Tadic Case: The Appeals Chamber Judgement

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Not only was Tadic the first resident of the UN Detention Unit and the first person since Nuremberg to be tried for war crimes before an international criminal court. But he was also the subject of at least three landmark judicial decisions, each of which are bound to become a hallmark of international criminal justice.

The first was the October 1995 Appeals Chamber decision on the Tadic defence motion for interlocutory appeal, which precisely defined the Tribunal’s area of jurisdiction and its primacy over national courts.

Second was the Trial Chamber May 1997 Judgement - the first ever judicial condemnation of ethnic cleansing as a policy, legally qualified as persecution on political, racial or religious grounds.

Finally, comes last week's Appeals Chamber Judgement, which sets precise criteria for establishing the character of a conflict - i.e.: whether 'international' or 'internal', as well as whether the victims of that conflict qualify as 'protected persons' under the Geneva Conventions.

In addition, many holes in the Tribunal's Rules of Procedure and Evidence were detected and filled during Tadic's seven-month trial (May-November 1995). And if the lawyers defending the Tribunal's other accused are today earning a decent wage, they should

be grateful to Tadic's Dutch defence counsel, Michail Wladimiroff. He forced the UN to significantly increase the original fee offer, but only after a difficult battle with the UN bureaucracy, in which the Tribunal Registry supported him.

Despite Tadic's part in the history of the ICTY, last week its Appeals Chamber denied two out of three of his claimed grounds for appeal against his judgement.

First, the Appeals Chamber rejected the accused's contention that his right to a fair trial was prejudiced, as there was no "equality of arms" between the Prosecution and Defence due to the prevailing circumstances in which the trial was conducted.

Second, the Appeals Chamber held that the Trial Chamber did not err when it decided that it was satisfied beyond reasonable doubt, that the appellant was guilty of the murder of two Muslim policemen.

The chamber did not grant leave to include the third ground for appeal - regarding the conduct of Tadic's ex-counsel Milan Vujin - and it was not addressed in the Judgement. (For more about Tadic's appeal and the 'Vujin case' see Tribunal Updates 110, 119, 122 and 123).

But the Prosecution also launched cross-appeals of their own in the wake of the Tadic verdict, and not only were they more successful in having their grounds accepted - all five passed - the result was a string of defining decisions in international law.
First, the Appeals Chamber found that at the relevant time and place (May-December 1992 in the municipality of Prijedor, north-western Bosnia-Herzegovina) there was an 'international' armed conflict underway and that as a result, its victims were legally classed as "protected persons". This granted them the protection of the grave breach regime of the 1949 Fourth Geneva Conventions, recognised by Article 2 of the Statute of the ICTY.

Consequently, the Appeals Chamber reversed the Trial Chamber's original verdict and found the appellant guilty on Counts 8, 9, 12, 15 and 32 of the Indictment, charging him with grave breaches of the Geneva Conventions.

Though Tadic had been acquitted on grave breaches charges, the same crimes were also qualified as crimes against humanity and/or violations of the laws or customs of war, on which the trial chamber pronounced him guilty.

The only new crime, of which the Appeals Chamber found Tadic guilty, was the killing of five Muslim men in the village of Jaskici.

Accepting the Prosecutor's second ground, the Appeals Chamber ruled that the Trial Chamber erred when it decided that it could not, on the evidence presented, be satisfied beyond reasonable doubt that Tadic had played any part in the killing of the five men, and that it also erred in its view of the doctrine of "common purpose". As a result the Appeals Chamber found the appellant guilty on Counts 29, 30 and 31 of the Indictment - murder qualified as grave breaches of the Geneva Convention, violation of the laws or customs of war and crime against humanity.

Reserving judgement on Tadic's appeal against his sentence of 20 years imprisonment, the Appeals Chamber has scheduled a pre-sentencing hearing for Aug. 30. Given that Tadic had now been found guilty on nine additional counts, deputy prosecutor Graham Blewitt said the prosecution might now demand an increased sentence. The prosecution had originally demanded Tadic be sentenced to life imprisonment.

The third and fourth grounds given in the Prosecutor's cross-appeal do not directly concern Tadic, but instead address the very high criteria of proof required in such cases, which was effectively set by the Trial Chamber's original decision in his case. The Trial Chamber concluded that Tadic acted with full knowledge of a widespread or systematic attack on the civilian population and with clear "discriminatory intent".

But the prosecution opposed the introduction of these elements as part of the process of proving responsibility for crimes against humanity, concerned at the effect that a ruling based on these elements might have on later cases.

The Appeals Chamber ruled that the Trial Chamber erred in introducing both elements, concluding that an act carried out for purely personal motives can still constitute a crime against humanity. It also ruled that 'discriminatory intent' did not have to be proven in the prosecution of all crimes against humanity, but only in the case of crimes relating to persecution on political, racial or religious grounds.

Finally, the Appeals Chamber found that the Trial Chamber erred in its decision of 27 November 1996 when it denied a Prosecution motion calling for the production of defence witness statements. It held instead that a Trial Chamber may order, depending on the circumstances of the case in hand, the disclosure of Defence witness statements after his or her main examination.

The Appeal Chamber Rules Bosnia An 'International' Conflict
But the most important and farthest reaching part of the Appeals Chamber Judgment undoubtedly concerns the definition of the character of the conflict that took place in Bosnia from 1992 to 1995.

Many doubts were raised by the Trial Chamber conclusion in May 1997, not unanimously, that the conflict in Bosnia became 'internal' in character after the withdrawal of the Yugoslav Army (JNA) on 19 May 1992.

It followed, from this conclusion, that the victims were not "protected persons" - so that all counts charging Tadic with grave breaches of the Geneva Conventions (See Tribunal Update No. 27) had to be rejected.

More than a third of the Appeals Chamber Judgment was dedicated to the examination of the 'character' of the conflict. Its ruling on the responsibility borne by foreign states that back one side against another in what otherwise would be regarded as a 'internal' conflict, has significant implications for present and future prosecutions at The Hague.

It will no doubt be the subject of analysis and discussions of international law experts everywhere for some time to come.

We shall try to briefly present how the Appeals Chamber arrived at the conclusion on the international character of the conflict in Bosnia and the status of its victims as "protected persons" under the Geneva Conventions.

The Appeals Chamber defined the problem it faced in the following terms: to consider the conditions under which armed forces - fighting against the central authorities of the same state in which they live and operate - may be deemed to act on behalf of another state, and to specify what degree of authority or control must be wielded by a foreign state over armed forces fighting on its behalf - in order to render international an armed conflict which is prima facie internal.

Should the conflict eventually be classified as 'international', it would inter alia follow that a foreign state may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.

Asking the question what constitutes state 'control' over organised military groups under international law - the Appeals Chamber concluded that on the basis of international case law and state practice, merely proving that the group is financially or even militarily assisted by a state is not enough to prove its actual control over that group.

In order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.

Only then can the state be held internationally accountable for any misconduct by the group. Despite this, following the ruling, it is not necessary to prove that the state also issued, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

In the case in question, for the conflict to be considered 'international' it was required to prove that the Belgrade authorities' control over the Bosnian Serb armed forces went beyond the mere financing and equipping of such forces, to participation in the planning and supervision of its military operations.
The Appeals Chamber then positively answered the question whether the Yugoslav Army exercised in 1992 the requisite measure of control over the Bosnian Serb Army. Relying on the facts as stated in the 1996 Judgement, the Appeals Chamber concluded that the majority (2:1) ruling by the judges - Judges Ninian Stephen and Lal Chand Vohrah, with Judge Gabrielle Kirk McDonald dissenting - applied incorrect standards when evaluating the legal consequences of the relationship between the FRY and Bosnian Serb forces.

According to the Appeals Chamber findings, the criteria of 'overall controls' over the Bosnian Serb forces were in fact met. The Chamber found that at the beginning of May officers of the JNA, which at that time was purely Serb, were involved in the capture of Doboj and the surrounding villages.

There can, therefore, be no doubt that an international armed conflict was underway at that point in time. Furthermore, the Appeals Chamber further found that after May 19, 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May materiel, weapons, and vehicles were still being brought from Belgrade to Bosnia-Herzegovina.

As a consequence, a close personal, organisational and logistical interconnection between the Bosnian-Serb army, paramilitary groups and the JNA persisted.

To support its conclusion, the Appeals Chamber has taken over and extensively cited part of the separate and dissenting opinion of Judge McDonald in the original ruling, which stressed that the creation of the VRS (Bosnian Serb Army) after May 19, 1992 was a pure legal fiction.

"The only changes made after (the) 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia," said the Chamber's decision.

"There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations.

"Importantly, the objective remained the same (...) The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. (...) The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade.

"Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade."

The Appeals Chamber concluded "the creation of the VRS by the FRY/VJ did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army.

"To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ.

"There is no evidence to suggest that these objectives changed on 19 May 1992. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities."
The chamber noted that Belgrade's overall political and military authority over Republika Srpska was further illustrated, after the fact, during the negotiation of the Dayton Peace Accord of 1995. Slobodan Milosevic, then President of Serbia, conducted negotiations in the name of the Republika Srpska and Serbia also took over the obligation upon itself to ensure that the Republika Srpska fully respected and complied with the agreement's provisions.

All this, the Chamber concluded, "would seem to bear out the proposition that in actual fact, at least, between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations.)"

"Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict."

The Appeals Chamber therefore concluded that for the period relevant to the case, the year 1992, the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992, the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict. The Appeals Chamber then turned to the second requirement, that is, whether the victims of the alleged offences were "protected persons" under the Geneva Conventions.

It concluded: "In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia-Herzegovina."

"However, it has been shown above that the Bosnian Serb forces acted as de facto organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals."

Deputy prosecutor Graham Blewitt described the decision by the Appeals Chamber as "exceptionally important" and one that would have an influence on other trials before the Tribunal. He also said it facilitate future indictments against the Yugoslav political and military leaders responsible for crimes in Bosnia.

"This is the end of the road for us", said Tadic's defence lawyer John Livingston. He added "he (Tadic) was shattered by the judgement."

**Location:** Balkans  
Serbia  
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