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 ABI-SAAB 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

I totally share and approve the analysis of the Decision on the first ground of the jurisdictional plea of the Appellant. I also accept its position on the second ground. But I have some difficulty in endorsing all the reasoning of the Decision concerning the third ground and more particularly its interpretation of the scope of Article 2 of the

Statute of the Tribunal on "grave breaches." I realise, however, that these divergencies concern the process of legal reasoning by which the result is reached more than the result itself, which I accept; whence the "separate" character of this Opinion.

I.

On the Origins of the Crimes Proscribed under the Statute of the Tribunal.

The crimes constituting the serious violations of international humanitarian law for the prosecution of which, according to Article 1 of the Statute, the Tribunal was established, and which are detailed in Articles 2 to 5 ("grave breaches" of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity) are all of relatively recent origin going back to the immediate aftermath of the Second World War. They were part of the cathartic reaction of the international community to the traumas of the untold horrors committed during that war.

They were articulated in a highly emotional atmosphere in the various fora where such reverberations of revulsion could find a way to legal expression, by reaching for the proscribed acts and practices from all possible angles and by all conceivable legal ways and means. This led to relatively loose normative formulation and a large degree of overlap between these crimes.

In spite of the large debates they initially gave rise to, and the recent resurgence of these debates as the same patterns of shocking behaviour started to reappear, these crimes hardly received any application in actual practice (with the notable exception of the Nuremberg and Tokyo trials, which in fact belong to the stage of creation), allowing them, through the process of legal concretisation, to fall into place in relation to each other and within the normative tapistry of the international legal system. The principle of "normative economy" or "économie des notions" being a categorical logical imperative for any legal system, a legal system cannot withstand the existence within its confines of two concepts or rules that fulfil essentially the same function or bear divergently on any one situation, however slight the divergence may be.

The International Criminal Tribunal for the former Yugoslavia, together with the International Tribunal for Rwanda, are thus afforded a unique opportunity to assume the responsibility for the further rationalisation of these categories at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order.

II.

The "Law of the Hague" and the "Law of Geneva"

Articles 2 and 3 of the Statute of the Tribunal address violations of what is respectively known in traditional literature as the "Law of the Hague" and the "Law of Geneva."

As these denominations indicate, the reference originally was to the place in which the different instruments codifying and developing these two strands of the jus in bello were concluded. At the turn of the century the Hague Regulations dealt with the

bulk of the jus in bello, with the notable exception of the "amelioration of the conditions of the wounded and sick", i.e. the then only Geneva Convention in existence. Even the extension of this latter Convention to war at sea was done by a Convention adopted at The Hague in 1907. But progressively, parts of the Hague Regulations were developed into new Geneva Conventions : in 1929 the "Prisoners of War" Code and in 1949 the new "Civilians" Convention, in addition to the updating of the other three.

Only then did a rationale for this distinction on the basis of the subject-matter emerge, i.e. that the Law of Geneva dealt with the protection of potential victims, while the Law of The Hague dealt with the conduct of hostilities.

Yet again in 1977, the bulk of the remaining law of The Hague was received and developed in the two Protocols additional to the 1949 Geneva Conventions. This tendency towards the fusion of the two strands of the jus in bello is also noticeable in the approach to crimes arising from their violation.

III.

Criminal Personal Responsibility for Violations of the Jus in Bello

Neither the Hague Regulations of 1899 nor those of 1907 had any provision concerning their implementation or the consequences of their violation. Nevertheless, after the First World War the Treaty of Versailles provided (in Articles 227-230) for the prosecution of war crimes on the basis of the violation of these Regulations (as well as for waging the war). But this proved to be "Much Ado about Nothing."

After the Second World War, the Nuremberg and Tokyo Trials prosecuted "war criminals" inter alia on the basis of the violations of the Hague Regulations as well as the Geneva Conventions where applicable, in spite of the absence in these instruments of specific provisions to that effect.

The 1949 Geneva Conventions were prepared in the wake of the Nuremberg trials and were highly influenced by them. The purpose of their introduction of the new regime of "grave breaches" was two-fold. First, while imposing on States parties the obligation to suppress all the violations of the Conventions by measures of their choice (penal, administrative, disciplinary, etc.), it purported to single out certain acts or omissions as particularly serious violations of the Conventions, and thus introduce a certain uniformity among States parties in dealing with them both internationally and within their penal systems as a special category of serious crimes. The second purpose was to introduce procedural obligations as to the prosecution of these crimes by establishing universal jurisdiction over them and the obligation on States parties to prosecute or extradite alleged perpetrators within their jurisdiction. Although, on the face of it, the first purpose does not figure as prominently as the second (because of the awareness - and weariness - of the drafters of the Conventions that they were "not drafting a penal code", whence also the absence of penalties and the avoidance of the term "war crimes"), it is no less important or relevant.

Significantly, however, one of the outcomes of the following round of codification in 1974-1977, is the classification in Article 85/5 of Protocol I of the "grave breaches" of

the Conventions and the Protocols as "war crimes", a term of art traditionally reserved to the violations of the law of The Hague.

This tendency towards the unification of the two concepts is also visible in the work in progress of the ILC on the "Draft Code of Crimes Against the Peace and Security of Mankind", which cites in its draft Article 22, "grave breaches" as the first category of "war crimes" (ILC, Report to the 50th General Assembly (A/50/10) pp. 51-53).

The drafters of the Statute of the Tribunal chose, however, to ignore this convergence and to treat the two categories separately. This is consonent with their conservative attitude to a fault, going as far as excluding from Article 2 "grave breaches" of Protocol I, on the argument that the Protocol does not reflect general international law. But the great majority of the provisions of the two Protocols are uncontestably part of general international law, while the status of only a few provisions is still subject to controversy. The baby thus went with the bath water.

IV.

Grave Breaches in Internal Armed Conflicts

One of the merits of the Decision is that by its finding that "grave breaches" are subsumed in the "serious violations of the laws or customs of war" it resituated the Statute firmly within the modern trend recognizing the essential identity of the legal regime of violations of the two strands of the jus in bello. But the Decision had to qualify this finding in a manner that would still preserve for Article 2 of the Statute an autonomous field of application in relation to Article 3, pursuant to the "effet utile" principle of interpretation.

While I agree with the way the Decision portrays the relationship between "grave breaches" and "serious violations of the laws or customs of war" as that of species to genus, and I can see some merit in applying them separately - "grave breaches" being more concretely formulated by reference to the detailed provisions of the Geneva Conventions - I find the "division of labour" between the two Articles of the Statute in the Decision rather artificial. Instead of reaching, as the Decision does, for the acts expressly mentioned in Article 2 via Article 3 when they are committed in the course of an internal armed conflict, I consider, on the basis of the material presented in the Decision itself, that a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict.

Admittedly the traditional view, as far as the interpretation of the Geneva Conventions is concerned, has been that the "grave breaches" regime does not apply to internal armed conflicts. But the minority view that it does is not devoid of merit if we go by the texts alone and their possible teleological interpretation.

Regardless, however, of the outcome of this initial debate, if we consider the recent developments which are aptly presented in the Decision, we can draw two conclusions from them. The first is that a growing practice and opinio juris both of States and international organizations, has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles as well as for the other serious violations of the jus in bello, even when they are committed in the

course of an internal armed conflict. The second conclusion is that in much of this accumulating practice and opinio juris, the former acts are expressly designated as "grave breaches" (*see* Decision para. 83).

This is not a mere question of semantics, but of proper legal classification of this accumulated normative substance, with a view to introducing a modicum of order among the categories of crimes falling within the substantive jurisdiction of the Tribunal.

The legal significance of this substance can be understood in at least two ways other than the one followed by the Decision, in order to bring the acts committed in internal conflicts within the reach of the grave breaches regime in the Geneva Conventions, and consequently of Article 2 of the Statute.

As a matter of treaty interpretation - and assuming that the traditional reading of "grave breaches" has been correct - it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the "subsequent practice" and opinio juris of the States parties : a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of "grave breaches." The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of "grave breaches" is extended to internal conflicts. But the first seems to me as the better approach. And under either, Article 2 of the Statute applies - the same as Articles 3, 4 and 5 - in both international and internal conflicts.

This construction of Article 2 is supported by the fact that it coincides with the understanding of the parties to the conflict themselves of the legal situation. Thus in their Agreement of 1 October 1992 - concerning the implementation of their earlier Agreement of 22 May 1992 which they specifically concluded within the framework of common Article 3 of the Geneva Conventions - they excluded from the obligation to release prisoners those "accused of or sentenced for, grave breaches ..." (Article 3). They thus recognised the applicability of the regime of grave breaches in their on-going conflict, which they had already classified as internal.

As I mentioned earlier, the outcome does not differ much from that of the Decision. But greater legal coherence is always a worthwhile judicial pursuit.

Georges Abi-Saab