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ICTY Issues Final Judgment Against Dušan Tadić in First International War Crimes Trial Since World War II

by Rochus J.P. Pronk & Brian D. Tittmore *

The final opinion and judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *The Prosecutor v. Dušan Tadić*, case was released on May 7, 1997. The decision represents a historical precedent in international law, for it establishes that an individual can be found criminally responsible for serious violations of the laws or customs of war and crimes against humanity, including persecution, in a fair trial before a truly international criminal court. As former Chief Prosecutor Justice Richard Goldstone noted in response to the verdict in this case, "International trials can work." In addition, Presiding Judge Gabrielle Kirk McDonald of the Trial Chamber stated that the decision was important because it represented the first judicial condemnation of the Serb ethnic cleansing policies.

"It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations."

Tadić Final Opinion and Judgment

Dušan Tadić is a citizen of the former Yugoslavia of Serb ethnic descent, and was a resident of the Republic of Bosnia and Hercegovina (Bosnia) at the time of the crimes with which he was charged.

Thirty-one individual counts of persecution, murder, cruel treatment, and inhuman acts were brought against Tadić, in relation to events alleged to have occurred in the Prijedor region in northwest Bosnia, more specifically at the Omarska, Keraterm and Trnopolje camps, in Kozarac, and in the area of Jaskici and Sivi. Tadić was found guilty on 11 counts, constituting both violations of the laws or customs of war, including violations of Article 3 common to the Geneva Conventions, and crimes against humanity.

Tadić was found not guilty on 20 counts. This includes all 9 counts of murder, because the Tribunal found there was insufficient evidence. The Tribunal held that although it was "inappropriate" to apply rules of some national systems that require the production of a body as proof of death, the Prosecution had failed to present sufficient evidence linking injuries received by any of Tadić's victims to a resulting death. Tadić was also cleared on all 11 counts relating to grave breaches of the 1949 Geneva Conventions, owing to non-applicability as explained below.

"Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof of death. However, there must be evidence to link the injuries received to a resulting death."

Tadić Final Opinion and Judgment

Tadić's principal defense to all of the charges against him was alibi, as he alleged that he was elsewhere when each of the events alleged were said to have occurred. After a thorough review of the evidence, the Tribunal rejected this defense, finding that there was much credible evidence establishing that the accused was present where and when alleged, and that Tadić was untruthful in denying such presence.

Three further aspects of the Tribunal's decision are particularly significant: its findings regarding the applicability of the grave breach provisions of the Geneva Conventions to Tadić's victims pursuant to Article 2 of the ICTY Statute, its interpretation of crimes against humanity, and its interpretation of accomplice liability under Article 7(1) of the ICTY Statute.

Applicability of the Grave Breach Provisions of the Geneva Conventions

Two members of the three-member panel, Judge Ninian Stephen of Australia and Judge Lal Chand Vohrah of

Malaysia, found that the Prosecutor had failed to establish that after May 19, 1992, the date by which the UN Security Council demanded the forces of the Federal Republic of Yugoslavia (FRY) to withdraw from Bosnia or be disbanded and disarmed, the armed forces of the Republika Srpska within Bosnia (VRS) were de facto organs or agents of FRY, because there was insufficient evidence that FRY continued to exercise "effective control" over the VRS. In so finding, the majority interpreted the decision of the International Court of Justice (ICJ) in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* as requiring the government of a state to exercise "effective" control over the operations of a military force in order for the acts of that force to be imputed to the state. Consequently, the majority found that the Prosecution failed to establish that the victims of the offenses charged against Tadić were in the "hands of a Party to the conflict or Occupying Power of which they [were] not nationals" and therefore "protected persons" within the meaning of Article 4 of the Fourth Geneva Convention. As a result, the Tribunal concluded that the grave breach provisions of the Geneva Conventions, which only apply to protected persons as defined under those conventions, did not apply to Tadić's prosecution, and dismissed the charges under Article 2 of the ICTY Statute on that basis.

"The Trial Chamber is, by majority with the Presiding Judge dissenting, of the view that, on the evidence presented to it, after May 1992 the armed forces of the Republika Srpska could not be considered as de facto organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) either in opstina Prijedor or more generally."

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Presiding Judge Gabrielle Kirk McDonald from the United States disagreed. She found that the ICJ in the *Nicaragua* case did not intend for an "effective control" standard to describe the degree of proof necessary for a determination of agency between a government and a military force, but rather a finding of "dependency on one side and control on the other" was sufficient. Alternatively, she found that any such "effective control" standard should be limited to the facts in *Nicaragua* and that a more general standard of "dependency and control" should apply to the circumstances in the Tadić case in determining an agency relationship between FRY and the VRS. In addition and in the further alternative, Judge McDonald held that the evidence supported beyond reasonable doubt that the VRS operating in opstina Prijedor acted as agents of FRY in regard to the attack and occupation of Prijedor during the time relevant to Tadić's charges under either the effective control or dependency and control standard, and therefore, the grave breach provisions of the Geneva Conventions would apply to Tadić's victims.

Crimes Against Humanity

The Tribunal also made several pivotal determinations respecting the nature and elements of crimes against humanity under Article 5 of the ICTY Statute. This article gives the Tribunal the power to prosecute persons for particular crimes "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." The crimes included under the rubric of crimes against humanity are murder, extermination, enslavement, deportation, imprisonment, torture, rape, "persecutions on political, racial and religious grounds," and "other inhumane acts."

"Thus, since the Nürnberg Charter, the customary status of the prohibition [of] crimes against humanity and the attribution of individual criminal responsibility for their commission have not be seriously questioned."

Tadić Final Opinion and Judgment

The Tribunal first found that the commission of crimes against humanity is necessarily a part of customary international law for which individual criminal responsibility will lie. The Tribunal went on to find that crimes against humanity under Article 5 require four principal elements to be established. First, that an accused committed one of the acts enumerated under Article 5. Second, that the acts were committed "during," as opposed to "in," an armed conflict, and were linked temporally and geographically to that conflict, a nexus that the Appeals Chamber, in its

Rule 61 Proceedings

Proceedings are held pursuant to ICTY Rule 61 in cases where a warrant of arrest, issued after an indictment has been confirmed by one Judge, has not been executed and, as a result, personal service of the indictment on the accused has not been effected. During an open hearing before an ICTY Trial Chamber the prosecutor presents all the evidence available, and if, on the basis of that evidence, the Judges find that there is reasonable ground to believe that the accused committed all the crimes they shall issue an international arrest warrant. Rule 61 Proceedings are not trials *in absentia* but do provide a formal means of redress for victims of the absent accused's alleged crimes by giving them an opportunity to have their testimony recorded for posterity.

previous jurisdiction appeal decision in the Tadić case, had held was not required as a matter of customary international law but was nevertheless expressly required under the ICTY Statute. Third, that at the time of the commission of the acts or omissions there was an ongoing widespread or systematic attack directed against a civilian population. Finally, it must be established that the accused knew or had reason to know that by his acts or omission that he was participating in the attack on the population; the act cannot be for purely personal motives.

In addition, the Tribunal, relying in part on the decision of the French *Cour de Cassation* in the case *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, indicated that the civilian population against whom the act is perpetrated can, in certain circumstances, include persons who at one time performed acts of resistance. The Tribunal also concurred with an earlier decision of Trial Chamber I in the *Mrksić (Vukovar Hospital)* ICTY Rule 61 proceeding that a single act can qualify as a crime against humanity as long as there is a link with a widespread or systematic attack against a civilian population. Likewise, the Tribunal agreed with Trial Chamber I in its Rule 61 ruling in the *Nikolic* prosecution that, although a "policy" to commit crimes against humanity must exist, it need not be the policy of a State but could be instigated or directed by a non-State organization or group. With respect to the crime against humanity of persecution under Article 5(h) of the ICTY Statute in particular, the Tribunal found that persecution can encompass inhumane or other acts that "seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or customarily denied," whether or not they are enumerated elsewhere in the Statute, and that such acts can take numerous forms, including those of a physical, economic or juridical nature. The Tribunal also held that the grounds for persecution under Article 5 of the Statute should be read disjunctively, such that each of the grounds, political, racial or religious, in and of itself is sufficient to establish a crime against humanity.

"Thus, the crime of persecution encompasses a variety of acts, including *inter alia*, those of a physical, economic or judicial nature, that violates an individual's right to the equal enjoyment of his basic rights."

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Applying its legal determinations to Tadić, the Tribunal found him guilty of crimes against humanity for two of the

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acts enumerated under Article 5, persecution on religious and political grounds, and inhumane acts. With respect to the former acts, the Tribunal was satisfied that there was sufficient evidence of a policy implemented under the direction of the Bosnian Serb leadership to terrorize the non-Serb population of Prijedor on discriminatory grounds and that its implementation was widespread and systematic throughout Prijedor. It found further that Tadić committed persecutory acts that were not unrelated to the armed conflict, having taken place as part of the takeover of Kozarac and the villages of Jaskici and Sivi and in camps run by the authorities of the Republika Srpska, and that such acts included participating in forced removals, forced transfers, and beatings of non-Serbs. Finally, the Tribunal found that Tadić undertook these acts at a time when he was aware of the general Serb policy of and discrimination against non-Serbs, and that he acted on the basis of religious and political grounds.

Accomplice Liability Under Article 7(1)

The Tribunal in the Tadić opinion also provided the first extensive analysis of accomplice liability under Article 7(1) of the ICTY Statute, which imposes individual criminal responsibility on anyone who "planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution" of a crime under Articles 2 to 5 of the Statute. Drawing principally upon post-World War II military war crimes cases, the Tribunal found that there is a basis in customary international law for both individual responsibility and participation in the various forms set out in Article 7(1), and accordingly, that it had competence to make findings regarding Tadić's guilt "as a principal or an accessory or otherwise as a participant." The Tribunal also found that an individual can be held criminally responsible as an accomplice under Article 7(1) of the ICTY Statute if he "knowingly aids, abets or otherwise assists, directly and substantially in the commission of a crime." In particular, the Tribunal found that if a person participates in an assault on one person and then remains with a group when it moves on to assault a second person, the person's presence can be considered to have an encouraging effect

on and lead to criminal responsibility for the second assault, even if the person does not physically take part in that second beating.

Consequently, the Tribunal found Tadić guilty of numerous violations of

"[T]he accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."

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the laws or customs of war and crimes against humanity, both as a principal and as an aider and abetter pursuant to Article 7(1) of the Statute. This included the notorious incident in which a group of Serbs at the Omarska camp forced two prisoners to sexually mutilate a third prisoner, Fikret Harambasic. While the

Tribunal found that Tadić had not taken an "active part" in Harambasic's assault and mutilation, it nonetheless found that he took part in beatings preceding this incident, was present at the time of the attack on Mr. Harambasic, and either perpetrated or intentionally assisted directly and substantially in the common purpose of inflicting physical suffering on all of the prisoners, and therefore, was individually criminally responsible for the beatings and other "grievous acts of violence" inflicted on all of the prisoners, including Mr. Harambasic.

The Tribunal postponed Tadić's sentencing until July 1997. It is expected that the Defense will appeal the judgment to the Appeals Chamber, with a possible cross-appeal by the Prosecution. ☹

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The Tribunal described its jurisdiction under the ICTY Statute as follows:

"Each of the relevant Articles of the Statute, either by its terms or by virtue of the customary rules which it imports, proscribes certain acts when committed "within the context of" an "armed conflict." Article 2 of the Statute directs the Trial Chamber to the grave breaches regime of the Geneva Conventions which applies only to armed conflicts of an international character and to offences committed against persons or property regarded as "protected," in particular civilians in the hands of a party to a conflict of which they are not nationals. Article 3 of the Statute directs the Trial Chamber to those sources of customary international humanitarian that comprise the "laws or customs of war." Article 3 is a general provision covering, subject to certain conditions, all violations of international humanitarian law which do not fall under Article 2 or are not covered by Articles 4 or 5. This includes violations of the rules contained in Article 3 common to the Geneva Conventions ("Common Article 3"), applicable to armed conflicts in general, with which the accused has been charged under Article 3 of the Statute. Article 5 of the Statute directs the Trial Chamber to crimes against humanity proscribed by customary international humanitarian law. By virtue of the Statute, those crimes must also occur in the context of an armed conflict, whether international or non-international in character. An armed conflict exists for the purposes of the application of Article 5 if it is found to exist for the purposes of either Article 2 or Article 3."