IN THE APPEALS CHAMBER

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab
Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

SEPARATE OPINION OF JUDGE LI ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Alphons Orie
Mr. Krstan Simic

INTRODUCTION

1. Although I concur in the Decision of the Appeals Chamber that the Appellant's appeal is dismissed, I am not in agreement with the Decision on three legal questions:

1. examination of the legality of the establishment of this Tribunal;

2. subject-matter jurisdiction of this Tribunal under Article 3 of its Statute; and,

3. characterization of the conflict in the former Yugoslavia.

Hence this Opinion, with due respect for the authority of my colleagues.

A. Examination of the Legality of the Establishment of this Tribunal

2. The Decision, relying on the doctrine of competence-competence, reviews the legality of the resolution of the Security Council on the establishment of this Tribunal. However, the said doctrine, properly understood, only allows the Tribunal to examine and determine its own jurisdiction, while here it has been improperly extended to the examination of the competence and appropriateness of the resolution of the Security Council on the establishment of this Tribunal. As Article 1 of the Statute of this Tribunal only grants this Tribunal "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute", and as the Charter of the United Nations also has never given this Tribunal the power of reviewing the legality of the resolutions of the Security Council, it is crystal clear that this Tribunal has no such power. So this review is *ultra vires* and unlawful.

3. Furthermore, the decision on the establishment of this Tribunal by resolution 808 (1993) of the Security Council pursuant to Article 39 of the Charter of the United Nations was grounded on its determination that the situation then existing in the former Yugoslavia constituted a threat to international peace and security. Whether the said situation did constitute a threat to international peace and security and what measures should be taken are political questions which the Security Council as a political organ of the United Nations is well qualified to determine and of which the Judges of this Tribunal, trained only in law and having little or no experience in international political affairs, are really ignorant. Consequently, the review of the said resolution seems to be imprudent and worthless both in fact and in law.

4. In conclusion, the Decision should have dismissed the appeal on this question without examining the legality of the establishment of this Tribunal.

B. Subject-matter Jurisdiction under Article 3 of the Statute

5. Article 3 of the Statute of this Tribunal provides for the subject-matter jurisdiction of this Tribunal over war crimes. However, as the subject-matter jurisdiction over war crimes is also dealt with in Article 2 of this Statute with respect to grave breaches of the Geneva Conventions of 1949, so for a general overview of the question, it is proposed initially to discuss them together.

6. Customary international law treats both the subject-matter jurisdiction and applicable law relating to war crimes differently, according to whether the armed conflict in which the said crimes are committed is international or internal. So, for solving these problems, the crucial question is to determine the character of the armed conflict.

7. Professor Meron states the customary international law of war crimes very correctly and clearly in the following terms:

> "Whether the conflicts in Yugoslavia are characterized as internal or international is critically important. The fourth Hague Convention of 1907, which codified the principal laws of war and served as the normative core for the post-World War II war crimes prosecutions, applies to international wars only. The other principal prong of the penal laws of war, the grave breaches provisions of the Geneva Conventions and Protocol I, is also directed to international wars. Violations of common Article 3 of the Geneva Conventions, which concerns internal wars, do not constitute grave breaches giving rise to universal criminal jurisdiction. Were any part of the conflict deemed internal rather than international, the perpetrators of even the worst atrocities might try to challenge prosecutions for war crimes or grave breaches, but not for genocide or crimes against humanity." (Meron, War Crimes in Yugoslavia and the Development of International Law, 88 AJIL 78, 80 (1994).)

8. The Final Report of 27 May 1994 of the Commission of Experts established pursuant to Security Council resolution 780 (1992) takes the same view as Professor Meron:

> "If a conflict is classified as international, then the grave breaches of the Geneva Conventions, including Additional Protocol I, apply as well as violations of the laws and customs of war. The treaty and customary law applicable to international armed conflict is well-established. The treaty law designed for internal armed conflict is in common [A]rticle 3 of the Geneva Conventions, Additional Protocol II of 1977, and SACrticle 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. These legal sources do not use the terms ‘grave breaches’ or ‘war crimes’. Further, the content of customary law applicable to internal armed conflict is debatable. As a result, in general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification." (S/1994/674, p. 13, para. 42.)

9. And the ICRC, an authority on international humanitarian law, in the Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, "underline[s] the fact that, according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict." (DDM/JUR/442 b, 25 March 1993, para. 4.)

10. Now, I may turn to the difference of my opinion from that of the Decision. The Decision asserts that there has been development of customary international law to such an extent that all the various violations of the laws or customs of war as enumerated in lit. (a)-(e) of Article 3 of the Statute of this Tribunal are liable to be prosecuted and punished even if they are committed in internal armed conflict. I cannot agree with this assertion.

11. According to Article 38 I(b) of the Statute of the International Court of Justice, for the establishment of a customary rule of international law, two requirements must be met:

1. the existence of a general practice of States; and

2. the acceptance of the general practice as law by States.

There is no proof of the fulfilment of these two requirements. On the contrary, the Decision itself admits that not all, but only "a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts." (Decision at p. 67, para. 126.) Furthermore, as is well known, the armed conflict in Rwanda was internal, so the Statute adopted by Security Council resolution 955 (1994), with regard to the subject-matter jurisdiction of the Tribunal for Rwanda, only provides for jurisdiction over the crimes of genocide in Article 2, jurisdiction over crimes against humanity in Article 3, and jurisdiction over violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977, without mentioning the jurisdiction over violations of the laws or customs of war as provided for in Article 3 of the Statute of this Tribunal. If the jurisdiction over such violations provided for in Article 3 of the Statute of this Tribunal as a result of the development of customary international law has been so extended as to cover all such violations irrespective of whether they are committed in international or internal armed conflict, why should the Statute for the International Tribunal of Rwanda have left out the provision of this jurisdiction?

12. As regards the interpretative statements of the French, U.S. and U.K. delegates on Article 3 of the Statute in the Security Council when voting on the resolution adopting the Statute, I agree. But these interpretative statements only give grounds for interpreting Article 3 of the Statute as granting the Tribunal the power to prosecute the various violations specified in the two Additional Protocols of 1977 and common Article 3 of the Geneva Conventions of 1949, which interpretation I endorse; they, however, do not maintain that the violations of the laws or customs of war which are enumerated in lit. (a)-(e) and committed in an internal armed conflict should be prosecuted according to Article 3 of the Statute.

13. And I cannot agree with the Decision that Article 3 "confers on the International Tribunal jurisdiction over any serious offence[s] against international humanitarian law not covered by Article 2, 4 or 5" (Decision at p. 51, para. 91) and that "the conditions to be fulfilled for Article 3 to become applicable" (Decision at p. 52, para. 94) may be laid down by the Decision. 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.

C. Characterization of the Conflict in the Former Yugoslavia

14. There are two approaches for characterizing the conflict in the former Yugoslavia. The first approach, which is adopted by the Appellant, is to look at the various conflicts in isolation. Consequently, the Appellant contends that in the relevant time and place, there was not even an armed conflict. The second approach, which is adopted by the Prosecution, looks at them in their entirety. So the Prosecution contends that at least beginning from 8 October 1991, there has been international armed conflict in the former Yugoslavia up to the present.

15. The Decision decides that the alleged crimes were committed by the accused in the context of an armed conflict, but does not determine that the armed conflict in the context of which they were committed was international in character.

16. The Prosecutor's submission relies mainly on the various resolutions of the Security Council, contending that they show that the Security Council consistently viewed the conflict in the former Yugoslavia in its entirety and considered it of international armed character. This contention is rejected by the Decision, which emphasizes that there have been both international and internal conflicts there at various times and places.

17. I am of the opinion that the submission of the Prosecution to view the conflict in the former Yugoslavia in its entirety and to consider it international in character is correct.

The armed conflict in the former Yugoslavia started shortly after the date on which Slovenia and Croatia declared their independence on 25 June 1991 between the military forces of the SFRY and Slovenia and Croatia. Such armed conflict should of course be characterized as internal because the declarations of independence were suspended in consequence of the proposal of the EC for three months. After the expiration of the three months' period, on 7 October 1991, Slovenia proclaimed its independence with effect from that date, and Croatia with effect from 8 October 1991. So the armed conflict in the former Yugoslavia should be considered international as from 8 October 1991 because the independence of these two States was definite on that date.

But there were some internal armed conflicts in the whole course of the conflict, for instance, Bosnians against Bosnians, and the question is how to treat such internal conflicts. This question is correctly answered by O'Brien as follows:

> "Most importantly, the conflict is clearly international: three nations have fought, primarily in the territory of two of them (thus far), with a number of fronts and partisans or proxy groups participating on behalf of each. Once this determination is made, it should not matter that some combatants are citizens of the same nation-State. It is virtually unthinkable that, for example, a Ukrainian fighting for the German Army in World War II would have succeeded in arguing that his fight was internal (against the Soviet State), regardless of the character of the broader conflict." (O'Brien, The International

Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AJIL 639, 647-648 (1993).)

18. Of the three nations mentioned by O'Brien in the passage quoted above, one is surely SFRY, afterwards FRY, and the other two are of course Croatia and Bosnia-Herzegovina. Indeed, there is sufficient evidence of probative value for proving that SFRY, afterwards FRY, participated, and FRY is still participating in the armed conflict against Croatia and Bosnia-Herzegovina. In the following I briefly list some:

1. The Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992) states that both the "Bosnian Serb Army" operating in Bosnia and the "Krajina Serb Army" operating in Croatia are "armed and supported by the JNA" (Annexes to the Final Report, UN Doc. S/1994/674, Annex Summaries and Conclusions, para. 29). Furthermore, it says that the Bosnian Serb Army is carrying out the FRY objective of creating a new Yugoslav State from parts of Croatia and Bosnia and Herzegovina, and that the 110,000 troops nominally subordinated to the "Serbian Republic of Bosnia" and the "Serbian Republic of Croatia" receive instructions, arms and ammunition and other support from the JNA and the FRY (Annex III to the Final Report, paras. 17 and 124).

2. The Reports of Mr Mazowiecki give a clear account of the policy of the so-called "ethnic cleansing" consistently employed by the FRY for the purpose of creating a Greater Serbia by the forceful incorporation of the parts of territory of Croatia and Bosnia-Herzegovina into a Greater Serbia. For instance, his third Report of November 1992 further describes the methods used for "ethnic cleansing" and states: "This lends credence to the fear that the ultimate goal may be to incorporate Serbian-occupied areas of Croatia and Bosnia and Herzegovina into a 'Greater Serbia'." (UN Doc. A/47/666, para. 13.)

3. The statement submitted by Mr Andrew J.W. Gow, dated 30 January 1995, corroborates in detail the above-mentioned statements of the Reports of the United Nations Commission of Experts and Mr Mazowiecki. (Documents presented to the Trial Chamber by the Prosecution, Vol. III, Document 101.)

4. Many resolutions of the Security Council reflect that there was a continuing international armed conflict in the former Yugoslavia. For instance, resolution 757 of 30 May 1992 imposed a series of economic sanctions against the FRY, which were to apply until the Security Council decided that the authorities of the FRY, including the JNA, had taken effective measures to fulfil the requirement of resolution 752 for the withdrawal of their forces from Bosnia and the cessation of their interference in Bosnia. The Council has never found that these requirements have been met and has not lifted all sanctions imposed. In effect, the Council's actions amount to a recognition of the continuing international character of the conflict. (The *Amicus Curiae* Brief of the U.S., 25 July 1995, p. 32.)

5. The Bosnia-Herzegovina Government declared formally on 20 June 1992 the state of war in the country. It announced that Bosnia-Herzegovina was "the victim of aggression carried out by the Republic of Serbia, the Republic of

> Montenegro, the Yugoslav Army and terrorists of the Serbian Democratic Party ...." (UN Doc. S/24214, Annex.) According to common Article 2(1) of the Geneva Conventions of 1949, the Conventions shall apply to all cases of declared war. So because of the declaration of war by the Government of Bosnia-Herzegovina, the armed conflict in that country must also be considered as international.

19. Moreover, it is to be noted that the Commission of Experts mentioned in paragraph 8 has consistently held the view that the conflicts in the former Yugoslavia should be envisaged in their entirety, to which the law applicable in international armed conflict should be applied. In its Final Report, the Commission declares its definite position clearly as follows:

> "[A]s indicated in paragraph 45 of its first interim report, the Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia." (S/1994/674, p. 13, para. 44.)

20. Finally, I must point out that, because the Decision has not determined that the armed conflict in the context of which the alleged criminal acts were committed was international in character, it has a flaw in that it has not established an important element of the jurisdiction of this Tribunal under Article 2 over this case.

(Signed) .....

Haopei Li

(Date) 2 October 1995