

Tadic's Appeal Hearing

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The Defence appealed both against the verdict that found Tadic guilty on 11 counts of persecution and beatings and against the judgment that sentenced him to 20 years of imprisonment.

The Prosecutor, on the other hand, appealed against the Trial Chamber finding (by a majority, with the Presiding Judge Gabrielle Kirk McDonald dissenting) that the armed conflict in the region of Prijedor in 1992 was not of an international character, due to which 11 counts of Grave Breaches of the Geneva Conventions were declared "non applicable."

The Prosecutor also appealed against the verdict of not guilty on five counts of murder. Finally, the Prosecutor alleged that the Trial Chamber erred in holding that an element of crime against humanity is that the accused must know that the attack is part of widespread or systematic attack on a civilian population; and that discriminatory intent is an element of all crimes against humanity.

Although the judgment found that the accused "knew" and acted with a "discriminatory intent," the Prosecutor appealed against this too, in his belief that the introduction of such subjective elements sets unreasonably high standards of proof of responsibility of persons charged with crimes against humanity.

Since Judge McDonald was the Presiding Judge in Trial Chamber II at the trial of Dusko Tadic, The Appeals Chamber in this case consists of Judge Mohamed Shahabuddeen (Presiding), Judge Antonio Cassese, Judge Wang Tieya, Judge Rafael Nieto-Navia and Judge Florence Mumba.

According to Tadic's Defence counsel, William Clegg, his client's right to a fair trial was violated by the refusal of the Bosnian Serb authorities of the Republika Srpska to co-operate with the Hague Tribunal, which made the Defence work difficult, Tadic's appeal against conviction is based on two grounds.

The first ground is the "inequality of arms" Inequality of Arms is a legal term that refers to any advantages that the prosecution may have over the defence, in this case the prosecution had no need to deal with Republika Serbska as its witness were all refugees living outside Republika Serbska territory. Clegg argued that the right of the appellant to a fair trial, "was prejudiced by the prevailing circumstances in Republika Srpska before and at the time the trial was conducted."

Clegg blamed the Republika Srpska authorities, who "did everything in their power to frustrate the efforts of the Defence team to trace and summon witnesses who could help find the truth."

Due to the refusal of the authorities to co-operate with the Defence team and the Tribunal itself, as well as to 'hiding and intimidation of potential witnesses, Clegg alleged, a number of relevant items of evidence' that may have been in favour of the defendant were not identified.

The Prosecution replied to this allegation by pointing out that the principle of "equality of arms" relates to the procedural equality of the Prosecution and Defence in the judicial process, and that it does not require "equality between parties in all of their material and practical circumstances."

It is clear, according to the Prosecution, "that a court cannot be prevented from trying and convicting a person merely because the accused claims that there are witnesses who could prove his or her innocence but who cannot be made to testify. Any accused can make this claim."

Not denying that Defence may have been having problems in identifying the witness's location or in securing the witness's attendance, the Prosecution holds that this problem can not be invoked as a ground of appeal "unless it was drawn to the attention of the Trial Chamber" during the trial.

The second part of Tadic's appeal relates to the Trial Chamber's alleged error in finding 'beyond reasonable doubt that the appellant killed Osman Didovic and Edin Besic.' That finding, the Defence claims, was based on the evidence of a single prosecution witness who identified Tadic as a perpetrator of that crime in front of the Serbian Orthodox church in Kozarac.

The Defence points out that apart from the fact that the conviction was secured on the basis of a single testimony, given by a witness introduced to the Prosecution by the government of Bosnia and Herzegovina. According to the Defence, the Trial Chamber should have concluded "that he was tainted by this association (...) since another witness who had similar association, Dragan Opacic, was found to have given false testimony during the trial."

In a reply to those allegations, Prosecutor Brenda Hollis pointed out that the statement of the witness in question, Mr. Nihad Seferovic, was disclosed to the Defence on 1 September 1995.

The statement further says that even though the witness was in contact with the Embassy of Bosnia and Herzegovina in Brussels, the Defence did not seek his disqualification, nor did it request his second appearance before the Tribunal - after the Opacic affair broke out - in order to cross-examine him about the nature of his contact with the embassy and the Bosnia and Herzegovina authorities.

The Prosecution appealed against the part of the judgement that establishes that in the period after the formal withdrawal of the Yugoslav Army (VJ) from Bosnia, on 19 May 1992, "the armed forces of the Republika Srpska could not be considered as de facto organs or agents of the FRY."

The Defence based their argument on the assertion that the Trial Chamber "erred in relying upon the 'effective control' test that it derived from the Judgment of the International Court of Justice (ICJ) in the 'Nicaragua case' (1986) to determine the applicability of the grave breach provision of the Geneva Convention."

The judgement was reached by a majority of two to one (Presiding Judge Gabrielle Kirk McDonald dissenting, see Tribunal Update No. 27). The other two judges, Judge Ninian Stephen and Judge Lal Chand Vohrah, found that after 19 May 1992 this armed conflict was not of a character to justify the imposition of Article 2 of the Statute (Grave Breaches), because the victims were not protected persons under the Conventions.

In her separate and dissenting opinion, Presiding Judge McDonald concluded that at all time relevant to the Indictment, the armed conflict was international in character, that the victims were protected persons and that "Grave Breaches" are applicable. The dependency of the Bosnian Serb Army (VRS) on, and exercise of control by the FRY (...) "support this finding of agency under either the majority's standard of effective control or under the more general test of dependency and control."

In its appeal, the Prosecution disputes the applicability of the Nicaragua case, pointing out that in that particular case the International Court of Justice (ICJ) was concerned with State responsibility [of the USA] for the actions of the Nicaraguan "contras", and not with individual criminal responsibility.

Furthermore, Prosecutor William Fernick outlined before the Appeals Chamber the thesis that during 1992, Bosnia and Herzegovina was in an international armed conflict whereby both sides, Bosnia and Herzegovina and Federal Republic of Yugoslavia (FRY), were obliged to respect the Geneva Conventions on the protection of civilians and prisoners of war.

According to Fernick, The forces of FRY acted inside Bosnia even after the formal withdrawal and renaming of former Yugoslav People's Army (JNA) into Army of Yugoslavia (VJ). In addition to that, the Army of Republika Srpska (VRS), remained under the control from Belgrade. 'Due to his connection with the activities of the army of the Bosnian Serbs [i.e. VRS], Dusko Tadic was also connected with FRY as one of the parties to the conflict that was obliged to respect Geneva Conventions.

Tadic's victims, the Prosecutor said, were "civilians with BH nationality (...) in the hands of a Party consisting of the FRY and all armed forces sufficiently linked to the FRY, including the Appellant."

The Defence appealed too, against the sentence of 20 years' Imprisonment passed on Tadic, which it believes to be unjust and too high. The Trial Chamber, Defence contends, failed to take sufficient account of the Appellant's "relative unimportance in the campaign of which he has been convicted." The Prosecutor, however, thinks the sentence was fitting, and points out that the Trial Chamber, in its sentencing judgment expressly referred to the "relative unimportance" of Tadic as one of the general mitigating factors.

In their previous hearing (see Tribunal Update No. 110), the Appeals Chamber rejected a Defence motion to add another ground to Tadic's appeal: "The right of the appellant to a fair trial was gravely prejudiced by the conduct of one of his former counsel Milan Vujin." Although the judges dismissed Tadic's complaint against Vujin in relation to his appeal, they accepted the possible validity of allegations that his former Defence counsel worked against his best interests.

Tadic alleges that Vujin 'instructed witnesses to give false evidence and withhold certain evidence that would identify the person who had in fact committed the crimes he had been convicted of committing.'" This is why, in a separate decision, the Appeals Chamber decided to start contempt proceedings against Vujin (see Tribunal Update No. 119).

The hearing scheduled for 30 March was postponed in view of the fact that Vujin was unable to travel from Belgrade to The Hague due to the NATO air campaign against Serbia that started several days earlier.

The new hearing was scheduled for Monday, 26 April 1999. Although this procedure is essentially unrelated to the Defence appeal, the judges have announced the possibility of accepting additional Defence evidence if the contempt proceedings find that Vujin really worked against the interests of his client, and thus

seriously endangered his right to a fair trial.

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