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-T*bis*-R117

Date: 11 November 1999

Original: English

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Lal Chand Vohrah
Judge Patrick Lipton Robinson

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

Judgment of: 11 November 1999

PROSECUTOR

v.

DU[KO TADI]

SENTENCING JUDGMENT

The Office of the Prosecutor:
Mr. Upawansa Yapa
Ms. Brenda Hollis
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for Du{ko Tadi}:
Mr. William Clegg
Mr. John Livingston

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I. INTRODUCTION

1. On 7 May 1997, Trial Chamber II found Du{ko Tadi} guilty on nine counts, guilty in part on two counts, and not guilty on 20 counts.[1] With respect to 11 of those 20 counts, Trial Chamber II found, by majority, that the charges brought under Article 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Statute" and "the International Tribunal" respectively) were inapplicable at all relevant times in op{tina Prijedor in Bosnia and Herzegovina because it had not been proved that the victims were protected persons within the meaning of the Geneva Conventions.[2] With respect to the charges that formed the basis of Counts 29, 30 and 31, Trial Chamber II found unanimously that the evidence did not support a finding of guilt beyond reasonable doubt.[3]

2. Pursuant to appeals by both the Office of the Prosecutor ("the Prosecution") and the Defence Counsel for Du{ko Tadi} ("the Defence") against the *Opinion and Judgment* and the *Sentencing Judgment of 14 July 1997*,[4] the Appeals Chamber entered its Judgement on 15 July 1999.[5] It found that the victims referred to in Counts 8, 9, 12, 15, 21, 29 and 32 of the Amended Indictment[6] were protected persons, as required under the applicable provisions of the Geneva Convention.[7] In addition, the Appeals Chamber concluded that the requisite elements of the underlying offences charged in Counts 29, 30 and 31 were satisfied beyond reasonable doubt.[8] Accordingly, the Appeals Chamber found Du{ko Tadi} guilty of these nine counts.[9]

3. The Appeals Chamber initially deferred sentencing on the additional counts to a later stage and subsequently remitted sentencing to a Trial Chamber to be designated by the President of the

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[1] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-T, Opinion and Judgment, 7 May 1997 ("Opinion and Judgment"), to which Judge McDonald appended a Separate and Dissenting Opinion regarding the applicability of Article 2 of the Statute.
[2] *Ibid.*, para. 608.
[3] *Ibid.*, paras. 373 and 761.
[4] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-T, Sentencing Judgment, 14 July 1997 ("Sentencing Judgment of 14 July 1997").
[5] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, Judgement, 15 July 1999, ("Appeals Judgement").
[6] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-T, Amended Indictment, 14 Dec. 1995, ("Amended Indictment").
[7] *Appeals Judgement*, para. 170.
[8] *Ibid.*, paras. 233 and 234.

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International Tribunal.[10] In the course of the proceedings before the Appeals Chamber, the parties indicated their position that the Trial Chamber which was to impose sentence should ideally be comprised of the three Judges which had heard the original trial. Noting that this was not possible as one of the Judges concerned no longer held office at the International Tribunal, the parties agreed that it would be preferable for the two remaining Judges to sit on the Trial Chamber to be composed for the purpose of sentencing.[11] By order of the President, this Trial Chamber is now responsible for determining the appropriate sentences to be imposed on Du{ko Tadi} in relation to Counts 8, 9, 12, 15, 21, 29, 30, 31 and 32.[12]

II. PRE-SENTENCING PROCEDURE

4. On 15 October 1999, the Trial Chamber conducted a hearing ("the Pre-Sentencing Hearing") at which the Prosecution tendered certain exhibits.[13] At this hearing, the parties made oral submissions and Du{ko Tadi} also made a statement. In respect of Counts 29, 30 and 31, the Prosecution recommended a sentence of an additional 15 years' imprisonment for each Count. This recommendation was stated to be based on the extreme gravity of the crimes and the part they represent in the larger course of egregious criminal misconduct committed by Du{ko Tadi}. The Prosecution did not offer any view as to whether the additional sentences of 15 years should be served consecutively or concurrently *inter se,* but submitted that this was a matter to be determined by the Trial Chamber. However, the Prosecution contended that this punishment, whether consecutive or concurrent, should be served in addition to the existing sentence of 20 years' imprisonment. In response, the Defence submitted that "the appropriate sentence is 15 years"[14] and recommended that the sentences be ordered to run concurrently.

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[9] *Ibid.*, para. 327
[10] *Ibid.*, para. 28 and *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 Sept. 1999.
[11] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, hearing of 30 August 1999, transcript of proceedings ("T.") pp. 351, 358, 361 and 362.
[12] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-T*bis*-R117, Order of the President Assigning Judges to a Trial Chamber, 15 Sept. 1999.
[13] Additional Material Relevant to Sentencing of Du{ko Tadi} & Confidential Attachments, filed on 15 Oct. 1999. Subsequently, on 20 Oct. 1999, the Prosecution filed National Provisions Cited by the Prosecution During Sentencing Hearing on 15 October.
[14] Pre-Sentencing Hearing, 15 Oct. 1999, T. p. 61.

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5. Pursuant to a scheduling order, the parties tendered written submissions.[15] At the request of the Defence, the Trial Chamber asked the Registrar to file a report on the conduct of Du{ko Tadi} while in custody at the United Nations Detention Unit.[16] All of the above submissions and materials have been considered by the Trial Chamber in the determination of the appropriate sentence.

III. APPLICABLE PROVISIONS

6. The Statute and the Rules of Procedure and Evidence of the International Tribunal ("the Rules") provide as follows regarding the penalties that may be imposed on persons convicted by a Chamber.[17] Article 24 of the Statute reads:

> Article 24
>
> Penalties
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. 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.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rules 85 and 101 provide in relevant parts:

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[15] On 30 Sept. 1999, the Prosecution filed the Respondent's Sentencing Brief & Confidential Attachments and on 14 Oct. 1999 it filed certain confidential material concerning Du{ko Tadi}'s cooperation with the Prosecution. The latter was filed at the request of the Trial Chamber. On 1 Oct. 1999, the Defence filed a Brief on Sentence Concerning New Convictions Pursuant to the Judgment of the Appeals Chamber Dated 15th July 1999 and the Scheduling Order of 16th September 1999, and on 12 Oct. 1999 it filed certain confidential material relating to Du{ko Tadi}'s alleged cooperation with the Prosecution. Furthermore, on 4 Nov 1999, the Prosecution filed the Prosecution's Brief in Respect of the General Practice Regarding Prison Sentences in Courts of Former Yugoslavia. On the same day the Defence filed the Defendant's Brief on General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia.

[16] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-T*bis*-R117, Order for the Preparation of the Sentencing Hearing, 13 Oct. 1999. An Internal Memorandum on the Conduct of Mr. Du{ko Tadi} whilst in Detention, prepared by the Commanding Officer of the United Nations Detention Unit, was filed on 14 Oct. 1999.

[17] The provisions set out below are those currently in force, which, in the opinion of the Trial Chamber, are the correct provisions to apply. In any event, in respect of the provisions relevant to sentencing, there is no distinction in substance between the current version of the Rules and the version of the Rules in force at the time of the *Sentencing Judgment of 14 July 1997*, which the Prosecution appears to be relying on.

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Rule 85

Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

[. . .]

(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

[. . .]

Rule 101

Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) 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.

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IV. FACTORS CONSIDERED IN SENTENCING

A. Purpose of sentencing

7. The unique mandate of the International Tribunal of putting an end to widespread violations of international humanitarian law and contributing to the restoration and maintenance of peace in the former Yugoslavia warrants particular consideration in respect of the purpose of sentencing.[18] The Trial Chamber in the *^elebi}i* case concluded that "[r]etributive punishment by itself does not bring justice" and that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law."[19] In discussing its sentencing policy, the Trial Chamber in the *Furund`ija* case stated:

> It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.[20]

8. Likewise, the Trial Chambers of the International Criminal Tribunal for Rwanda have consistently upheld, in the light of the object and purpose of the establishment of that Tribunal, that sentences imposed must be directed mainly at retribution and deterrence.[21]

9. The Trial Chamber shares the opinion expressed in the above-mentioned cases 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.

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[18] Regarding the mandate of the International Tribunal, see Security Council Resolutions 808 and 827 (S/Res/808 (1993) and S/Res/827 (1993)).

[19] *Prosecutor v. Delali} et al.*, Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, paras. 1231 and 1234.

[20] *Prosecutor v. Furund`ija*, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 288. See also *The Prosecutor v. Erdemovi}*, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, para. 64, where the Trial Chamber held deterrence and retribution to be the most important purposes for sentences imposed in respect of crimes against humanity.

[21] *The Prosecutor v. Kayishema and Ruzindana*, Case No.: ICTR-95-1-T, Sentence, 21 May 1999, para. 2; *The Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, Sentence, 5 Feb. 1999, para. 20; *The Prosecutor v. Akayesu*, Case No.: ICTR-96-4-T, Sentence, 2 Oct. 1998, para. 19 and *The Prosecutor v. Kambanda*, Case No.: ICTR-97-23-S, Judgement and Sentence, 4 Sept. 1998, para. 28.

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B. The general practice regarding prison sentences in the courts of the former Yugoslavia

10. Article 24(1) of the Statute and Rule 101 of the Rules require the Trial Chamber to consider the general practice regarding prison sentences in the courts of the former Yugoslavia. In order to be assisted by the parties with regard to the application of these two provisions, the Trial Chamber in a scheduling order requested the Prosecution and the Defence to submit their views in respect of this practice, both at the time of the commission of the offences for which Du{ko Tadi} now stands to be sentenced and at the present time, specifying the maximum penalty available for each of these offences.[22]

11. Although the written briefs of the parties fail to adequately address the issue set out in the scheduling order, the Trial Chamber takes note of the following relevant submissions. Both parties agree that the Trial Chamber may use the sentencing practice in the courts of the former Yugoslavia for guidance, but that it is not binding, and that the Criminal Code of the Socialist Federal Republic of Yugoslavia[23] ("the SFRY Criminal Code"), which was in force at the time of the commission of the offences, is the statute relevant to the sentencing of Du{ko Tadi}.[24] In conclusion, the Prosecution submits that it is the range of punishments applicable under the SFRY Criminal Code which is relevant and that there is no bar to the imposition of an additional punishment on Du{ko Tadi} in excess of 20 years, whereas the Defence contends that 20 years' imprisonment is the maximum term that can be imposed.

12. The Trial Chamber shares the view expressed by the parties that the sentencing practice in the courts of the former Yugoslavia may be used for guidance, but that it is not binding. It also notes that this view finds consistent support in the jurisprudence of the International Tribunal.[25] Consequently, the Trial Chamber has had recourse to the relevant

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[22] On 4 Nov. 1999, the Prosecution filed the Prosecution's Brief in Respect of the General Practice Regarding Prison Sentences in Courts of the Former Yugoslavia. On the same day the Defence filed the Defendant's Brief on General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia.

[23] Adopted by the SFRY Assembly at the session of the Federal Council held on September 28, 1976; declared by decree of the President of the Republic on September 28, 1976; published in the Official Gazette SFRY No. 44 of October 8, 1976; a correction was made in the Official Gazette SFRY No. 36 of July 15, 1977; took effect on July 1, 1977.

[24] Considering that the Defence during the Pre-Sentencing Hearing on 15 Oct. 1999 argued that the Chamber in this respect should take into account the relevant statutory provisions currently in force (T. pp. 60 to 61), the Trial Chamber understands the latest submission of the Defence to mean that it has changed its position on this issue.

[25] See *Prosecutor v. Delali} et al.*, Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 1194; *The Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-T, Judgement, 25 June 1999, para. 242 and *The Prosecutor v. Erdemovi}*, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, paras. 33, 39 and

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provisions of the SFRY Criminal Code, according to which violations of international law comparable to the offences for which Du{ko Tadi} now stands to be sentenced were punished by imprisonment for not less than five years or by the death penalty.[26] Moreover, in such cases, the maximum term of imprisonment was limited to 20 years.[27] In this regard it may be noted that the death penalty was abolished in Bosnia and Herzegovina on 28 November 1998 and that instead a "long term imprisonment" was introduced ranging from 20 to 40 years for "the gravest forms of criminal offences [. . .] committed with intention".[28]

13. As discussed above, the general sentencing practice of the courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person. Rather, the Trial Chamber is only required to have recourse to the sentencing practice of the courts of the former Yugoslavia and may properly take into consideration other factors, such as those set out in Article 24 of the Statute and Rule 101 as well as factors pertaining to the special nature and purpose of the International Tribunal. The Trial Chamber, therefore, takes the view that in respect of crimes which in the former Yugoslavia could have attracted the death penalty, it may, as the maximum, impose a sentence of imprisonment for the remainder of a convicted person's life.

C. Circumstances relevant to sentencing for each of the crimes

1. Counts 8, 9, 12, 15, 21 and 32

14. The Appeals Chamber found Du{ko Tadi} guilty under Counts 8, 9, 12, 15, 21 and 32 of the Amended Indictment, charging him with grave breaches in respect of each criminal transaction underlying these Counts. For that same criminal conduct, Trial

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40. In this context it also bears mentioning that the Trial Chambers of the International Criminal Tribunal for Rwanda in imposing sentence have made similar findings in respect of equivalent Article 23(1) of its Statute, see *The Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, Sentence, 5 Feb. 1999, para. 18; *The Prosecutor v. Akayesu*, Case No.: ICTR-96-4-T, Sentence, 2 Oct. 1998, para. 14 and *The Prosecutor v. Kambanda*, Case No.: ICTR-97-23-S, Judgement and Sentence, 4 Sept. 1998, para. 23.

[26] Article 142 of the SFRY Criminal Code.

[27] Article 38 of the SFRY Criminal Code.

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Chamber II in the *Opinion and Judgment* found Du{ko Tadi} guilty under Article 3 (violations of the laws or customs of war) and Article 5 (crimes against humanity) of the Statute. In the *Sentencing Judgment of 14 July 1997*, Trial Chamber II set out the particular circumstances relevant to the sentencing of that criminal conduct. With regard to sentencing Du{ko Tadi} for Counts 8, 9, 12, 15, 21 and 32 of the Amended Indictment, the Trial Chamber takes the view that the same circumstances are relevant. Accordingly, these circumstances are hereby incorporated by reference.[29]

2. Counts 29, 30 and 31

15. Paragraph twelve of the Amended Indictment alleges in relevant parts:

> About 14 June 1992, armed Serbs, including **Du{ko TADI]**, entered the area of Jaski}i and Sivci in op{tina Prijedor and went from house to house calling out residents and separating men from the women and children. The armed Serbs killed Sakib ELKA[EVI], Osme ELKA[EVI], Alija JAVOR, Abaz JASKI] and Nijas JASKI] in front of their homes. [...]

16. On the basis of this allegation, the Amended Indictment charged Du{ko Tadi} in Count 29 with a grave breach (wilful killing), in Count 30 with a violation of the laws or customs of war (murder), and in Count 31 with a crime against humanity (murder).

17. With regard to these Counts, Trial Chamber II made the following factual findings in the *Opinion and Judgment*.

> [...] In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaski}i and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten. The village houses were searched to make sure that all men were accounted for. Then the men, other than three older men, were marched off in the direction of Kozarac and their families have never seen or heard of them again. When they had left, the women found the bodies of five men who had been shot, their corpses left to lie where they fell. [...][30]
>
> [...]
>
> Of the killing of the five men in Jaski}i, the witnesses Draguna Jaski}, Zemka [ahbaz and Senija Elkasovi} saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone; Senija Elkasovi} saw that

[28] Article 38 of the Criminal Code of the Federation of Bosnia and Herzegovina published by "Official Gazette of Federation of Bosnia and Herzegovina" No 43-98 on November 20, 1998.
[29] *Sentencing Judgment of 14 July 1997*, paras. 11 to 35.
[30] *Opinion and Judgment*, para. 348.

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four of them had been shot in the head. She had heard shooting after the men from her house were taken away. Sena Jaski} saw two of the five dead bodies identified by the other three witnesses; the witness Subha Muji} also saw unidentified bodies in the village after the armed men had gone. That the armed men were violent is not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence.

The group of armed men were relatively few in number and the accused was one of them and took an active part in the rounding up of men in the village; some witnesses described him as giving orders to others but the evidence for this is not strong. It may, however, be of some significance that of the group only the accused was known to the witnesses; it would seem that he alone came from the locality and, rather than giving orders, he may have been acting as guide to the locality and as to who lived in the village.[31]

[...]

This Trial Chamber is satisfied beyond reasonable doubt that the accused was a member of the group of armed men that entered the village of Jaski}i, searched it for men, seized them, beat them, and then departed with them and that after their departure the five dead men named in the Indictment were found lying in the village and that these acts were committed in the context of an armed conflict. However, this Trial Chamber cannot, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them. Save that four of them were shot in the head, nothing is known as to who shot them or in what circumstances. It is not irrelevant that their deaths occurred on the same day and at about the same time as a large force of Serb soldiers and tanks invaded the close-by and much larger village of Sivci, accompanied by much firing of weapons. Again it is not irrelevant that the much larger ethnic cleansing operation conducted that day in Sivci involved a very similar procedure but with no shooting of villagers. The bare possibility that the deaths of the Jaski}i villagers were the result of encountering a part of that large force would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths. The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.[32]

18. The Appeals Chamber, however, reversed Trial Chamber II's finding that Du{ko Tadi} could not be held responsible for the killing of the five men in Jaski}i. It found that Trial Chamber II had "misapplied the test of proof beyond reasonable doubt"[33] and that "the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaski}i."[34] Furthermore, the Appeals Chamber held Du{ko Tadi} criminally responsible under Article 7(1) of the Statute for these

[31] *Ibid.*, paras. 370, 371.
[32] *Ibid.*, para. 373.
[33] *Appeals Judgement*, para. 183.
[34] *Ibid.*

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killings pursuant to the notion of "common design".[35] Consequently, the Appeals Chamber found Du{ko Tadi} guilty under Counts 29 through 31 on the basis that he "participated in the killings of the five men in Jaski}i, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population."[36]

D. Aggravating circumstances

19. Pursuant to Sub-rule 101(B)(i) the Trial Chamber shall take into account any aggravating factors in determining of the appropriate sentence. In this context, the Trial Chamber takes note of the following factors. Each of the offences was committed in circumstances that could not but aggravate the crimes and the suffering of its victims. The horrific conditions at the camps established by Bosnian Serb authorities in op{tina Prijedor and the inhuman treatment of the detainees in the camps, of which Du{ko Tadi} was well aware, were discussed in detail in the *Opinion and Judgment*. Du{ko Tadi}'s willing participation in the brutal treatment exacerbated these conditions and serves only to increase the harm which he inflicted on his victims and accordingly to aggravate the crimes of which he has been found guilty.

20. Consideration must also be given to the willingness of Du{ko Tadi} to commit the crimes and to participate in the attack on the non-Serb civilian population of op{tina Prijedor which formed the basis of the crimes against humanity which Du{ko Tadi} committed. In the course of the *Opinion and Judgment* Trial Chamber II discussed Du{ko Tadi}'s burgeoning role in the SDS, committed as it was to extreme principles of Serb nationalism, his direct participation in the attack on Sivci and Jaski}i and its consequences, his conscious desire to contribute to the elimination of non-Serb elements from op{tina Prijedor and the continuous involvement of Du{ko Tadi} in the persecution of non-Serbs. Consequently, the Trial Chamber has taken into consideration, in determining an appropriate sentence, Du{ko Tadi}'s awareness of, and enthusiastic support for, the attack on the non-Serb civilian population of op{tina Prijedor by Bosnian Serb forces and the Republika Srpska authorities operating in that area.

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[35] *Ibid.*, paras. 185 to 232.
[36] *Ibid.*, para. 233.

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E. Mitigating circumstances

21. Sub-rule 101(B)(ii) provides that the Trial Chamber in determining sentence shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction". In the *Sentencing Judgment of 14 July 1997*, Trial Chamber II noted that "Du{ko Tadi} has in no relevant way cooperated with the Prosecutor".[37] Since then, however, Du{ko Tadi} has provided the Prosecution with some material relating to certain events in op{tina Prijedor. The Defence submits that the Trial Chamber should take this action by Du{ko Tadi} into account as a mitigating factor pursuant to Sub-rule 101(B)(ii). In opposing the submission, the Prosecution argues that it is the sole arbiter of whether the criterion of Sub-rule 101(B)(ii) has been fulfilled and that the provision does not apply in the present case since Du{ko Tadi}'s cooperation with the Prosecutor cannot be characterised as "substantial".

22. The Trial Chamber finds that the assessment as to whether an accused or convicted person has provided "substantial cooperation" within the meaning of Sub-rule 101(B)(ii) lies with the Chamber and not with the Prosecution. Consequently, the Trial Chamber has carefully reviewed the material. Having regard to the nature and content of that material, the Trial Chamber finds that Du{ko Tadi}'s action to provide the Prosecutor with the material constitutes some degree of cooperation. It does not, however, meet the standard of substantial cooperation as required by Sub-rule 101(B)(ii). Accordingly, the Trial Chamber has not taken Du{ko Tadi}'s cooperation with the Prosecution into account in the determination of the sentence.

23. Furthermore, the Trial Chamber, at the request of the Defence, directed the Registrar to prepare and file a report on Du{ko Tadi}'s conduct while in detention at the United Nations Detention Unit. In this report, the Commanding Officer of the Detention Unit concluded that "during the last eighteen months [Du{ko Tadi}] has behaved as a model detainee."[38] The Prosecution has challenged the conclusion of the Commanding Officer and, in support of its challenge, has filed certain material relating to the contempt proceedings against Du{ko Tadi}'s former Defence Counsel, Mr. Vujin.[39]

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[37] *Sentencing Judgment of 14 July 1997*, para. 58.
[38] Internal Memorandum on the Conduct of Mr. Du{ko Tadi} whilst in Detention, filed on 14 Oct. 1999.
[39] Additional Material Relevant to Sentencing of Du{ko Tadi} & Confidential Attachments, filed on 15 Oct. 1999.

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24. On this matter, the Trial Chamber considers it appropriate to defer to the view expressed by the Commanding Officer of the Detention Unit, and has taken it into account in the determination of the appropriate sentence.

F. Personal circumstances of Du{ko Tadi}

25. In the course of this Sentencing Judgment, the Trial Chamber has, either by reference to the *Sentencing Judgment of 14 July 1997* or directly, considered certain circumstances pertaining to the criminal conduct of Du{ko Tadi}, which bear on the gravity of the offences and the intensity of the injury to the victims, as well as the role and degree of his criminal responsibility. His personal circumstances, however, must also be considered, for the Trial Chamber should determine the appropriate sentence in relation to the individual as well as the criminal conduct. Further, while the purpose of criminal law sanctions include such aims as just punishment, deterrence, incapacitation of the dangerous and rehabilitation, the Trial Chamber accepts that the "modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime".[40]

26. In the *Sentencing Judgment of 14 July 1997*, Trial Chamber II set out the personal circumstances of Du{ko Tadi} which were relevant to sentencing. This Trial Chamber takes the view that the same circumstances are relevant in imposing sentence for the present Counts. Consequently, these circumstances are hereby incorporated by reference.[41] The Trial Chamber also notes that Du{ko Tadi} has remarried and remains a family man.

G. Crimes against humanity and war crimes

27. The Trial Chamber is charged with the task of sentencing Du{ko Tadi}, *inter alia*, for the act of killing five men in Jaski}i, in respect of which he was convicted by the Appeals Chamber under three different categories: wilful killing as a grave breach (Count 29), murder as a violation of the laws or customs of war (Count 30) and murder as a crime against humanity (Count 31). Accordingly, the question arises as to whether the Trial

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[40] Lafave & Israel, *Criminal Procedure* (2 ed, 1992), p. 1102 (citing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L. Ed. 1337 (1949)).

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Chamber should differentiate on the basis of gravity of the offence between the sentence imposed for the offence of murder as a crime against humanity, and the sentences imposed for the two war crimes, wilful killing as a grave breach and murder as a violation of the laws or customs of war.

28. In the *Erdemovi} Appeals Judgement*, a majority of the Appeals Chamber held that 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 and "should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime".[42] 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. The Trial Chamber sees no reason to depart from this view and it notes that this view finds further support in the jurisprudence of the International Criminal Tribunal for Rwanda.[43]

29. In determining the appropriate sentence for Counts 29, 30 and 31, the Trial Chamber has taken into account that, all else being equal, a crime against humanity is a more serious offence than a war crime.

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[41] *Sentencing Judgment of 14 July 1997*, paras. 61 to 72.

[42] *Prosecutor v. Erdemovi}*, Case No.: IT-96-22-A, Judgement, 7 Oct. 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 20 *et seq.*, and Separate and Dissenting Opinion of Judge Stephen, para 5, where he states "I have had the advantage of reading the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah in which they examine in detail three requirements for a valid plea of guilty, that it be voluntary, informed and unambiguous. I agree, with respect, in their conclusion that, while the requirement of voluntariness was satisfied in the present case, the requirement that the plea be an informed plea was not satisfied. I do so for the reasons expressed by their Honours [. . .]."

[43] *The Prosecutor v. Kambanda*, Case No.: ICTR-97-23-S, Judgement and Sentence, 4 Sept. 1998, para. 14; *The Prosecutor v. Akayesu*, Case No.: ICTR-96-4-T, Sentence, 2 Oct. 1998, paras. 6 to 10; *The Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, Sentence, 5 Feb. 1999, at paras. 13 to 14; and *The Prosecutor v. Kayishema and Ruzindana*, Case No.: ICTR-95-1-T, Sentence, 21 May 1999, para. 9.

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H. Count 8: torture or inhuman treatment

30. The Trial Chamber notes that Count 8 of the Amended Indictment charged Du{ko Tadi} alternatively with two distinct offences, namely torture or inhuman treatment.[44] In convicting Du{ko Tadi} under this Count, the Appeals Chamber did not specify in respect of which of the two offences it found him guilty. With regard to the determination of the appropriate sentence in respect of this Count, the Prosecution submits that the "primary allegation" in the Amended Indictment is focused on torture and that a punishment for torture is appropriate. The Prosecution concedes, however, that if the Trial Chamber finds that there is any ambiguity, it should proceed to sentence on the lesser offence, namely inhuman treatment.[45]

31. The Trial Chamber's task is limited to sentencing Du{ko Tadi} in respect of the Appeals Chamber's guilty verdict under Count 8. It is not for this Chamber to determine, either on the basis of the "primary allegation" in the Amended Indictment or the factual findings set out in the *Opinion and Judgment*, for which of the two alternative offences charged in that Count Du{ko Tadi} is to be held criminally responsible. Only the Chamber convicting him is competent to do that. Since the *Appeals Judgement* does not specify for which of the two distinct offences Du{ko Tadi} is held criminally liable, an ambiguity undoubtedly exists. Under these circumstances, the Trial Chamber finds that it is appropriate to apply the principle of *in dubio pro reo*, which states that any ambiguity must accrue to the defendant's advantage. Consequently, in sentencing Du{ko Tadi} in respect of Count 8, the Trial Chamber has considered the appropriate punishment for the lesser offence of inhuman treatment.

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[44] In *Prosecutor v. Delali} et al.,* Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, paras. 452 to 497 and 516 to 543 the definitions of the crimes of torture and inhuman treatment are discussed in depth.

[45] Pre-Sentencing Hearing, 15 Oct. 1999, T. p. 36.

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V. PENALTIES

32. FOR THE FOREGOING REASONS THE TRIAL CHAMBER, having considered all of the evidence and the arguments in light of the Statute and the Rules, unanimously imposes on Du{ko Tadi} the following penalties:

A. Counts 8 and 9

For inhuman treatment as a grave breach, the Trial Chamber sentences Du{ko Tadi} to nine years' imprisonment;

For wilfully causing great suffering or serious injury to body or health as a grave breach, the Trial Chamber sentences Du{ko Tadi} to nine years' imprisonment;

B. Count 12

For wilfully causing great suffering or serious injury to body or health as a grave breach, the Trial Chamber sentences Du{ko Tadi} to six years' imprisonment;

C. Count 15

For wilfully causing great suffering or serious injury to body or health as a grave breach, the Trial Chamber sentences Du{ko Tadi} to six years' imprisonment;

D. Count 21

For wilfully causing great suffering or serious injury to body or health as a grave breach, the Trial Chamber sentences Du{ko Tadi} to six years' imprisonment;

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E. Counts 29, 30 and 31

For wilful killing as a grave breach, the Trial Chamber sentences Du{ko Tadi} to twenty-four years' imprisonment;

For murder as a violation of the laws or customs of war, the Trial Chamber sentences Du{ko Tadi} to twenty-four years' imprisonment;

For murder as a crime against humanity, the Trial Chamber sentences Du{ko Tadi} to twenty-five years' imprisonment;

F. Count 32

For wilfully causing great suffering or serious injury to body or health as a grave breach the Trial Chamber sentences Du{ko Tadi} to nine years' imprisonment;

G. Concurrence of Sentences

Each of the sentences is to be served concurrently, both *inter se* and in relation to each of the sentences imposed in the *Sentencing Judgment of 14 July 1997*.

H. Credit for time served

In accordance with Sub-rule 101(D), Du{ko Tadi} is entitled to credit for time for which he "was detained in custody pending surrender to the Tribunal or pending trial or appeal." Although he was arrested on 12 February 1994, his detention pending surrender to the International Tribunal did not commence until 8 November 1994 when Trial Chamber I issued a formal request to the Government of the Federal Republic of Germany to defer to the jurisdiction of the International Tribunal.[46] Consequently, Du{ko Tadi} is entitled to credit for five years and three days of time served in relation to the sentence imposed by the

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

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Trial Chamber, as at the date of this Sentencing Judgment, together with such additional time as he may serve pending the determination of any appeal.

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

Gabrielle Kirk McDonald
Presiding

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Lal Chand Vohrah	Patrick Lipton Robinson

Judge Robinson appends a Separate Opinion to this Sentencing Judgment.

Dated this eleventh day of November 1999
At The Hague,
The Netherlands.

[**Seal of the Tribunal**]

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