



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-Abis

Date: 26 January 2000

Original: English

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**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.**

**DUŠKO TADIĆ**

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**JUDGEMENT IN SENTENCING APPEALS**

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**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 Duško Tadić ("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.<sup>1</sup> 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

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<sup>1</sup> "Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral", *Prosecutor v. Duško Tadić*, 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> The Trial Chamber also ordered that the minimum sentence imposed was not to be subject to any entitlements to credit.<sup>6</sup>

7. Following appeals by both parties against the Opinion and Judgment ("Appeals Against Opinion and Judgment"), Duško Tadić on 11 August 1997 filed a further appeal

<sup>2</sup> "Opinion and Judgment", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, T.Ch. II, 7 May 1997, pp. 227-228, paras. 607-608 and page 300.

<sup>3</sup> *Ibid.*, pp. 300-301.

<sup>4</sup> "Sentencing Judgment", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, T.Ch. II, 14 July 1997, p. 41, para. 76.

<sup>5</sup> *Ibid.*, para. 77.

<sup>6</sup> *Ibid.*

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

8. The Appeals Chamber entered its Judgment on the Appeals Against Opinion and Judgment on 15 July 1999.<sup>9</sup> 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”).<sup>10</sup> 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.<sup>11</sup>

<sup>7</sup> “Notice of Appeal by the Defence Against Sentencing Judgment of 14 July 1997”, 11 August 1997.

<sup>8</sup> 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 9<sup>th</sup> 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.

<sup>9</sup> “Judgement”, *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, 15 July 1999 (“Appeals Judgement”).

<sup>10</sup> *Ibid.*, p. 144, para. 327.

<sup>11</sup> *Ibid.* p. 11, para. 27 and p. 144, para. 327.

9. Following oral and written submissions,<sup>12</sup> 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.<sup>13</sup>

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").<sup>14</sup> 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.<sup>15</sup>

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

<sup>12</sup> "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 15<sup>th</sup> July 1999", 25 August 1999, p. 7, para. 12; Transcript of hearing in *Prosecutor v. Duško Tadić*, 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 Judgment 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).

<sup>13</sup> "Order Remitting Sentencing to a Trial Chamber", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, 10 September 1999, p. 3.

<sup>14</sup> "Sentencing Judgment", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-Tbis-R117, 11 November 1999.

<sup>15</sup> *Ibid.*, p. 17.

request was issued to the Federal Republic of Germany to defer to the jurisdiction of the International Tribunal.<sup>16</sup>

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.<sup>17</sup> By Order of 3 December 1999, the Appeals Chamber ordered that the two appeals be joined.<sup>18</sup>

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

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<sup>16</sup> *Ibid.*, p. 12, para. 22 and p. 17.

<sup>17</sup> "Notice of Appeal Against Sentencing Judgment of 11<sup>th</sup> November 1999", 25 November 1999, p. 4, para. 8.

<sup>18</sup> "Order", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A and IT-94-1-Abis, 3 December 1999, p. 3.

<sup>19</sup> "Appellant's Brief on Appeal Against Sentencing Judgment of 11<sup>th</sup> 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.<sup>20</sup>

(i) The sentence is unfair, as it was longer than the facts of the case required.<sup>21</sup>

(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").<sup>22</sup>

(iii) The Trial Chamber erred by giving insufficient attention to the Appellant's personal circumstances.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

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<sup>20</sup> "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).

<sup>21</sup> *Ibid.*, pp. 3-4, para. 5 ((a)-(d)); T. 303 (21 April 1999).

<sup>22</sup> *Ibid.*, pp. 4-6; T. 304, 311 (21 April 1999).

<sup>23</sup> *Ibid.*, pp. 9-10, para. 7 ((a)-(d)); T. 305 (21 April 1999).

<sup>24</sup> *Ibid.*, p. 10, para. 8; T. 306-308 (21 April 1999).

<sup>25</sup> *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.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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

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.<sup>31</sup>

<sup>26</sup> Appellant's Brief Against Sentencing Judgement of 11 November 1999, pp. 1-15, paras. 1-8; T. 482-485 (14 January 2000).

<sup>27</sup> *Ibid.*, pp. 15-18, paras. 9-13; T. 477-482 (14 January 2000).

<sup>28</sup> *Ibid.*, pp. 18-19, paras. 14-15; T. 489-490 (14 January 2000).

<sup>29</sup> *Ibid.*, pp. 19-20, para. 16; T. 485-489 (14 January 2000).

<sup>30</sup> *Ibid.*, pp. 20-21, para. 17; T. 490 (14 January 2000).

<sup>31</sup> 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:<sup>32</sup>

- (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:<sup>33</sup>

- (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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<sup>32</sup> "Notice of Appeal by the Defence Against Sentencing Judgment of 14 July 1997", 11 August 1997; T. 303, 306, 309 (21 April 1999).

<sup>33</sup> "Notice of Appeal Against Sentencing Judgment of 11<sup>th</sup> 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.<sup>34</sup>

(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.<sup>35</sup>

(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.<sup>36</sup>

(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

<sup>34</sup> Appellant’s Brief Against Sentencing Judgement of 14 July 1997, pp. 1-4; T. 303 (21 April 1999).

<sup>35</sup> *Ibid.*, pp. 3-4, paras. 5((a)-(d)); T. 303 (21 April 1999).

<sup>36</sup> *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.<sup>37</sup>

(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.<sup>38</sup> 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.<sup>39</sup>

(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.<sup>40</sup> 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

<sup>37</sup> *Ibid.*, pp. 9-10; T. 305 (21 April 1999).

<sup>38</sup> "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).

<sup>39</sup> *Ibid.*, pp. 11-13, paras. 5.4, 5.8; T. 312 (21 April 1999).

<sup>40</sup> *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.<sup>41</sup>

(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.<sup>42</sup>

(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.<sup>43</sup>

## 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

<sup>41</sup> *Ibid.*, p. 14 para. 5.12; T. 313-314 (21 April 1999).

<sup>42</sup> *Ibid.*, p. 9 para. 4.7; T. 314-315 (21 April 1999).

<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup>

(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

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<sup>44</sup> T. 306-308 (21 April 1999).

<sup>45</sup> 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.<sup>46</sup>

## 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

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<sup>46</sup> 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.”<sup>47</sup>

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.

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<sup>47</sup> *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.<sup>48</sup> 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.<sup>49</sup>

(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.<sup>50</sup>

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<sup>48</sup> Appellant's Brief Against Sentencing Judgement of 14 July 1997, p. 14, para. 9; T. 308-309 (21 April 1999).

<sup>49</sup> *Ibid.*

<sup>50</sup> 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.<sup>51</sup>

## 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).<sup>52</sup> 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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<sup>51</sup> T. 319-320 (21 April 1999).

<sup>52</sup> 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.<sup>53</sup> Specifically, the Appellant suggests that the Trial Chamber was in error in agreeing with the views expressed in the *Čelebići*<sup>54</sup> and *Furundžija*<sup>55</sup> 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".<sup>56</sup> 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.<sup>57</sup>

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

<sup>53</sup> Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 1-15; T. 482-485 (14 January 2000).

<sup>54</sup> "Judgement", *Prosecutor v. Zejnil Delalić et al.*, Case No.: IT-96-21-T, 16 November 1998, ("Čelebići Judgement").

<sup>55</sup> "Judgement", *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T, 10 December 1998.

<sup>56</sup> Sentencing Judgment of 11 November 1999, p. 6, para. 7, quoting the Čelebići Judgement, para. 1234. See Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 2.

<sup>57</sup> *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.<sup>58</sup>

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.<sup>59</sup>

(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.<sup>60</sup>

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 [Čelebići and Furundžija] 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".<sup>61</sup>

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

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<sup>58</sup> *Ibid.*, p. 4, para. 2(f).

<sup>59</sup> *Ibid.*, pp. 4-6, paras. 2(g) and (h).

<sup>60</sup> Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 3-6, paras. 2-5.

<sup>61</sup> 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’”.<sup>62</sup>

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.<sup>63</sup>

## 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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<sup>62</sup> 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.

<sup>63</sup> *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.<sup>64</sup>

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.<sup>65</sup>

<sup>64</sup> Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 15-16, paras. 9-11; T. 477-482 (14 January 2000).

<sup>65</sup> *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.<sup>66</sup>

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.<sup>67</sup>

## 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,<sup>68</sup> 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

<sup>66</sup> Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 9, para. 11; T. 494 (14 January 2000).

<sup>67</sup> *Ibid.*, p. 9, para. 11; T. 496-497 (14 January 2000).

<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

**(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

<sup>69</sup> 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 Tadić*, Case No.: IT-94-1-Tbis-R117, T.Ch. *This*, 441-442 (15 October 1999).

<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

## 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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<sup>71</sup> Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 7, para. 7.  
<sup>72</sup> *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.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup>

**(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.<sup>76</sup> The Respondent also argued that, "in many national jurisdictions", different penalties accrue for one act by reference to the nature of the victim.<sup>77</sup> The Respondent relied for its submission in this regard on the position of the Trial Chamber following the *Erdemović*<sup>78</sup> decision, that all things being equal, a crime against humanity was a more

<sup>73</sup> Appellant's Brief Against Sentencing Judgment of 11 November 1999, pp. 19-20, para. 16.

<sup>74</sup> *Ibid.*

<sup>75</sup> T. 487-488 (14 January 2000).

<sup>76</sup> T. 499 (14 January 2000).

<sup>77</sup> T. 499-500 (14 January 2000).

<sup>78</sup> "Judgement", *Prosecutor v. Dražen Erdemović*, Case No.: IT-96-22-A, App.Ch., 7 October 1997.

serious offence than an ordinary war crime.<sup>79</sup> 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.<sup>80</sup>

(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.<sup>81</sup>

## 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.

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<sup>79</sup> T. 500-501 (14 January 2000).

<sup>80</sup> T. 501-502 (14 January 2000).

<sup>81</sup> 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”<sup>82</sup> 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.<sup>83</sup>

**(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

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<sup>82</sup> Appellant’s Brief Against Sentencing Judgment of 11 November 1999, p. 20-21, para. 17.

<sup>83</sup> *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.<sup>84</sup>

## 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.

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<sup>84</sup> 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** Duško Tadić 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;

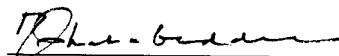
(6) **ORDERS** that each of the sentences imposed in sub-paragraph (3) above be served concurrently both *inter se* and in relation to the sentences imposed in the Sentencing Judgments of 14 July 1997 and 11 November 1999 and affirmed in sub-paragraphs (1) and (4) above;


(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, Duško Tadić should serve a term of imprisonment ending no earlier than 14 July 2007;

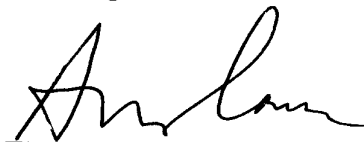
(8) ALLOWS the third ground of Appeal against the Sentencing Judgment of 14 July 1997 and the sixth ground of appeal against the Sentencing Judgment of 11 November 1999, REVISES the Sentencing Judgment of 14 July 1997 and the Sentencing Judgment of 11 November 1999 by FINDING, as it now does, that Duško Tadić 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.

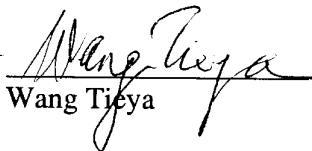
Accordingly, the Appeals are allowed in part, dismissed in part.

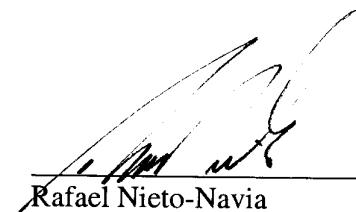
Done in both English and French, the English text being authoritative.

  
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]

## 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<sup>1</sup>, 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

<sup>1</sup> See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v. Duško Tadić*, 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 *Tadić* (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.<sup>2</sup> 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 10<sup>th</sup> 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

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<sup>2</sup> 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 *Tadić* (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)<sup>3</sup>. 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

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<sup>3</sup> 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.

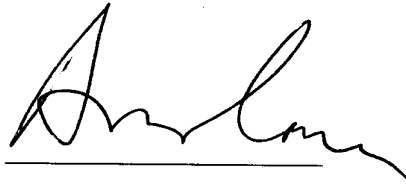
18. I should add that usually the problem I have just discussed should not arise. As was correctly held by Trial Chamber II in *Kupreškić et al.*<sup>4</sup>, whenever the same fact may be regarded as falling under two different provisions of the International Tribunal's Statute, for instance Article 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 *Erdemović* 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.

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<sup>4</sup> See "Judgement", *Prosecutor v. Zoran Kupreškić 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.

A handwritten signature in black ink, appearing to be 'Antonio Cassese', written over a horizontal line.

Antonio Cassese

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

**[Seal of the Tribunal]**