le droit de s'en affranchir".[21] The fortress character of the sovereignty of the state was under assault.

There has been debate as to what is meant by "humanity" in the concept of a crime against humanity: does the term refer to an attack on humanity at large, or does it refer to an attack on the standards of humaneness observed by humanity at large? That dichotomous approach is one way of looking at the matter. However, it is possible that the two views cannot wholly be separated from one another. As the foregoing excerpts suggest, it is safe to take the position that a crime against humanity is an attack on the legitimate interests which all states have in maintaining certain standards that are essential for the coexistence of mankind. The view may thus be offered that a crime against humanity is an attack on humanity at large in the sense that humanity at large cannot hold together without adherence to the standards in question. But I do not consider that the circumstance that a crime against humanity is directed to attacks against humanity in that sense is decisive of the issue of the comparative gravity of the offence. That circumstance was merely the ground on which conduct, which was not otherwise punishable at international law, was declared to be so punishable.

Thus, the concept of a crime against humanity went to the criminalisation of the act on the international plane; it did not go to establish that the crime, once created, was *ipso facto* more serious than a war crime in relation to the same act. A war crime can be very

[20] *The Trial of German Major War Criminals, Speeches of the Chief Prosecutors at the Close of the case against Individual Defendants* (London, 1946), p. 63.
[21] *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (O.G.H.br.Z.)* (Berlin, 1949), vol.2, p. 271, as translated and cited in Henri Meyrowitz, *La répression par les tribunaux allemands des*

serious. As was pointed out by Judge Li in paragraphs 20-22 of the separate and dissenting opinion which he appended to the *Erdemovi}* judgement of the Appeals Chamber, it can be as extensive and as odious as a crime against humanity. Whether it was or was not so in a particular case would turn on the facts. It is not correct to approach issues of this kind on an *a priori* basis founded on the view that, as a matter of law, the seriousness is necessarily greater where the same act is charged and proved as a crime against humanity.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 prohibits statutory limitations in respect of both crimes. The fourth preambular paragraph of the convention states "that war crimes and crimes against humanity are among the gravest crimes in international law": no difference in seriousness is suggested. Other instruments speak to similar effect.

Nor does any difference in seriousness appear in the Statute of the International Criminal Court. Article 8 (1) of the Statute states that the "Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". As explained above, that does not say that a war crime cannot be committed in other circumstances; nor does it require proof of the specified circumstances as a necessary ingredient of a war crime. It does however show that a war crime can in fact be committed in the same circumstances as a crime against humanity. The provision does not bear on the relative position of war crimes as a class on any scale of criminality relating to breaches of international humanitarian law generally.

Where it happens that the act constituting a crime against humanity is also a war crime, its punishment as a crime against humanity is not, as it were, computed so as to comprise punishment for a war crime plus an additional element in respect of the other legal ingredients required by a crime against humanity; the calculus of penalty is not constructed that way. It is only if the thinking lies in the opposite direction that it would be correct to affirm that "... all things being equal, a punishable offence, if charged and proven as a crime against humanity, ... should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime".

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crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi no. 10 du Conseil de contrôle allié (Paris, 1960), at p. 347.

In support of the argument of greater seriousness, the prosecution submitted that customary international law has evolved since the Second World War to the point where that law now attaches more importance to crimes against humanity than it did at the end of that war. I do not see that. The international community has once more become alive to allegations of breaches of the law on the point, but I have not been directed to any evidence that the law itself has changed. The prosecution did not cite any material in support of its argument.

There is also an argument that crimes against humanity are intended to protect a societal interest over and above those visualised by war crimes and should in consequence be regarded as being more serious. I have no difficulty with a proposition that crimes against humanity are intended to protect a societal interest other than those visualised by the law relating to war crimes; but this fact does not make the former more serious than the latter. That other societal interest was the ground on which acts which were not previously regarded as breaches of international humanitarian law were now regarded as breaches; that interest was not intended to make such breaches automatically more serious than other breaches, "all things being equal".

I conclude this branch by returning to the distinction between use of certain grounds for criminalising an act not otherwise within the pale of criminality and use of such grounds to establish relative seriousness for purposes of punishment. As has been seen, paragraph 21 of the Joint Opinion noted that an act constituting a crime against humanity should be committed "in pursuance of an organized policy or as part of a widespread or systematic practice against a certain civilian group". But from that it does not follow that a crime against humanity is intrinsically more serious than a war crime: what follows from there being no proof that the act was committed in pursuance of such an organised policy or as part of such a widespread or systematic practice is that there is simply no crime cognisable at international law unless the act happens to be a war crime, which could but need not be the case. With respect, this circumstance was overlooked in that paragraph of the Joint Opinion when it made reference to crimes against humanity "as injuring a broader interest than that of the immediate victim and *therefore* as being of a more serious nature than war crimes" (emphasis added). This approach uses the grounds of criminalisation as indicia of relative seriousness in law. The conclusion does not follow from the premise.

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Second, the jurisprudence may be consulted. The Joint Opinion cites three non-Tribunal cases, namely, *Wielen (the Stalag Luft III case), Einsatzgruppen* and *Ahlbrecht*. They are considered below.

The transcript of *Wielen*[22] shows, as was recalled in paragraph 24 of the Joint Opinion, that defence counsel stated that the Judge-Advocate had said that "the charge does not call, in this case, for a punishment of a crime against humanity but only - and that is already enough - a crime against the rules and usages of war, consisting in the shooting of prisoners of war". But it is not possible to put what was reportedly said by the Judge-Advocate as high as intending to suggest that, as a matter of law, crimes against humanity are intrinsically more serious than war crimes. There was no issue as to whether one offence fell in a higher category of juridical seriousness than the other, and no occasion to opine on that specific and important point of law. As was recognised by the Judge-Advocate, the indictment was for war crimes only. For those offences, fifteen of the eighteen accused were sentenced to the supreme penalty, namely, death by hanging. In one case, the sentence was commuted to life imprisonment. There is nothing to suggest that, had the same acts also constituted crimes against humanity, the supreme penalty would have been reserved for the latter, leaving only some lesser penalty for the war crimes.

Einsatzgruppen is next.[23] There, the prosecution said:

> "The same acts we have declared under count one as crimes against humanity are alleged under count two as war crimes. The same acts are, therefore, charged as separate and distinct offenses. In this there is no novelty. An assault punishable in itself may be part of the graver offense of robbery, and it is proper pleading to charge both of the crime. So here the killing of defenseless civilians during a war may be a war crime, but the same killings are part of another crime, a graver one if you will, genocide - or a crime against humanity. This is the distinction we make in our pleading. It is real and most significant... One series of events, if they happen to occur during the time of hostilities, may violate basic rights of man and simultaneously transgress the rules of warfare. That is the intrinsic nature of the offenses here charged. To call them war crimes only is to ignore their inspiration and their true character".

[22] The published report, commencing at p. 31 of Vol. XI of *Law Reports of Trials of War Criminals* (London, 1949), does not set out the pertinent part of the transcript of the oral proceedings.
[23] *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* (Nuernberg, 1949), Vol. IV, pp. 48-49.

The implications of the prosecution's statement need not be exaggerated. All legal systems provide for robbery to be punished more severely than assault. In this respect, however, there is no parallel with the instant case. No similar difference in authorised punishment exists as between a crime against humanity and a war crime; as will be shown below, so far as the Tribunal is concerned, the prescribed penalty is the same. In that case - *Einsatzgruppen* - the majority of the accused were convicted of crimes against humanity, war crimes and membership of criminal organisations; they were sentenced to death by hanging, without there being any suggestion that that supreme penalty was attributable only to the crime against humanity and not equally to the others. The acts relating to the counts for crimes against humanity and war crimes were substantially the same. On the other hand, a minority who were convicted of all three offences were sentenced to imprisonment only. No difference in penalty having been laid down by law, the level of punishment was controlled by the circumstances of each case, not by the legal classification of the crime.

The statement of the prosecution in *Einsatzgruppen* properly emphasised the gravity of a crime against humanity; it is too slender to support the view that, in law, a crime against humanity in respect of the same act is more serious than a war crime for purposes of punishment.

Lastly, there is *Ahlbrecht.*[24] There the Special Criminal Court at Arnhem found the accused guilty of war crimes and of crimes against humanity and sentenced him to death. On appeal, the Netherlands Court of Appeal set aside the conviction for crimes against humanity and substituted a sentence of life imprisonment for the sentence of death in respect of the war crimes, not considering "the criminality of the appellant's behaviour great enough to demand that he suffer the death penalty". Referring to this, paragraph 23 of the Joint Opinion states:

> "As the [Netherlands] Court of Appeal found that these requisite elements of a crime against humanity were not present in respect of the Appellant who was guilty merely of a war crime, it did 'not consider the criminality of the

[24] *Ahlbrecht* Case, Special Court of Cassation, 11 April 1949, *Nederlandse Jurisprudentie*, No. 425, p. 747, unofficial translation, cited in paragraph 23 of the Joint Opinion and digested in *Annual Digest and Reports of Public International Law Cases* (1949), pp. 396-398. The judgment in the appeal of *Erdemovic* refers to the appellate court as the "Dutch Court of Appeal"; the title of the court as cited in *Nederlandse Jurisprudentie* (1949) is "*Bijz. Raad van Cassatie*", subsequently translated in *Annual Digest and Reports of Public International Law Cases* (1949) as "Special Court of Cassation".

> Appellant's behaviour great enough to demand that he suffer the death penalty' and accordingly reduced his sentence to life imprisonment".

That way of putting the matter in the Joint Opinion suggests that, where the "requisite elements of a crime against humanity were not present" and the appellant was "guilty merely of a war crime", the court could not "consider the criminality of [his] behaviour great enough to demand that he suffer the death penalty" in respect of the war crime. That, with respect, is too wide a view. Behaviour which does not disclose all the elements of a crime against humanity may yet be sufficiently reprehensible to merit a death sentence if it constitutes a war crime; and that happened in *Wielen*. The better view is that the Netherlands Court of Appeal acted on its appreciation of the facts of the particular case and not on any impression of the relative seriousness in law of the two crimes. If it took the latter approach, it would, with respect, have been in error.

The Netherlands Court of Appeal concurred with the following definition of a crime against humanity given by the United Nations War Crimes Commission:

> "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims".[25]

A reasonable interpretation of the judgement of the Netherlands Court of Appeal is that the court treated circumstances which "endangered the international community or shocked the conscience of mankind" as going to the question whether there was legal justification for "intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims". Absent such an element, there could be no legal justification for judicial intervention on the basis that a crime against humanity had been committed; but that, it may be thought, has no bearing on the

[25] *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H.M. Stationery Office, London, 1948), p.179.

comparative level of punishment as between such a crime and any other crime known to international law which the behaviour might disclose.

This conclusion seems consistent with the cases decided after World War II. *Milch* is an example. There, convictions were made in respect of crimes against humanity and war crimes. The acts were the same, the holding of the United States Military Tribunal at Nuremberg being "that the same unlawful acts of violence which constituted war crimes under Count One of the Indictment also constitute crimes against humanity as alleged in Count Three of the Indictment".[26] A common sentence of life imprisonment was imposed in respect of the convictions on those two counts. A common sentence of imprisonment was likewise imposed in the cases of *Creutz, Huebner, Lorenz, Bruekner, Hildebrandt and Schwalm,* in *United States v. Greifelt and Others.*[27] In *Einsatzgruppen, supra,* there was a common death sentence.

In respect of these decisions, it could be argued that it does not necessarily follow that the court considered that each offence carried the same sentence; the court could have proceeded on the basis that each offence considered separately would attract a different maximum level of penalty, the single penalty imposed being simply that which the court considered to be appropriate to all of the offences taken together. However, the decisions show no basis in law for such an interpretation. The interpretation which I prefer is that, in imposing a single sentence, the courts proceeded on the basis that the law made no distinction between a sentence for a war crime and a sentence for a crime against humanity. This view is supported by the recent decision in *Kupreškic* in which, referring to the controlling instruments of post-World War Two trials, the Trial Chamber said:

> "... those instruments which provided for the various penalties consequent upon the various crimes did not distinguish between war crimes and crimes against humanity: they envisaged the same penalties (death sentence, imprisonment, etc.) for both categories in the same terms."[28]

In short, it may not be possible to extract from the jurisprudence cited in the Joint Opinion a principle that the same act, if dealt with as a crime against humanity, has

[26] *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II, (Nuernberg, October 1946), p.791.
[27] *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. V, (Washington, 1950), pp. 165-167.
[28] *Prosecutor v. Kupreškic*, ICTY, IT-95-16-T, 14 January 2000, para. 674.

ordinarily to be punished more severely than if treated as a war crime. If, as I consider, the distinction suggested is not part of customary international law, it was not open to the Tribunal to make it so.

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Third, the problem may be viewed in the light of the Statute of the Tribunal.

The first branch of Article 24(1) of the Statute, which is concerned to exclude capital punishment, provides that penalty "shall be limited to imprisonment". Correspondingly, Rule 101(A) of the Tribunal's Rules of Procedure and Evidence states that a "convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life". As to the period of imprisonment for particular offences, these provisions are subject to the second branch of Article 24(1) of the Statute. The latter states that, in "determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". The better view (supported by the jurisprudence of this Tribunal and that of the International Criminal Tribunal for Rwanda) seems to be that the Yugoslav practice applies as guidelines which have to be taken into account but which do not control. Here, in any event, there was not any showing on the record that, under the practice of the courts of the former Yugoslavia, acts in the nature of crimes against humanity were punished more severely than acts in the nature of war crimes; both seemed to be subject to the same range of punishment.[29] Thus, no suggestion appears in the penal regime of the Tribunal that, as compared with a war crime, a crime against humanity is intrinsically meritorious of severer punishment.

The opposite position presents practical difficulties. Some of these were noted in a separate opinion which I appended to the sentencing judgment delivered in *Erdemovi}* on 5 March 1998.[30] Those difficulties are not removed by the caveat relating to "all things being equal". The legal ingredients of the two crimes not being identical, the facts establishing one crime may, but need not, disclose the other. It is believed that the caveat in question was intended to apply only where the same facts show that both crimes were committed by the same act. But, in that case, what follows? On the basis of principles of punishment

[29] See para. 25 of Judge Li's separate and dissenting opinion in the *Erdemovic* appeal, and para. 12 of *Tadi} Sentencing Judgment* of 11 November 1999.

which need not be rehearsed, it is not easy to appreciate how the accused in such a case is liable to a lesser punishment for a war crime than for a crime against humanity, or, correspondingly, why a crime against humanity has to be punished more severely than a war crime, even though both crimes were committed by the same act and in the same circumstances.

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The proposition that a crime against humanity is, by law, to be punished more severely than a war crime in respect of the same act may well conform to popular impressions. But the proposition was not discussed in the lower court in *Erdemovi}*. It neither formed a ground of appeal in the subsequent appeal proceedings, nor was argued in any of the related briefs presented by either side. It was not listed among three preliminary questions which the Appeals Chamber addressed *proprio motu* to the parties in a scheduling order of 5 May 1997.[31] It was raised in that Chamber through a question put from the bench to defence counsel in the course of a one-day hearing concerned mostly with other matters.[32] Yet it was a principal point on which the appeal turned. It is also an important and difficult question; it is not a simple one clearly settled on the face of the existing jurisprudence in favour of the view taken in the Joint Opinion. Judge Li's opinion and that now presented by Judge Cassese do not suggest that.

I agree with the positions taken by Judge Li and Judge Robinson. Under existing law, which the Tribunal has to apply, there is no principle that, all things being equal, a crime against humanity is more serious than a war crime and that the same act charged as the former has to be punished more severely than if charged as the latter. Today's judgment is in conformity with existing law: it does not recognise such a principle.

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[30] IT-96-22-T*bis*.
[31] See para. 16 of judgment of the Appeals Chamber in *Erdemovic* , 7 October 1997, IT-96-22-A.
[32] *Erdemovic* , Appeal Transcript, 26 May 1997, pp. 34-37 and 101-102.

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

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Mohamed Shahabuddeen

Dated this 26th day of January 2000
At The Hague,
The Netherlands

[**Seal of the Tribunal**]

VI. SEPARATE OPINION OF JUDGE CASSESE

1. Regretfully, I cannot share the majority's view that the same conduct, if characterised as a crime against humanity, does not necessarily entail, all else being equal, a heavier penalty than if it is classified as a war crime. I shall briefly set out the legal grounds of my disagreement.

2. For a correct solution to this difficult legal problem, two preliminary considerations must be taken into account regarding certain unique features of international criminal law.

3. Firstly, international criminal rules, being still at a rudimentary stage of development, do not provide for offences that are specific and well-defined. They do not describe in detail an individual class of conduct (say, murder, or the destruction of private property, or rape). Rather, they contemplate broad categories of disparate offences. In effect, they normally envisage a cluster of prohibited offences that are diverse both in nature and gravity. This applies, for instance, to the provisions of the Statute of the International Tribunal which confer on the Tribunal jurisdiction over certain crimes and at the same time set out the various classes of those crimes. Thus, Article 3, the article which confers upon the Tribunal jurisdiction over "violations of the laws or customs of war" (i.e. war crimes), lists such diverse conduct as the "employment of poisonous weapons", "wanton destruction of cities, towns or villages or devastation not justified by military necessity" and "plunder of public or private property". These categories of conduct, plus those which, according to the Appeals Chamber[1], are envisaged in that provision, are not only objectively different from one another, but also differ in gravity. The same holds true for Article 5 of the Statute, which enumerates as crimes against humanity such diverse offences as "murder", "enslavement", "torture", "rape", "persecution" as well as "other inhumane acts".

4. Secondly, the *nulla poena sine praevia lege poenali* principle that is generally upheld in most national legal systems is still inapplicable in international criminal law. Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty (normally in civil law countries criminal codes envisage the maximum

[1] See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-AR72, App. Ch., 2 October 1995, paras. 87-93.

and minimum penalty attached to the perpetration of the crime, namely the so-called sentencing tariff; recently also in some common law countries, laws have been passed containing such a tariff). This principle is clearly intended to achieve three main objectives:

(i) to spell out the varying degree of disapproval or condemnation of certain instances of misbehaviour by the social order. Clearly, the more reprehensible a course of conduct is considered, the heavier the penalty imposed on persons engaging in that conduct. Thus, if a national legal system provides for a penalty of 25 years' imprisonment for murder whereas it envisages 10 years for theft, this signifies that this legal system attaches greater importance to human life than to private property.

(ii) to ensure legal certainty by reducing the discretionary power of courts (*arbitrium judicis*).

(iii) to bring about some relative uniformity and harmonisation in the application of penalties.

5. In international criminal law the determination of penalties has for long been left to the courts. Only recently have international instruments provided some broad guidelines (but no sentencing tariff). Thus, for example, the Statute of the International Tribunal on the one hand implicitly rules out the death penalty and on the other instructs the Tribunal to "have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" (Article 24 of the Statute). Similar provisions can be found in the Statute of the International Criminal Tribunal for Rwanda (Article 23). As for the Statute of the International Criminal Court, Article 23 lays down the *nulla poena* principle, but only in a particular form: it provides that "a person convicted by the Court may be punished only in accordance with this Statute", thereby clearly referring to Articles 77 and 78 which among other things implicitly exclude the death penalty and in addition provide that imprisonment "may not exceed a maximum of 30 years".

6. It follows that, generally speaking, one cannot infer from international criminal provisions on penalties that a criminal offence is regarded as more serious than another. Thus, faced with two different offences falling under the same provision (for example, "extermination" of civilians and "persecution [of civilians] on political, racial or religious grounds", both covered by Article 5 of the Statute), one cannot say *a priori* which of them is more serious and must therefore entail a heavier penalty. The same holds true for conduct

falling under different criminal provisions, for instance plunder of private property as a war crime and taking civilians as hostages as a grave breach of the 1949 Geneva Conventions. This is all the more true given that some categories of crimes which, in theory, might be considered as less serious than other categories, may in practice instead prove inherently much graver: suffice it to mention war crimes such as the bombardment of an undefended town or the killing of hundreds of enemy combatants through the use of prohibited weapons. It goes without saying that these instances of war crimes may in practice turn out to be more inhumane and devastating than some instances of crimes against humanity such as the deportation or imprisonment of civilians.

7. In short, one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them (for instance, between war crimes and grave breaches of the Geneva Conventions, or between war crimes and crimes against humanity).

8. In consequence, when it comes to determining the sentence for one of the crimes under discussion, the judges of international tribunals must proceed on a case by case basis and decide the penalty in each specific instance by considering: (i) the objective factual circumstances of the offence's commission (for instance, the degree of iniquity of the criminal conduct, the rank or position of command of the accused, the number of victims, the values jeopardised by the crime, and so on); and (ii) the subjective state of mind of the convicted person. Of course, in addition to these elements the court will have to weigh and take into account any extenuating or aggravating circumstances.

9. Clearly, in this area, even more than in the determination of the law, great latitude accrues to courts. This is yet another consequence of the fairly rudimentary character of current international criminal law.

10. The above considerations apply to a possible comparison between diverse conduct which may be susceptible to classification as various crimes. Things are nevertheless different when we tackle the legal issue I have raised above, at the beginning of this Opinion. This issue, it should be duly emphasised, is whether the very same fact imputed to an accused, if characterised as a war crime, may be regarded as more or less serious than if it is instead defined as a crime against humanity.

11. According to the Appeals Chamber the same fact (say, murder), if classified as a war crime under Article 3 of the Statute, should not entail a lesser penalty than if it is instead given the nomenclature of "crime against humanity" under Article 5 of the Statute.

12. I respectfully disagree. If the murder perpetrated by a certain accused is classified as a "war crime," it is sufficient for the *actus reus* to consist of the death of the victim as a result of the acts or omissions of the perpetrator, while the requisite mental element must be the intent to kill or to inflict serious injury in reckless disregard of human life. As was rightly held by the Appeals Chamber in *Tadic* (Interlocutory Appeal), a war crime is any serious violation of a rule of international humanitarian law entailing the individual criminal responsibility of the person breaching that rule.[2] In this connection I should address a legal issue that is of considerable importance with regard to the definition of war crimes.

13. The proposition has been advanced that war crimes require an element akin to the "widespread and systematic practice" required for crimes against humanity. This contention is based on Article 8(1) of the Statute of the International Criminal Court (ICC) that confers jurisdiction over war crimes "in particular when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes". I respectfully submit that this proposition is based upon a misapprehension. First, Article 8 of the ICC Statute confers jurisdiction over all war crimes and then adds that that jurisdiction should be exercised "in particular" over large scale or systematic war crimes. This is quite understandable. The drafters of the Statute intended to spell out the notion that in principle the ICC should concentrate on the most egregious instances of war crimes, while lesser categories of such crimes should be prosecuted and tried by national courts to the greatest extent possible. This appeared to them to be warranted by the need for the ICC not to be inundated with war crimes cases that could be easily tried by national courts. In addition, the principle of "complementarity" underlying the Statute was taken into account (as provided in the 10th preambular paragraph of the Statute: the ICC as established "shall be complementary to national criminal jurisdictions"). The Court can nevertheless exercise its jurisdiction over *any* war crime, even those that are not large-scale and systematic (unless of course a State is "genuinely" willing and able to prosecute and try the case and the International Criminal

[2] See Decision *cit.,* para. 94.

Court considers it appropriate for that case to be tried by a national court). In addition, the authors of the Statute were aware that the substantive provisions of the Statute might be interpreted as affecting or at any rate impinging upon customary international law. Hence they adopted Article 10, which provides that "[n]othing in this Part [namely Part II, which includes Article 8] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". Plainly, this provision intends to make it clear that, amongst other things, Article 8 on war crimes in no way impacts upon, i.e. does not narrow, broaden or modify customary international rules on war crimes. The conclusion is therefore warranted that the ICC Statute in no way affects the customary rules on war crimes as well as those contained in the Statute of the ICTY or the ICTR. For the proper definition of war crimes one should therefore rely upon these rules, as were set forth by the aforementioned decision of the Appeals Chamber in *Tadic* (Interlocutory Appeal).

14. Let us now return to the question of murder as a war crime or as a crime against humanity. Murder, in order to be defined a "crime against humanity", must be part of a widespread or systematic practice. In addition, it must be established that the mental element of the crime includes not only the *mens rea* concerning the killing of the victim, but also knowledge of the existence of the widespread or systematic practice. Thus, if murder is defined as a "crime against humanity", it cannot consist merely of a single or even a multiple violation of international humanitarian law, however serious this may have been. Rather, murder is simply one element of extensive criminal misconduct and the murderer must have acted in the knowledge that his or her conduct formed part of this overall context. Normally a "widespread or systematic practice" of misbehaviour is either planned or instigated, or promoted, or countenanced, or at least tolerated by the governmental authorities wielding control over the area where the crime has been committed. It follows that the murder at issue forms part of a whole pattern of criminality, and may amount to what the great Dutch international lawyer B.V.A. Röling termed "system criminality" (encompassing large-scale crimes perpetrated to advance the war effort, at the request of, or with the encouragement or toleration of government authorities), as opposed to "individual criminality" (embracing crimes committed by combatants on their own initiative and often

for reasons known only to themselves)[3]. In addition, the requisite intent of the perpetrator is more serious than in murder as a "war crime": the perpetrator must not only intend to cause the death of one or more persons, but must have done so while being aware that this conduct was a common practice. This among other things may also signify that he or she was hoping to enjoy impunity by engaging in conduct that, being widespread, might ultimately have gone unpunished.

15. Clearly, the reaction of the international community to such a crime must be more severe than in cases where the same conduct attributed to the accused amounts to a war crime. For, if classified as a crime against humanity, the murder possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values of the international community to a greater extent than in the case where that offence should instead be labelled as a war crime. The international community and the judicial bodies responsible for ensuring international criminal justice therefore have a strong societal interest in imposing a heavier penalty upon the author of such a crime against humanity, thereby also deterring similar crimes.

16. If the above considerations are accepted, it follows that whenever an offence committed by an accused is deemed to be a "crime against humanity", it must be regarded as inherently of greater gravity, all else being equal (*ceteris paribus*), than if it is instead characterised as a "war crime". Consequently, it must entail a heavier penalty (of course, the possible impact of extenuating or aggravating circumstances is a different matter which may in practice nevertheless have a significant bearing upon the eventual sentence).

17. The above remarks also apply to other similar cases. For instance, the murder of a group of civilians perpetrated in an armed conflict, if classified as genocide, clearly is more serious than if defined as a war crime or as a grave breach of the 1949 Geneva Conventions. For in the case of genocide, the same *actus reus* (the killing of multiple persons) must be accompanied by a specific intent (that of destroying a group or members of a group on national, ethnical, racial or religious grounds). This mental element renders the crime more

[3] See B.V.A. Röling, "The Significance of the Laws of War" in A. Cassese (ed.), *Current Problems of International Law*, 1975, 137-139.
Of course, large-scale and systematic war crimes may also form part of "system criminality": consider for example the mass killing or ill-treatment of prisoners of war. However, the reverse is not true: crimes against humanity always constitute a form of system criminality, while war crimes may also constitute (and indeed very often do constitute) a form of "individual criminality".

abhorrent and reprehensible. Indeed, the *dolus* is more grave than that required for murder as a war crime or as a grave breach: what is now required is not only the intent to kill other human beings but the aggravated intent to destroy them because they belong to a particular group. Hence, a heavier penalty should be imposed.

18. I should add that usually the problem I have just discussed should not arise. As was correctly held by Trial Chamber II in *Kupre{ki} et al*.[4], whenever the same fact may be regarded as falling under two different provisions of the International Tribunal's Statute, for instance Article 3 (on war crimes) and Article 5 (on crimes against humanity), or under Article 2 (grave breaches) and Article 4 (genocide), pursuant to the principle of speciality the latter characterisation should prevail. Indeed, the crimes under Article 5 (or Article 4) may often turn out to be *lex specialis vis-à-vis* war crimes (or grave breaches) respectively, because they require the presence of certain legal elements that are not necessary under Article 3 or 2. In those cases the "special" provision should prevail. It follows that, under the circumstances under discussion, the question I have been dealing with in this Opinion should not in practice arise.

19. This problem may however arise under other circumstances; for instance, when at his initial appearance the accused pleads guilty to a crime classified by the Prosecutor in the Indictment both as a crime against humanity and, alternatively, as a war crime (this is precisely what happened in the *Erdemovic* case). It may also arise when, in cases where more than one accused was involved in the same criminal conduct, the mental element of the crime against humanity (knowledge that the criminal conduct is part of a widespread or systematic practice) can only be proved for one accused, whereas it cannot be proved for another. In this case the former accused might be found guilty of a crime against humanity while the latter might instead be convicted of a war crime. At this point the question of sentencing would arise and the court would have to decide whether the same conduct, if classified as a crime against humanity, should have as a consequence a heavier penalty.

[4] See "Judgement", *Prosecutor v. Zoran Kupre{ki} et al*, Case No.: IT-95-16-T, T. Ch. II, 14 January 2000, paras. 683-684.

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

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Antonio Cassese

Dated this twenty-sixth day of January 2000
At The Hague,
The Netherlands.

[**Seal of the Tribunal**]