

ICTY, APPEALS CHAMBER

***Prosecutor v. Dusko Tadic*, Judgment in Sentencing Appeals, 26 January 2000**

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 Chamber¹, are envisaged in that provision, are not only objectively different from one another, but also differ in gravity. The same holds true for Article 5 of the Statute, which enumerates as crimes against humanity such diverse offences as "murder", "enslavement", "torture", "rape", "persecution" as well as "other inhumane acts".

4. Secondly, the *nulla poena sine praevia lege poenali* principle that is generally upheld in most national legal systems is still inapplicable in international criminal law. Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty (normally in civil law countries criminal codes envisage the maximum ¹ See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v. Du{ko Tadi}*,

Case No.: IT-94-1-AR72, App. Ch., 2 October 1995, paras. 87-93.

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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

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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.

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

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

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

of course a State is “genuinely” willing and able to prosecute and try the case and the International Criminal

² See Decision *cit.*, para. 94.

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

14. Let us now return to the question of murder as a war crime or as a crime against humanity. Murder, in order to be defined a “crime against humanity”, must be part of a widespread or systematic practice. In addition, it must be established that the mental element of the crime includes not only the *mens rea* concerning the killing of the victim, but also knowledge of the existence of the widespread or systematic practice. Thus, if murder is defined as a “crime against humanity”, it cannot consist merely of a single or even a multiple violation of international humanitarian law, however serious this may have been. Rather, murder is simply one element of extensive criminal misconduct and the murderer must have acted in the knowledge that his or her conduct formed part of this overall context.

Normally a “widespread or systematic practice” of misbehaviour is either planned or instigated, or promoted, or countenanced, or at least tolerated by the governmental authorities wielding control over the area where the crime has been committed. It follows that the murder at issue forms part of a whole pattern of criminality, and may amount to what the great Dutch international lawyer B.V.A. Röling termed “system criminality” (encompassing large-scale crimes perpetrated to advance the war effort, at the request of, or with the encouragement or toleration of government authorities), as opposed to “individual criminality” (embracing crimes committed by combatants on their own initiative and often 55

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

15. Clearly, the reaction of the international community to such a crime must be more severe than in cases where the same conduct attributed to the accused amounts to a war crime. For, if classified as a crime against humanity, the murder possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values of the international community to a greater extent than in the case where that offence should instead be labelled as a war crime. The international

community and the judicial bodies responsible for ensuring international criminal justice therefore have a strong societal interest in imposing a heavier penalty upon the author of such a crime against humanity, thereby also deterring similar crimes.

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

17. The above remarks also apply to other similar cases. For instance, the murder of a group of civilians perpetrated in an armed conflict, if classified as genocide, clearly is more serious than if defined as a war crime or as a grave breach of the 1949 Geneva Conventions.

For in the case of genocide, the same *actus reus* (the killing of multiple persons) must be accompanied by a specific intent (that of destroying a group or members of a group on national, ethnical, racial or religious grounds). This mental element renders the crime more

³ See B.V.A. Röling, “The Significance of the Laws of War” in A. Cassese (ed.), *Current Problems of International Law*, 1975, 137-139.

Of course, large-scale and systematic war crimes may also form part of “system criminality”: consider for example the mass killing or ill-treatment of prisoners of war. However, the reverse is not true: crimes against humanity always constitute a form of system criminality, while war crimes may also constitute (and indeed very often do constitute) a form of “individual criminality”.

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

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

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

classified as a crime against humanity, should have as a consequence a heavier penalty.
4 See "Judgement", *Prosecutor v. Zoran Kupre{ki} et al*, Case No.: IT-95-16-T, T. Ch. II, 14 January 2000, paras. 683-684.

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

Antonio Cassese

Dated this twenty-sixth day of January 2000

At The Hague,

The Netherlands.

[Seal of the Tribunal]