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]

SEPARATE OPINION OF JUDGE ROBINSON

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

In this Opinion I comment on -

(I) the difference in the penalty imposed by the Trial Chamber for crimes against humanity and war crimes, and

(II) the sentence of twenty-five years for the murder of the five men in respect of Counts 29, 30 and 31.

I

In 1997, the Appeals Chamber remitted the *Erdemovi}*[1] case to a Trial Chamber on the ground, *inter alia*, that the accused, who had pleaded guilty to a count charging him with a crime against humanity, and for which he had been sentenced to ten years' imprisonment, had not been informed that that crime was more serious than a war crime, with which he had been alternatively charged. When he was repleaded, the accused pleaded guilty to the war crime and was sentenced to five years' imprisonment.

That decision of the Appeals Chamber in *Erdemovi}*, which is discussed in this Sentencing Judgment ("Judgment"), is, of course, binding on Trial Chambers as to the relative gravity of crimes against humanity and war crimes; and it is only because I am bound by it that I have concurred in those sections of this Judgment which reflect a more severe penalty for crimes against humanity than for war crimes. Were I not so bound, I would have imposed the same sentence for war crimes as for crimes against humanity.

I set out below briefly the reasons for this position.

There is, in principle, no warrant either in past or contemporary practice for the conclusion that crimes against humanity are more serious than war crimes, and, in any event, for sentencing purposes, there is no justification for this approach when both crimes have precisely the same factual bases.

[1] *Prosecutor v. Erdemovi},* Case No.: IT-96-22-A, Judgement, 7 Oct. 1997 ("*Erdemovi} Judgement*").

The Separate and Dissenting Opinion of Judge Li in *Erdemovi}*[2] provides as good a point of departure as any for the consideration of this question.

Judge Li identifies eight reasons why crimes against humanity are not more serious than war crimes[3]; they may be summarised as follows:

1. the gravity of a crime is determined by the intrinsic nature of the act itself, not by its classification.
2. that a crime against humanity is not necessarily more serious than a war crime is illustrated by a comparison between the crimes against humanity with which the appellant Erdemovi}, was charged and a war crime under Article 3(c) of the Statute of the International Tribunal ("Statute") of bombardment of an undefended town, which results in the death of a million civilians.
3. crimes against humanity were first introduced after World War II in the Nuremberg Charter to fill the lacuna in international law left by the limited coverage of war crimes in respect of acts committed principally against combatants and prisoners of war of the other belligerent nations and civilians in occupied territory; crimes against humanity were introduced to prosecute atrocities by Germany against its own nationals, particularly Jews and anti-Nazi German politicians and intelligentsia.
4. in the trials following the Second World War there was generally no distinction in the punishment of crimes against humanity and war crimes.
5. the United States War Crimes Act of 1996[4] provides for the death penalty for a person who commits a grave breach of the Geneva Conventions of 1949, where death results to the victim.
6. the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[5] does not treat crimes against humanity as being more serious than war crimes.

[2] *Prosecutor v. Erdemovi},* Case No.: IT-96-22-A, Separate and Dissenting Opinion of Judge Li, 7 Oct. 1997 (*"Judge Li Separate Opinion"*).
[3] *Id.,* paras. 18 - 26.
[4] Codified as 18 U.S.C. section 2441.
[5] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 Nov. 1968, 8 I.L.M. (1969).

7. Articles 141-143 of the Yugoslav Criminal Law[6] provides the same penalty of five to twenty years' imprisonment for genocide, war crimes against the civilian population and the wounded and sick.
8. the proper meaning of a crime against humanity is not that it is a crime against the whole of humanity, but rather that it is a crime which offends humaneness i.e. a certain quality of behaviour.

I find all these reasons persuasive, particularly the first four, and of these, I consider especially cogent the third and fourth.

The best way of determining whether the history of crimes against humanity supports the contention that they constitute more serious offences than war crimes is by examining the penalties imposed in respect of these crimes by the tribunals established immediately after the Second World War. Such a survey shows that the tribunals did not treat crimes against humanity as being graver offences than war crimes.[7] For example, in the *Milch Case*,[8] defendant Milch was convicted on both charges of war crimes and crimes against humanity for the same acts, and sentenced to life imprisonment.

It is well-established that the purpose of creating the new offence of crimes against humanity in 1945 was not to establish a crime of a graver nature than the existing war crimes, but simply to fill a gap in the law as to culpability for crimes committed by a combatant against its own nationals. Thus, Bassiouni writes "[t]he essential difference between acts deemed war crimes and those deemed 'crimes against humanity' is that the former are acts committed in time of war against nationals of another state, while the latter

[6] Federal Republic of Yugoslavia (Serbia and Montenegro) 1993.
[7] *See* Jia, Bing Bing, "The Differing Concepts of War Crimes and Crimes Against Humanity in International Criminal Law" in Goodwin-Gill, Guy and Talmos, Stefan (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) (citing *U.S. v. Pohl et al*., in Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Washington DC 1949) (hereafter "*Trials of War Criminals*"), V, 958, in which defendants Hans Hohberg and Leo Volk were jointly sentenced for war crimes and crimes against humanity; *U.S. v. Wilhelm List et al., Trials of War Criminals*, XI, 757, in which General Rendulic's conviction under count 4 of a typical crime against humanity (torture, deportation to slave labour and systematic terrorization of inhabitants of occupied territories), did not lead to a much heavier sentence.) Dr. Jia comments that although "the military tribunals sitting at Nuremberg did not adopt a consistent line of reasoning with regard to the difference between war crimes and crimes against humanity . . . they did not seem to consider that crimes against humanity should be punished more severely than war crimes. For them it was the nature and consequence of the underlying offence and the existence *vel non* of mitigating circumstances that determined the penalty imposed." *Id.,* p.263.

are acts committed against nationals of the same state as that of the perpetrators. Thus, the Charter took a step forward in the form of a jurisdictional extension when it provided that the victims of the same types of conduct that constitute war crimes were protected without the requirement that they be of a different nationality than that of the perpetrators."[9] This is, no doubt, a correct analysis because the acts proscribed by Article 6(c) of the Charter[10] as crimes against humanity are substantially the same acts proscribed by Article 6(b) as war crimes.

If the history of crimes against humanity and war crimes does not reveal any distinction in the relative gravity of the two crimes, is there anything in contemporary practice that establishes such a distinction?

The Draft Statute of the International Criminal Court (ICC) prepared by the International Law Commission (ILC), and submitted to the United Nations General Assembly in 1994, ("1994 ICC Draft Statute") does not reveal any gradation of the two crimes as to their relative gravity.[11] However, paragraph 14 of the ILC's commentary on Article 20 of the 1994 ICC Draft Statute describes crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part."[12]

The Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC, and presented to the United Nations General Assembly in 1996[13] ("ILC Draft Code"), does

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[8] *Trials of War Criminals*, II, 773, 797.
[9] Bassiouni, M. Cherif, *Crimes Against Humanity in International Law* (Dordrecht 1992), 179.
[10] Charter of the International Military Tribunal of Nuremberg annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 Aug. 1945, 85 U.N.T.S. 251.
[11] *See* Articles 20 (c) and (d) in the Report of the International Law Commission on the work of its forty-sixth session, GAOR, 49th session, Supplement No. 10 (A/49/10). *See also,* paragraphs 8 to 10 of the Commentary, dealing with war crimes, and paragraphs 11 to 14 addressing crimes against humanity, 1994 ICC Draft Statute, pp. 73 – 76. It should be noted that the ILC was not concerned with gradation in terms of the gravity of the crimes falling within the jurisdiction of the Court. Its essential concern was to ensure that the future Court would have jurisdiction only over "the most serious crimes of concern to the international community as a whole." *See* Preamble to the 1994 ICC Draft Statute, p.44, now reflected in Article 5(1) of the ICC Statute.
[12] 1994 ICC Draft Statute, p.76.
[13] Report of the International Law Commission on the work of its forty-eighth session, GAOR, 51st session, Supplement No. 10 (A/51/10).

not reveal any gradation of the two crimes as to their relative gravity,[14] and in fact, both Articles 18 and 20, which define crimes against humanity and war crimes, respectively, require that these crimes be committed "in a systematic manner or on a large scale."[15]

In its effort to ensure that the Draft Code of Crimes Against the Peace and Security of Mankind was confined to the most heinous crimes of concern to the international community[16], the ILC, at one stage of its proceedings, considered the concept of exceptionally serious war crimes,[17] although it was later discarded. An analysis of its definition of an exceptionally serious war crime shows, in terms of gravity, little difference between that crime and a crime against humanity. An exceptionally serious war crime is defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict…"[18]

Nor is there in the Statute of the International Criminal Court, adopted in 1998,[19] ("ICC Statute") any gradation of the two crimes as to their relative gravity, although Article 7, which defines crimes against humanity, requires that they be committed "as part of a widespread or systematic attack directed against any civilian population." However, Article 8(1) of the ICC Statute, in conferring jurisdiction over war crimes "in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes", reflects a requirement that is akin to the widespread or systematic element in crimes against humanity.

The Tribunal's Statute, adopted in 1993, does not reflect any gradation of crimes against humanity and war crimes as to their relative gravity,[20] and, significantly, does not include in the definition of crimes against humanity the requirement that they be committed on a

[14] *See* Article 18 (crimes against humanity) and Article 20 (war crimes) of the ILC Draft Code and associated commentaries.
[15] *See* ILC Draft Code, pp. 93 and 100, respectively.
[16] *See e.g.* ILC Draft Code, p. 42.
[17] *See* Article 22 of the Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-third session, GAOR, 46th session, Supplement No. 10 (A/46/10), p.269.
[18] *Id.*, p. 247.
[19] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9. The 1994 ICC Draft Statute was one of the basic documents used both in the preparatory work and in the conference which adopted the ICC Statute.
[20] *See* Articles 3 and 5 of the Statute.

widespread and systematic basis, although paragraph 48 of the United Nations Secretary General's Report[21] (to which the Tribunal's Statute is attached) indicates that "crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." As a general rule, indictments of the Tribunal allege that crimes against humanity are committed on a widespread or systematic basis.[22]

Nor does the Statute establishing the Rwanda Tribunal[23] make any distinction as to relative gravity between crimes against humanity and war crimes; however, in contradistinction to the Tribunal's Statute, the definition of crimes against humanity (in Article 3) does contain the requirement that they be committed on a widespread and systematic basis.

The mere fact that crimes against humanity are generally required to be committed on a widespread and systematic basis does not, by itself, make them more serious than war crimes, and certainly, this cannot be the case where they are constituted by the very same acts as war crimes. Judge Li is, of course, correct that war crimes can also be committed systematically and on a large scale[24], and in this regard, the non-differentiation between crimes against humanity and war crimes in terms of their relative gravity is highlighted both by Article 20 of the ILC Draft Code, which requires that war crimes be committed "in a systematic manner or on a large scale," and Article 8(1) of the ICC Statute which requires that war crimes be committed "as a part of a plan or policy or as part of a large-scale commission of such crimes."

If these two latter instruments are seen as reflecting a customary norm requiring that crimes against humanity be committed on a widespread or systematic basis, it would seem that they also reflect a norm requiring that war crimes be committed, if not on a similar basis, then on

[21] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704.
[22] *See e.g.,* paragraph 3.7 of the Indictment (Amended) in *Prosecutor v. Tadi},* Case No.: IT-94-1-T; paragraph 12 of the Second Amended Indictment in *Prosecutor v. Jelisi},* Case No.: IT-95-10-PT; paragraph 16 of the Indictment in *Prosecutor v. Krsti},* Case No.: IT-98-33.
[23] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (8 Nov. 1994).
[24] *Judge Li Separate Opinion*, para. 20.

one that is akin to it. As a matter of fact, many of the war crimes charged in the Tribunal's indictments are committed as part of a plan or policy or on a large scale.

I, therefore, find that the *Erdemovi} Judgement* and its affirmation in this Judgment (in paragraph 28), exaggerate the significance of the widespread and systematic element in crimes against humanity by treating it as an indication that those crimes are more serious than war crimes. Nothing in this finding should be construed as meaning that that element is not an important feature of the definition of crimes against humanity, and perhaps, even one that arises under customary law. But, it is not a distinguishing element in terms of the relative gravity of both crimes.

There are three references in the Tribunal's Statute to the gravity of crimes, the first and third being general, and the second specific.[25]

Article 1 of the Statute confines the jurisdiction of the Tribunal to the prosecution of persons "responsible for serious violations of international humanitarian law….". Although this provision is a general limitation of the Tribunal's prosecutorial powers to serious violations, it does not establish any criterion for determining levels of gravity in respect of the four categories of crimes within the jurisdiction of the Tribunal. Article 2 specifically refers to the grave breaches of the Geneva Conventions of 1949 and simply lists eight acts which constitute such breaches. Article 24, paragraph 2, merely mandates the Trial Chamber to take into account the gravity of the offence as a factor in determining sentence. However, the point is that nowhere does the Statute, either in express or implied terms, grade the four categories of crimes that fall within the Tribunal's jurisdiction according to their gravity.

For sentencing purposes, the relevant comparison is not between the four categories of crimes on the basis of their classification or nomenclature; rather, the comparison should be between the specific acts that constitute the specific crimes; to adapt the illustration given by Judge Li relating to his second reason why crimes against humanity are not necessarily

[25] The reference to "serious violations" in Article 23, paragraph 1, Article 10, paragraph 1 and Article 29, paragraph 1 of the Statute, has the same meaning as the phrase in Article 1 of the Statute.

more serious than war crimes, it could not be argued that any of the crimes against humanity for which the appellant has been convicted (e.g. the murder of five men in Jaski}i under Count 31), is more serious than a war crime under Article 3(c) of the Statute in which an undefended town is bombarded, resulting in the death of a million civilians.

In sum, therefore, where both crimes are constituted by the same acts, as in the instant case, there should be no differentiation in penalty.

Another objection to the differentiation in penalty for crimes against humanity and war crimes is the practical difficulty that is involved in implementing such an approach. Judge Shahabuddeen has referred to this difficulty in his Separate Opinion in *Erdemovi}*:[26] the imposition of the maximum sentence for murder as a crime against humanity would necessarily call for a lower sentence for murder as a war crime, even if there are no mitigating factors in the latter case.

In the example given by Judge Shahabuddeen, the requirement of a differentiation in penalty would seem to lead to an artificiality in sentencing, totally removed from the facts of the particular case.

I regret that I am also unable to support the contention in paragraph 28 of the Judgment that one of the factors indicating that crimes against humanity are more serious than war crimes is that the former are seen "as a crime against more than just the victims themselves, but against humanity as a whole." In this matter I totally share the view of Egon Schwelb that, of the two meanings of the term 'humanity' in crimes against humanity - (i) the human race or mankind as a whole and (ii) humaneness, that is a certain quality of behaviour - it is the latter which is applicable.[27]

I, therefore, conclude that there is nothing either in the history of crimes against humanity and war crimes or in contemporary practice relating to these crimes which supports the conclusion that, as a matter of principle, crimes against humanity are more serious

[26] *Prosecutor v. Erdemovi},* Case No.: IT-96-22-T *bis*, Separate Opinion of Judge Shahabuddeen, 5 March 1998.
[27] *See* Schwelb, Egon, *Crimes Against Humanity*, 23 British Yearbook of International Law, 178, 195 (1946).

violations of international humanitarian law than war crimes; and in any event, for sentencing purposes there is no basis for maintaining such a distinction where both crimes are constituted by the very same acts.

It is a fair comment that the Tribunal's approach to cumulative charging is relatively flexible and liberal. Trial Chambers have on several occasions dismissed preliminary objections to the form of an indictment on the ground of cumulative charging by holding that such objections would only be relevant at the sentencing stage.[28] One way of dealing with this issue is by imposing concurrent sentences; but another way is to impose the same sentence for two crimes when they are constituted by the same acts. The Tribunal, in the future, may yet have to confront at a preliminary stage, more squarely than it has in the past, the issue of cumulative charges.

II

In view of the sentence of twenty years imposed by Trial Chamber II for the murder of two Muslims (Count 1), it may be questioned why a sentence of twenty-four years for wilful killing as a grave breach, twenty-four years for murder as a violation of the laws or customs of war, and twenty-five years for murder as a crime against humanity was imposed for the killing of five men in Jaski}i (Counts 29, 30 and 31).

With regard to Count 1, the Trial Chamber's finding was that the appellant, who was part of a group of Serbs, killed two Muslim policemen by slitting their throats. With regard to Counts 29, 30, 31, the Appeals Chamber's finding was that the appellant actively took part in the common criminal design to rid the Prijedor region of the non-Serb population, and, pursuant to this common design, five men were killed in the attack on Jaski}i on 14 June 1992.[29]

I do not find the killing of the five men in Jaski}i to be more heinous than the killing of the two Muslim policemen, in which the appellant himself physically committed the act that led to their deaths.

[28] *See e.g.*, *Prosecutor v. Tadi},* Case No.: IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov. 1995, para. 17.
[29] *Prosecutor v. Tadi},* Case No.: IT-94-1-A, Judgement, 15 July 1999, paras. 231 – 233.

Article 24, paragraph 1, of the Statute does not oblige the Tribunal to follow the general practice regarding prison sentences in the courts of the former Yugoslavia; rather, its effect is only to oblige the Tribunal to take account of that practice; this construction of Article 24, paragraph 1, is reflected in Sub-rule 101 (B) (iii) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Tribunal would, therefore, not be bound by a maximum sentence of twenty years if that was applicable in the former Yugoslavia for the kind of crimes with which the appellant is charged.[30] Sub-rule 101(A) of the Rules provides for imprisonment for a term up to and including the remainder of the convicted person's life. This provision is compatible with contemporary practice in many domestic jurisdictions. It is to be noted that Article 77 (1) of the ICC Statute provides for imprisonment for a maximum term not in excess of thirty years, or "a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."

In all the circumstances of this case, I consider a term of imprisonment of twenty-five years to be the appropriate penalty for the killings covered by Counts 29, 30 and 31.

Since I take the view that the murders under Count 1 are of the same gravity as the murders under Counts 29, 30 and 31, and sentences of twenty-four years, twenty-four years and twenty-five years, respectively, have been imposed for the killings under the latter Counts, whereas the former attracted a sentence of twenty years, there might appear to be an inconsistency in the global approach to sentencing. It is necessary therefore to explain that I hold that the appropriate penalty for the murders under Count 1 is imprisonment for twenty-five years.

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

[30] *See* paras. 11 and 12 of this Judgment for a complete discussion of the submissions made by both parties in respect of the general practice regarding prison sentences in the former Yugoslavia, as it relates to these sentencing proceedings.

Patrick Lipton Robinson

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

[Seal of the Tribunal]