THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA: THE DECISION OF THE APPEALS CHAMBER ON THE INTERLOCUTORY APPEAL ON JURISDICTION IN THE TADIC CASE

Dusko Tadić is a Bosnian Serb. He is the first defendant of whom the International Criminal Tribunal for Yugoslavia (the “Tribunal”) obtained custody, following his transfer to the Tribunal at its request from Germany. Tadić had been arrested there and investigations had begun into his involvement in offences in Yugoslavia. These enquiries were discontinued at the request of the Tribunal.¹

Tadić and another defendant, not in the custody of the Tribunal, were charged with offences against a number of persons in and outside the Bosnian Serb camp at Omarska in northern Bosnia. The indictment alleged murder, cruel treatment and rape, each offence being charged in the alternative as a grave breach of the Geneva Conventions (Article 2 of the Statute of the Tribunal (the “Statute”)), a violation of the laws and customs of war (Article 3 of the Statute) or a crime against humanity (Article 5 of the Statute).²

Tadić raised a number of objections to the jurisdiction of the Tribunal.¹ He contested the legality of its establishment and complained that the primacy given to the Tribunal over national courts was unjustified. He questioned each of the heads of subject-matter jurisdiction over the offences with which he was charged. This article will consider the response of the Appeals Chamber of the Tribunal to these claims.¹ The first part will deal with the institutional challenges made by Tadić. The second part will examine his objections to the substantive jurisdiction of the Tribunal.

A. The Institutional Competence of the Tribunal

1. The powers of the Security Council

The most fundamental of Tadić’s attacks on the authority of the Tribunal was...
his claim that it had not been lawfully established. It will be recalled that the Tribunal was set up under the authority of Security Council Resolution 827, a Chapter VII resolution which created binding obligations for the UN member States. Resolution 827 recited the Council’s determination that the continued and widespread violations of international humanitarian law in Yugoslavia constituted a threat to international peace and security and the Council’s conviction that the establishment of an international tribunal to try those responsible would contribute to the restoration and maintenance of peace. Tadić maintained that creation of the Tribunal in this way and/or for this purpose was beyond the competence of the Security Council. In response, the Prosecutor argued that this complaint was beyond the competence of the Tribunal and, in principle, his argument seems irresistible. It persuaded the Trial Chamber, which, even if it were conceded that there were limits on the Security Council’s powers, denied its own competence to decide whether the Council had exceeded its authority. Nowhere in the Security Council Resolution or in the Statute of the Tribunal is there an express power under which the Tribunal might take on the question of the lawfulness of the process and measures by which it was set up. The claim that it could goes far beyond the usual reach of “compétence de la compétence” jurisdiction, where a court determines whether a particular cause of action is within its remit. It was the very existence of the Tribunal which was put in issue by Tadić.

However, the majority opinion of the Appeals Chamber was that this was a matter which could be considered by it. President Cassese sought to distinguish the position of courts in domestic legal orders, where there might be a court to determine the legitimacy of the creation of other tribunals, and in the international legal system, where each court was “self-contained” (paragraph 11*). A narrow interpretation of its competence to exclude the question of its very existence would be inappropriate, leaving a vital matter not merely unresolved but unresolvable. Such a power needed no explicit authority in the foundation instruments of the Tribunal but was implicit in the Security Council’s intention to set up, not any subsidiary organ but a tribunal (paragraph 14).

The Appeals Chamber decision apparently accepted the Trial Chamber’s rejection of a power of constitutional review of the decisions of the Security Council but then, in a way which is difficult to follow, said that the lower court’s judgment was “beside the point”. The Appeals Chamber’s decision referred to the use by the Trial Chamber of judgments of the International Court of Justice in which the Court had declined to examine the legality of acts of UN organs. President Cassese distinguished them because, he said, they dealt with matters of “primary” jurisdiction of the International Court, not the “incidental” question of whether there was

8. Idem, para.16.
9. Para. references in the text are to the Appeals Chamber’s decision, supra n.4.
any primary jurisdiction to exercise (paragraph 21). It might be thought that, given the former, the latter was an a fortiori case of lack of jurisdiction. Judge Li, in his dissenting opinion, took this view: “this review”, he said, “is ultra vires and unlawful”. President Cassese said that if the question of the legality of the Tribunal’s creation were not answered then, it would arise at the end of the proceedings, although it is hard to see how. For him, this was a further reason for asserting jurisdiction to decide it in the hearing before the Appeals Chamber (paragraph 6).

However, if there are judicially determinable limits on the extent and exercise of the Security Council’s powers, there is the possibility of judicial review by the International Court of the decision to establish the Tribunal. It is true that such a possibility is remote but that is a consequence of the lack of development of the international legal system rather than a cause for the assertion of jurisdiction by the Tribunal itself over these questions. It is ironic that the existing authorities on the powers of the International Court vis-à-vis the Security Council have been under reconsideration recently. Depending on the outcome of the Lockerbie cases, there may or may not be a judicial organ with competence to consider the matter. Unfortunate or not, this is not a ground of jurisdiction for the Tribunal which is not otherwise there. It cannot be disputed, however, that it might have been politically convenient for the Tribunal to decide the issue, so laying to rest a matter which might have emerged in any future proceedings.

Having found that it was competent to examine the question of its own creation, the Appeals Chamber rejected the claim that the question was, nonetheless, beyond its power on the ground of non-justiciability, a claim given some weight by the Appeals Chamber’s concession that the Security Council was vested with a wide discretion (paragraph 21). The result was that the Appeals Chamber was faced with a long list of objections to the legitimacy of the Security Council’s actions. It compressed them into three questions. The first and second related to the internal vires of the Security Council, the third to whether there was an external, legal condition for the exercise of its power to create a court.

(a) The power of the Security Council to invoke Chapter VII. The judgment proceeded from the starting point that the powers of the Security Council derived from treaty, the Charter, and could not go beyond the authority there conferred. Recourse to the “exceptional powers” of ordering measures under Article 41 or 42

10. Supra n.4, dissenting opinion, pp.1-2.
was contingent on the determination by the Council that there had been "a threat to the peace, a breach of the peace or an act of aggression": in determining the existence of any of these the Council did not have a "totally unfettered discretion". The Appeals Chamber had no difficulty in confirming that the situation in Yugoslavia, whether it were characterised as an international or as an internal conflict, justified the Council's conclusion that there had been a breach of the peace (paragraph 30).  

(b) The range of measures envisaged under Chapter VII. The Appeals Chamber considered that the range of powers conferred on the Council by Articles 39-42 of the Charter was wide enough to make it unnecessary to resort to implied powers or other possible sources of competence for the creation of the Tribunal. The Council had a wide discretion to decide upon what action was necessary to meet "the threat to the peace etc.", the existence of which was a necessary precondition for taking measures under Chapter VII. Tadić argued, first, that there was no basis in Chapter VII for setting up a criminal tribunal. The Appeals Chamber said that Article 41 was the only conceivable source of power and, despite the assertion of the applicant that Article 41 envisaged only measures by States and even then did not contemplate creating a tribunal, "the establishment of the International Tribunal falls squarely within the powers of the Security Council" (paragraph 36). The Appeals Chamber reached this conclusion because it was satisfied that Article 41 provided only examples of what measures were open to the Council, not an exhaustive list of what it might do. Nor was the Tribunal convinced by a supplementary argument, that the Council could not create a subsidiary organ with judicial powers. Since what was involved was not the delegation of the Council's powers but the exercise of them, the fact that the Council did not, in general at least, have a judicial function, was not a bar to instituting the Tribunal (paragraph 38). Finally, given that this was within the Council's powers, the Tribunal rejected without argument the claim that it was an inappropriate measure in this situation. The conclusion that the creation of a tribunal fell within the Security Council's powers was made easier by the wide range of action undertaken or authorised by the Council recently. The Council itself had said that the Tribunal would have no power to create the law it was to apply, which eliminated arguments that the Council had tried to go even further and create a legislative organ. If, when instituting subsidiary organs, the Council addresses its own competence, it is hard to envisage the circumstances, even if judicial review is available, when the reviewing body would not defer to the Council's decision.

(c) Was the establishment of the Tribunal contrary to the general principle whereby courts must be "established by law"? The challenge to the authority of the

14. In any event, the applicant had decided not to proceed with this question before the Appeals Chamber (para. 30).
15. S.C. Res. 827, para. 2 and Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 29; and see text accompanying infra n. 29.
Tribunal here was not based specifically on Charter considerations. Relying on a variety of human rights instruments, Tadić maintained that there was a general principle of law that criminal tribunals must be established by law. In what was the most interesting and potentially the most far-reaching part of the decision, the Appeals Chamber disposed of this contention, though in careful terms (paragraphs 43-47). It was not that courts could be created other than "by law" but that what "law" required was different with regard to international courts than for national courts, which were the concern of the human rights treaties. What could not be insisted upon was that the requirements of the separation of powers as understood by domestic constitutional systems be imposed upon an international system in which they played no part.

Instead, an international court must be established according to the rule of law and what that meant was that "it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments" (paragraph 45). What mattered was not whether a tribunal was "pre-established" but that it was established according to the proper processes of a body with the authority to create a court and that, as a court, it would observe the requirements of procedural fairness. The Appeals Chamber concluded that the recitation of the language of Article 14 of the International Covenant on Civil and Political Rights in Article 21 of the Statute and the guarantees of judicial independence and integrity in Article 13, supplemented by the provisions of the Rules of Procedure and Evidence, assured procedural fairness in cases before the Tribunal. In a subsequent decision the Trial Chamber has made it clear that in deciding what procedural fairness requires, the Tribunal has to take into account the circumstances in which it operates and the nature of its jurisdiction. 16

So, having taken on the question of its own legitimacy, the Appeals Chamber decided that it had had a proper genesis. Its decision gives little guidance on what is the appropriate standard for review because, on all the arguments, the Appeals Tribunal was convinced that the Council's action had been clearly within its powers. What if had reached the opposite conclusion? Would the lights have been turned out and the microphones switched off?

2. Primacy of the Tribunal over competent domestic courts

Article 9(2) of the Statute says: "The ... Tribunal shall have primacy over national courts." Tadić claimed that the Tribunal should have respected the trial against him which had commenced in Germany. The Tribunal first pointed out that there was no trial in Germany, only an investigation, so that the applicant's claims lost their force because it could not be said that the Tribunal was conducting a new trial of Tadić (paragraph 52). However, the Appeals Chamber did address his arguments. That there might have been a trial in Bosnia did not decide the issue in Tadić's favour. The Trial Chamber had resisted his attempts to reinforce this position by relying on the sovereign right of States to try offences occurring within

16. Case No.IT-94-1-T. Decision on the Prosecutor's Motion requesting protective measures for victims and witnesses, paras.27-28. The circumstances in which the Tribunal is now operating have been changed by the agreements included in the Dayton Accords: see UN Doc.S/1994/999, text in (1996) 35 I.L.M. 75.
their territory. It reiterated the orthodoxy that this was a claim which could be raised only by the aggrieved State and not by an individual. 17 The Appeals Chamber was not prepared to take so formalistic an approach. Nonetheless, it noted that, as against the UN, a State’s domestic jurisdiction was limited by the power of the organisation to take measures under Chapter VII. Further, far from contesting the jurisdiction of the Tribunal, Bosnia and Germany had approved of it and co-operated with the Tribunal. 18 Again, the charges against Tadic were not ordinary crimes but crimes of universal jurisdiction, crimes which the Security Council had decided merited judgment by an international court. The Tribunal “must be endowed with primacy over national courts”, otherwise the claim to try a defendant before a national court would undermine the very function of the Tribunal (paragraph 58). If there were no right of a State to try him, Tadic maintained that he, Tadic, had a right to be tried by a national court—a jus de non evocando. Tadic based his claim on national constitutional provisions which precluded a defendant from being removed from his “natural judge” to another tribunal. The Tribunal found these stipulations of purely domestic significance—an individual removed from his natural “national” court to the (international) Tribunal would benefit, rather than be disadvantaged. He would be brought to a court “at least equally fair, more distanced from the facts and taking a broader view of the matter” (paragraph 62).

All the contentions urged on Tadic’s behalf that the Tribunal was institutionally incompetent were rejected. There is no formal system of stare decisis for the Tribunal. It will be interesting to see to what extent the Trial Chamber and the Appeals Chamber itself will be willing to hear new argument on the matters raised by Tadic or whether, at least in the absence of wholly new submissions, they now regard such questions as closed. It would be easier to be sanguine about the extent of the jurisdiction asserted by the Appeals Chamber, particularly as to the legitimacy of the creation of the Tribunal, if one could be sure that questions about its ultimate authority would not be made part of every defence case.

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B. The Substantive Jurisdiction of the Tribunal

Tadic argued that the Tribunal lacked jurisdiction over crimes committed in the context of an internal armed conflict. Its jurisdiction under Articles 2, 3 and 5 of the Statute was, he stressed, limited to conduct which was criminal by international law, 19 which covered only that committed in the context of an international armed conflict. Had the Appeals Chamber accepted this argument it would have had to dismiss those charges drawn under Article 2 (grave breaches of the Geneva Conventions 1949), Article 3 (violations of the laws or customs of war) and Article 5

17. *Supra* n.7, at para.41.
18. Bosnia and Herzegovina and Germany are among the States which have enacted implementing legislation for co-operation with the Tribunal: see Report 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, A/50/365, para.132.
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(crimes against humanity) of the Statute, in the last case, despite express words in the Statute, unless it could conclude that the armed conflict in the context of which Tadić's conduct had occurred was of an international character. If it could not, only Article 4 (dealing with genocide) would then have been applicable. Tadić had not been charged with genocide and the Tribunal was therefore obliged to focus attention on the existence and nature of the conflict.

1. Was there an armed conflict?

Tadić argued that there was no armed conflict at all in the region where the crimes were allegedly committed. There had been movements of tanks, he alleged, but in the Prijedor region there had been no actual combat and only a political assumption of power by the Bosnian Serbs. The Appeals Chamber decided that it was only necessary to show that "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict" (paragraph 70). This is clearly correct. It would, for instance, have been absurd to have claimed during the Gulf War of 1990–91 that Geneva Convention III of 1949 had no application to the treatment of prisoners of war held in the United Kingdom merely on the ground that the armed conflict was actually taking place in Kuwait, Saudi Arabia and Iraq.20 The level of intensity of the conflict in the territories controlled by the parties to the conflict was therefore sufficient to justify the term "armed conflict". President Cassese considered that an armed conflict existed "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" (paragraph 70). This definition conflates the issue of the degree of intensity of armed action required for an armed conflict to exist and the nature of such a conflict. In the latter context it is wider than Additional Protocol II, which does not encompass an armed conflict between organised groups within a State.21

2. Was the armed conflict international or non-international?

The Appeals Chamber concluded that it was not necessary to decide this question. The Prosecutor had argued that the Security Council, upon adoption of the Statute, had determined that the conflicts in the former Yugoslavia were international and that, consequently, the Appeals Chamber had jurisdiction over all the charges against Tadić. The Appeals Chamber refused to accept this argument, holding that "the Security Council had purposely refrained from classifying the armed conflicts as international" (paragraph 76). The Appeals Chamber adopted this approach to enable it to conclude that it was empowered to adjudicate upon violations of international humanitarian law, whether committed in an international or in a non-international context, where the violations were criminal.

20. President Cassese relied upon the following Arts. to support his conclusion: common Art. 3 of the Geneva Conventions 1949; Art. 5, Geneva Convention I (and corresponding Arts. in the other 1949 Conventions); Art. 6(2), Geneva Convention IV; Art. 3(b), Additional Protocol I; Art. 4(1) and (2), Additional Protocol II.

under existing international law. Accordingly, Article 2 of the Statute (grave breaches of the Geneva Conventions 1949) applied only to international armed conflicts but Article 3 (violations of the laws or customs of war) was not so limited and reached conduct in international and non-international armed conflicts.

3. Grave breaches

Article 2 of the Statute deals with grave breaches of the Geneva Conventions 1949. President Cassese concluded that it would be necessary for a prosecutor to prove that such breaches were committed during an international armed conflict. He referred to a statement contained in the amicus curiae brief submitted by the US government that “the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character” (paragraph 83). President Cassese recognised that the legal views of a permanent member of the Security Council, along with those of other States to which he referred, provided an indication of a possible change in the opinio juris of States. This was not, however, sufficient “in the state of development of the law” to lead to the conclusion that the grave breaches provisions applied also during a non-international armed conflict.

It is difficult to justify, on grounds of logic, a different regime of criminal responsibility for an act depending solely on whether it was committed during an international or a non-international armed conflict. But that is what States did in setting the threshold in common Article 2 of the Geneva Conventions as an armed conflict between two or more of the high contracting parties or in cases of occupation. Thus, the concept of a protected person is linked to membership of the armed forces of a party to the conflict and to nationality, making it difficult to apply in a non-international armed conflict. An example will illustrate the legal difficulties of applying the grave breaches provisions to a non-international armed conflict. A Bosnian government soldier kills a Bosnian Serb prisoner captured after a military engagement. Since the Bosnian Serb is not a member of the armed forces of a “Party to the conflict”, he is not a protected person within the meaning of Geneva Convention I, II or III. The Bosnian government soldier would be a

22. Cf. the view of Judge Li, discussed infra, who dissented on this issue. He decided that the conflict was of an international character. See also Case No.IT–94–2–R61, Decision of Trial Chamber I, Dragam Nikolic 20 Oct. 1995, p.17. The ICRC, which had negotiated special agreements as envisaged by common Art.3 in 1992, must have believed the conflict to have been non-international.

23. Note, however, the view of Judge Abi-Saab that a “strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict” (p.5 of his judgment). He preferred to base this view upon “a teleological interpretation of the [Geneva] Conventions in the light of their object and purpose”. The Trial Chamber in Tadic had accepted the applicability of the grave breach provisions in Art.2 of the Statute to non-international armed conflicts, arguing that common Art.2 of the 1949 Conventions was not imported into Art.2 of the Statute.

24. In Public Prosecutor v. Koi [1968] I All E.R. 419, 426, Lord Hodson, speaking for the Board, concluded that “the [Geneva] Convention [III] does not extend the protection given to prisoners of war to nationals of the detaining power [and] that the same principle must apply as regards persons who, though not nationals of, owe a duty of allegiance to, the detaining power”.

protected person for this reason. He could therefore be a victim of a grave breach but could not be liable for committing a grave breach himself unless the victim was a protected person. A similar result would follow if, in the example given above, the Bosnian Serb prisoner is replaced by a Bosnian Serb civilian, who would then have the same nationality as the government soldier and would fall outside Article 4 of Geneva Convention IV. Even if the Bosnian Serbs were considered to be acting as agents of the Federal Republic of Yugoslavia, a Bosnian Serb civilian would be of the same nationality as the Bosnian government forces and would not therefore be a protected person. However, Bosnian civilians would be if it were accepted that the Bosnian Serb forces were acting as the agents of the Federal Republic of Yugoslavia.

4. Violations of the laws or customs of war

Article 3 of the Statute is derived from the Hague Regulations 1907 but was sufficiently wide to cover, according to the decision of the Appeals Chamber, "any serious offence against international humanitarian law not covered by Articles 2, 4 or 5" (paragraph 91). It was applicable whatever the nature of the armed conflict. One may have sympathy with the view of President Cassese that the "primary purpose of the establishment of the International Tribunal [was] not to leave unpunished any person guilty of any serious violation, whatever the context within which it may have been committed" (paragraph 92). The issue is, however, whether the decision of the Chamber is fully supported by international law.

In a powerful dissent Judge Li argued that violations of the laws or customs of war could be tried only if the context was an international armed conflict. He drew for support upon Security Council Resolution 955 (1994) which established the International Tribunal for Rwanda. This did not provide for jurisdiction over violations of the laws or customs of war. Why, he argued, if offences under this head could be committed in either type of armed conflict, had the Security Council omitted it from the Statute of the Rwanda Tribunal? He concluded by stating that the "Decision on this question is in fact an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority".

The decision, as written by President Cassese, marks a fundamental change in the liability of an individual for war crimes. He is now to be held liable for serious breaches of an extensive body of international humanitarian law committed during a non-international armed conflict, save for the grave breaches provisions of the Geneva Conventions 1949, and presumably also of Additional Protocol I.

26. The term "civilian" refers to one who is not a member of the armed forces but in the context of a non-international armed conflict it must be understood as referring to a person taking no active part in the hostilities (see common Art. 3 of the 1949 Geneva Conventions).
27. This argument convinced President Cassese that the armed conflict in Bosnia could not be treated as international: supra n.4, at para. 76.
28. Note also that Art. 4 of the Statute of the Rwanda Tribunal provides for jurisdiction over "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II".
29. Supra n.4, dissenting judgment, para. 13.
30. According to President Cassese this includes treaty law binding upon the parties to the conflict (sic) and customary international law: paras. 89 and 127 of the decision, supra n.4.
31. The grave breaches provisions contained in Art. 2 of the Statute are confined to the 1949 Geneva Conventions. They do not form part of the jurisdiction of the Rwanda Tribunal.
The decision suggests that rebels in a non-international armed conflict must comply with the requirements of Article 4(2) of Geneva Convention III in order to avoid liability for breaches of the relevant laws or customs of war. Are they therefore to be recognised as “lawful combatants” with immunity from the national law of the territory of which they are nationals when they carry out their activities in accordance with the laws or customs of war? It would be strange if the government of the territory took so magnanimous a view. Indeed, the structures of both common Article 3 of the Geneva Conventions 1949 and Additional Protocol II are against it, for they permit a State to bring criminal prosecutions in respect of offences related to the armed conflict.32 Thus the rebels would be liable for criminal offences under the law of the territory when they carry out their activities within the laws or customs of war and for war crimes when they do not. Government forces would be liable only in respect of their breaches of the laws or customs of war.33

A government may fear this extension of liability under international law more than rebels, since it would lose control over any prosecutions of rebels or of its own soldiers if an international court, operating in the same way as the Tribunal, indicted individuals held by the government. Moreover, its own forces, including those holding a command responsibility, may find themselves indicted in the same manner. Once the implications of the decision of the Appeals Chamber become clear, some governments may well prove themselves to be hostile to the extension of liability under international law, created by the judgment of a court and not by treaty. A State may, for instance, deny that an armed conflict is taking place on its territory.34 It is likely that the special agreements envisaged by common Article 3 of the Geneva Conventions 1949 will continue to form part of the infrastructure of the regulation of a non-international armed conflict, if only to draw to the attention of the parties concerned their obligations under international humanitarian law. The Appeals Chamber’s decision that a breach of the laws or customs of war may form the subject matter of a prosecution under international law may be extended by special agreements to cover grave breaches of the 1949 Geneva Conventions and Additional Protocol I. In this case individual liability would exist only under national law, if at all.35

5. Crimes against humanity

In interpreting Article 5 of the Statute the Appeals Chamber confirmed the remit granted by the Security Council that crimes against humanity may be com-

32. See Art.6 of Additional Protocol II. The advantage of Art.1(4) of Additional Protocol I is that those fighting in an armed conflict on behalf of a people in their exercise of the right of self-determination would have the same rights and obligations as those fighting on behalf of a State.

33. Both groups may also be liable for breaches of their own disciplinary codes (assuming that the rebels have such a code).

34. G. I. A. Draper drew attention to the fact that neither the French government with respect to the conflict in Algeria nor the British government with respect to those in Kenya, Malaya and Cyprus recognised that common Art.3 of the Geneva Conventions 1949 should be invoked: The Red Cross Conventions (1958), p.15, n.47.

mitted in either an international or in a non-international armed conflict. The
decision also recognised that the Security Council might have defined the crime
more narrowly in Article 5 than is allowed by customary international law, by
requiring an armed conflict of any kind as a condition of liability for crimes against
humanity.

The decision does not refer to the further limitations contained within Article 5
of the Statute. The conduct constituting a crime against humanity must be
"directed against any civilian population". This is to be contrasted with the
Geneva Conventions, which refer to conduct against individuals.* If this is not to
be a distinction without a difference, it would seem to be a requirement for the
Tribunal that the crimes against humanity "must be systematic or organised, not
simply episodic and/or scattered attacks on individuals".†

6. Conclusion

The significance of the decision of the Appeals Chamber cannot be underesti-
mated. Its interpretation of Article 3 of the Statute sends a coach and four through
the traditional distinctions between an international and a non-international con-
flict. Hitherto, States have entered into treaty arrangements based upon this dis-
tinction. They will now find that, in a non-international armed conflict, the laws or
customs of war (save for the grave breaches provisions of the Geneva Conventions
1949 and Additional Protocol I, if applicable) will govern the conflict and there will
be international liability for breaches of them.‡ Further, such international liability
will have primacy over their own national law in cases where an international
tribunal has jurisdiction over the conflict.

Moreover, if the obiter dictum of the President that "customary international
law may not require a connection between crimes against humanity and any con-
flict at all" (paragraph 141) is subsequently followed by the Security Council, the
extension of individual criminal liability under international law will be very con-
siderable and will have been achieved otherwise than by treaty.

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36. Art.51(1) of Additional Protocol I refers to the civilian population and to individual
civilians. See generally Schwelb, "Crimes Against Humanity" (1946) 23 B.Y.I.L. 179.
37. O'Brien, op. cit. supra n.5, at p.648. See also Case No.IT-94–2-R61, supra n.22, at p.14;
Dr. Militaire et de Droit de la Guerre 319, 336. Amnesty International Report 1993 con-
cluded that "it was open to question whether rape had been specifically selected by military
leaders as a weapon of war", but see now Case No.IT-94–2-R61, idem, pp.19–20. Note also
the use of the word "deportation" in Art.5 which would suggest the removal of a person to
another country and not merely within the territory of the same State.
38. For the view of the British government that the use of chemical weapons by Iraq
against civilians at Halabja was contrary to international humanitarian law see (1988) 59
B.Y.I.L. 579 (relied upon by President Cassese at para.121).

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