

International Humanitarian Law and the *Tadic* Case

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The decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)*¹ is likely to be of considerable significance for international humanitarian law. The decision concerned a challenge by the defendant to the jurisdiction of the Tribunal on three grounds:

- (a) that the Tribunal had not been lawfully established;
- (b) that the primacy over national courts which Security Council resolution 827 purported to give to the Tribunal was unlawful; and
- (c) that the Tribunal lacked subject-matter jurisdiction in respect of the charges laid against the defendant.

The purpose of this article is to examine the issues of humanitarian law in the *Tadic* case and to attempt an assessment of the impact of the decision on the development of that law. The article is therefore confined to the defendant's third ground of challenge to the jurisdiction of the Tribunal and does not consider the other grounds of challenge, which have been examined elsewhere.²

I. The Challenge to the Subject-Matter Jurisdiction of the Tribunal

The indictment charged Tadic with a list of crimes allegedly committed in the Prijedor region of Bosnia-Herzegovina between 25 May 1992 and early August of the same year. Many of the counts in the indictment concerned events said to have taken place at a camp at Omarska, where large numbers of Bosnian Muslims and Croats

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1 Decision of 2 October 1995 in Case No. IT-94-1-AR72; 35 ILM (1996) 32; the decision of the Appeals Chamber and the decisions of the Trial Chamber in the same case will be reported in volume 105 of the *International Law Reports*.

2 See the article by Professor Alvarez in this volume. Nor does the present article consider the decision of the Trial Chamber regarding Prosecutor's motion on the protection of witnesses and victims (decision of 10 August 1995).

were detained by Serb forces. The charges dealt with accusations of rape, unlawful killing, torture and cruel treatment. In respect of each of the alleged incidents the indictment charged the defendant under Articles 2, 3 and 5 of the Statute of the Tribunal.³ Thus, paragraph 4 of the indictment, which concerned an accusation that the defendant had raped a woman prisoner at the Omarska camp, charged him:

(a) with (i) a grave breach of wilfully causing great suffering, under Article 2(c) of the Statute or, in the alternative, (ii) cruel treatment under Article 3 of the Statute; and

(b) with rape, as a crime against humanity under Article 5(g) of the Statute.

This same pattern of charging a crime against humanity and, in the alternative, a grave breach and a violation of the laws and customs of war, was repeated throughout the indictment.

3 These Articles define the principal heads of the Tribunal's jurisdiction in the following terms:

Article 2: Grave Breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3: Violations of the Laws or Customs of War

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 5: Crimes against Humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

No charges were brought against Tadic under Article 4 of the Statute, which gives the Tribunal jurisdiction over allegations of genocide.

The defendant maintained that the Tribunal lacked subject-matter jurisdiction in respect of all these charges, on the ground that none of the acts alleged in the indictment had taken place in the course of an international armed conflict.⁴ He contended that Articles 2 and 3 of the Statute conferred jurisdiction in respect only of acts committed in an international armed conflict, since the concepts of grave breaches of the Geneva Conventions and violations of the laws or customs of war were confined to conflicts of that character. With regard to the charges of crimes against humanity, this argument encountered the obvious difficulty that Article 5 of the Statute expressly referred to the commission of such crimes 'in armed conflict, whether international or internal in character'. The defendant argued, however, that the Nuremberg decision⁵ had established that these also had to be linked to an international armed conflict and that the Security Council had thus exceeded its powers by purporting to give the Tribunal jurisdiction over crimes against humanity committed in an internal armed conflict.

The Prosecutor replied that the alleged offences had been committed in the course of an international armed conflict.⁶ According to the Prosecutor, the Security Council had treated the entire conflict in the former Yugoslavia as an international armed conflict, as was shown by its calls to the parties to observe the Geneva Conventions and its references, in a number of resolutions, to grave breaches of those Conventions.⁷ The Prosecutor, supported by the United States (which submitted an *amicus curiae* brief),⁸ argued that the views of the Security Council regarding the character of the conflict had to be given great weight. Moreover, even if the characterisation of the conflict by the Council was held not to be decisive, the conflict in Bosnia-Herzegovina in the summer of 1992 involved the federal Yugoslav army ('the JNA') to such an extent that the conflict had to be regarded as an international conflict in any event.

In the alternative, the Prosecutor submitted that the Tribunal's jurisdiction regarding war crimes and crimes against humanity was not confined to acts taking place in an international armed conflict.⁹ The laws and customs of war referred to in Article 3 of the Statute had to be taken to include all the customary international law of armed conflict, including that part which was applicable in non-international armed conflicts. The United States had put on record this interpretation of Article 3 in its statement to the Security Council at the time of the adoption of the Statute, when its Representative said:

4 *Brief to Support the Motion on the Jurisdiction of the Tribunal* (23 June 1995), Section 3 ('Defence Trial Brief').

5 Cmd. 6964 (1946). The International Military Tribunal held that Article 6(c) of its Charter treated acts as crimes against humanity only if they were committed in execution of, or in connection with the Second World War; pages 64-5.

6 *Prosecutor's Response to the Defence's Motions filed on 23 June 1995* (7 July 1995), 36-45.

7 See, especially, Security Council Resolution 764, adopted on 13 July 1992.

8 *Amicus Curiae Brief presented by the Government of the United States of America* (25 July 1995), 25-35.

9 *supra*, note 6 above, 47-59.

...it is understood that the 'laws or customs of war' referred to in Article 3 [of the Statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to those Conventions.¹⁰

This interpretation had not been challenged by any other State and, indeed, similar, though less explicit, statements had been made by France and the United Kingdom.¹¹ So far as crimes against humanity were concerned, the Prosecutor maintained that Article 5 of the Statute expressly conferred jurisdiction over crimes against humanity committed during an internal armed conflict. The Prosecutor rejected the defence argument that the Council had exceeded its powers in this respect, contending that the limited scope which the International Military Tribunal had attributed to crimes against humanity did not reflect contemporary international law.

The Prosecutor accepted that the concept of grave breaches was normally limited to international armed conflicts (indeed, the reference in Security Council resolutions on the former Yugoslavia to grave breaches of the Geneva Conventions was one of the indications relied upon as suggesting that the conflict was of an international character). He maintained, nevertheless, that the grave breaches provisions of the Geneva Conventions should be treated as applicable to the conflict in Bosnia-Herzegovina whatever the character of the conflict there, because the parties had accepted their applicability in an agreement concluded between them on 22 May 1992 and in a number of subsequent unilateral declarations.¹² The United States, however, went further and argued that the grave breaches jurisdiction under Article 2 of the Statute was applicable to conduct in an internal armed conflict.¹³

The Trial Chamber held that the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Article 2, 3 or 5 of the Statute. With respect to Articles 3 and 5, the Trial Chamber accepted in all essential respects the arguments advanced by the Prosecutor. The decision that the grave breaches jurisdiction under Article 2 also extended to unlawful acts committed in internal armed conflicts was, however, more surprising, since the Prosecutor had not advanced such an argument and the Trial Chamber based its decision on grounds which differed in a number of respects from those advanced by the United States. The Trial Chamber held that, despite its reference to grave breaches of the Geneva Conventions, Article 2 of the Statute did not confine the Tribunal to applying the grave breaches provisions of the Conventions but enabled the Tribunal to treat those provisions as declaratory of customary law and to try persons committing the acts listed in the grave breaches provisions even in an internal armed conflict to which those provisions would not apply as treaty law.¹⁴ In view of its decision regarding

10 S/PV. 3217, 15.

11 Ibid., at 11 and 19.

12 Ibid., at 44-7.

13 *US Amicus Brief*, at 35-6.

14 Trial Chamber decision on Jurisdiction, paras. 46-52

the scope of application of Articles 2, 3 and 5, the Trial Chamber considered it unnecessary to determine the character of the armed conflict in Bosnia-Herzegovina, although it noted that there were 'clear indications' in the material before it that the conflict was an international one.¹⁵

On appeal, the Appeals Chamber upheld the dismissal of the defendant's challenge to the jurisdiction of the Tribunal but did so on grounds which differed in significant respects from those of the Trial Chamber.

II. The Existence and Nature of the Armed Conflict in Bosnia-Herzegovina

Unlike the Trial Chamber, the Appeals Chamber considered at length whether there was an armed conflict taking place in the Prijedor region of Bosnia-Herzegovina at the time of the alleged offences and, if so, whether that conflict was of an internal or international character. Whereas the defendant's submission to the Trial Chamber was that there had been no international armed conflict, on appeal he sought to argue that there had been no armed conflict of any kind in Prijedor at the relevant time. Instead, he maintained that the Serb inhabitants had assumed authority in the region without active resistance on the part of the Muslim and Croat inhabitants, so that, whatever the position may have been in other parts of Bosnia-Herzegovina, there had been neither an internal nor an international armed conflict in Prijedor.

This argument assumes that an armed conflict exists only in those parts of a State (or States) where actual fighting is taking place at any given time. However, as the Appeals Chamber held, there is nothing in the Geneva Conventions or other rules of humanitarian law to justify such an assumption, let alone the conclusion which the defendant apparently sought to draw from it, namely that the conditions of detention of prisoners detained away from the scene of the fighting would not be subject to humanitarian law. On the contrary, many provisions of humanitarian law are expressly intended to apply away from the scene of the fighting or after active hostilities have ceased. It is not surprising, therefore, that the Appeals Chamber held that:

...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁶

15 Ibid., para. 53.

16 Appeals Chamber Decision, para. 70.

On this basis, the situation in Bosnia-Herzegovina had clearly reached the level of an armed conflict by May 1992 and the acts alleged in the indictment were sufficiently connected to that conflict to be subject to the rules of humanitarian law, irrespective of whether there was any fighting in the Prijedor region itself.

The Appeals Chamber did not, however, accept that the situation in the former Yugoslavia should automatically be regarded as a single armed conflict, which was wholly international in character. Instead, it held that the conflict (or, rather, the conflicts) had both internal and international characteristics.¹⁷ In particular, the Decision takes as a starting point that:

To the extent that the conflicts had been limited to clashes between the Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia and Montenegro) could be proven).¹⁸

In this respect, the Decision swims against the tide of much of the literature on the conflicts in the former Yugoslavia, which has tended to treat the entirety of the conflicts as a single entity and as international in character.¹⁹ It also departs from the conclusion of the Commission of Experts established by Security Council Resolution 780 (1992), which considered that:

...the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.²⁰

Nevertheless, in the opinion of the present writer, there were good reasons for the Appeals Chamber to adopt the view that it did. These reasons become clearer when the true nature of the Appeals Chamber's decision on this point is realized.

First, the Appeals Chamber was right to reject the argument that the Security Council had, in effect, already determined that the totality of the conflicts in the former Yugoslavia were to be treated as international in character. There is no indication in the text of Resolution 827, establishing the Tribunal, in the Statute of the Tribunal, which was annexed to that resolution, or in the Report of the Secretary-General,²¹ on which the Security Council acted in adopting that resolution, that the character of the conflict had already been determined. Yet since the law applicable to international armed conflicts is markedly different from that which applies to internal conflicts, such a determination would have been of the utmost importance, as it would have played a central role in ascertaining the substantive law against

17 Ibid., para. 77.

18 Ibid., para. 72.

19 See, in particular, the important and highly influential article by Meron, 'International Criminalization of Internal Atrocities' 89 *AJIL* (1995) 554 at 556.

20 1st interim report of the Commission, 10 February 1993; UN Doc. S/25274, para. 45. The Commission expressed the same view in its final report of May 1994, UN Doc. S/1994/674, para. 44.

21 UN Doc. S/25704.

which a particular accused would have been judged and, in some cases, would have made the difference between establishing whether or not he was guilty of an offence against international law. In view of the importance attached by the Security Council to the principle that the Tribunal should apply the existing international law and that the Council should not be seen as a legislature, if the Council had intended to determine such an important issue it would have needed to make a very clear statement to that effect.

The approach of the Security Council to the conflicts in the former Yugoslavia is, of course, an important piece of international practice which should be given considerable weight. That practice, especially when contrasted with the Council's treatment of what was clearly an internal conflict in Rwanda,²² shows that the Council undoubtedly considered that there was an international armed conflict (or conflicts) taking place in the former Yugoslavia. The repeated references to those provisions of the Geneva Conventions which apply only to international armed conflicts makes that much clear.²³ That does not amount, however, to saying that the Council viewed the network of conflicts in the former Yugoslavia as being wholly international in character. On the contrary, there are several indications that it treated those conflicts as having both internal and international aspects. The Report of the Secretary-General on the establishment of a tribunal for the former Yugoslavia, for example, states, in its comment on the choice of date for the commencement of the Tribunal's temporal jurisdiction, that 1 January 1991 had been chosen as 'a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.'²⁴ Moreover, the statement of the United States (quoted above) to the effect that Article 3 of the Statute of the Tribunal conferred jurisdiction in respect of breaches of common Article 3 of the Geneva Conventions, the sole provision which specifically applies to internal armed conflicts, would have been meaningless if the Council had determined that all of the conflicts in the former Yugoslavia were of an international character.

Secondly, there is nothing intrinsically illogical or novel in characterising some aspects of a particular set of hostilities as an international armed conflict while others possess an internal character. Conflicts have been treated as having such a dual aspect where a Government is simultaneously engaged in hostilities with a rebel movement and with another State which backs that movement. The International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* stated that:

The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of

22 See Meron, *supra*, above note 19.

23 See especially, Resolutions 764 (1992), 771 (1992), 780 (1992) and 787 (1992).

24 UN Doc. S/25704, para. 62.

that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.²⁵

A similar view has been taken by the International Committee of the Red Cross and by writers in respect of other armed conflicts.²⁶

Thirdly, the complexity of the situation in Bosnia-Herzegovina itself since May 1992 suggests that the conflicts taking place there should not be treated as a single, international armed conflict, but must rather be regarded as possessing both internal and international aspects. Thus, the hostilities between the Bosnian Government forces and troops from Croatia and Serbia/Montenegro were clearly international in character, once Bosnia-Herzegovina had become an independent State.²⁷ At the other end of the spectrum, it is difficult to see how the hostilities between the Bosnian Government forces and dissident Muslim forces in Bihac can be regarded as anything other than an internal conflict. The fighting between the Bosnian Government forces and Bosnian Serb forces after the JNA officially withdrew from Bosnia-Herzegovina in May 1992 is admittedly more difficult to characterise, especially since there is a sharp conflict of views regarding the degree of continuing involvement by the JNA after its formal withdrawal. Nevertheless, as the Appeals Chamber pointed out, the agreement concluded on 22 May 1992, under the auspices of the International Committee of the Red Cross, between the warring parties in Bosnia-Herzegovina suggests that those parties themselves treated that conflict as having an internal character. That agreement, in contrast to an earlier agreement of November 1991 regarding the fighting in Croatia,²⁸ provided for the application of parts of the Geneva Conventions to the fighting in Bosnia-Herzegovina. Yet if the conflict had been an international one in all its dimensions, such an agreement would have been invalid, since the Conventions would automatically have been applicable in their entirety and the Conventions preclude the parties to a conflict restricting the rights of protected persons by special agreement.²⁹

It is unfortunate, therefore, that the Appeals Chamber chose to reinforce its decision on the character of the conflict by referring to what it described as a *reductio ad absurdum* argument. That argument was to the effect that if the conflict between the Bosnian Government and Bosnian Serb forces was to be regarded as international,

25 ICJ Repts, 1986, p. 3 at 114; 76 ILR 1 at 448.

26 For example, the ICRC Annual Report for 1988 treats the armed conflict in Angola as an international armed conflict in so far as it involved South Africa but as an internal conflict in other respects; pp. 16-17. See also Gasser, 'International Non-International Armed Conflicts' 31 *Am. U. LR* (1982) 911.

27 The Arbitration Commission of the International Conference on the Former Yugoslavia fixed the date on which Bosnia-Herzegovina became a State as 6 March 1992, the date on which the result of the referendum on independence was announced; *Opinion No. 11*, 96 ILR 719. Possible alternative dates are the date of recognition by the European Community Member States, 6 April 1992, or the date on which Bosnia-Herzegovina became a member of the United Nations, 22 May 1992. The acts alleged to have been committed by the defendant in *Tadic* occurred after all these dates.

28 The November 1991 agreement is summarized in *International Review of the Red Cross*, 1991, 610.

29 Article 6, Conventions I, II and III; Article 7, Convention IV. Appeals Chamber Decision, para. 73.

on the basis that the Bosnian Serb forces were agents of the Federal Republic of Yugoslavia (Serbia and Montenegro), there would be an imbalance in the way in which violations of humanitarian law committed against civilians would be treated. Whereas atrocities by Bosnian Serb forces against Bosnian civilians would be perpetrated against protected persons and would therefore constitute grave breaches of the Fourth Geneva Convention, similar atrocities by Bosnian Government forces against Bosnian Serb civilians would not amount to grave breaches, because the Bosnian Serb civilians 'having the nationality of Bosnia-Herzegovina, would not be regarded as protected persons' under the Fourth Convention, Article 4(1). This argument is unconvincing and potentially dangerous. Even if one accepts the Appeals Chamber's premise regarding the nationality of Bosnian Serbs, the 'absurdity' of the situation envisaged by the Appeals Chamber is no greater than that which follows from holding that the conflict between the Bosnian Government and the Bosnian Serbs was an internal conflict, whereas that between the Bosnian Government forces and the JNA was international in character. In that case, an atrocity perpetrated by Bosnian Serbs against Bosnian civilians would be committed against protected persons (and would therefore constitute a grave breach of the Fourth Convention) if the perpetrators could be shown to have been operating under JNA command at the relevant time but would otherwise fall within the law applicable to internal armed conflicts, whereas atrocities perpetrated by Bosnian Government forces against Bosnian Serb civilians would only ever fall to be judged by reference to the law of internal armed conflicts.

Moreover, there is good reason to doubt the Appeals Chamber's premise regarding nationality. It should not be presumed, especially for a purpose such as the application of humanitarian law, that when a State breaks up into a number of new States as a result of the secession of parts of its territory and that secession is opposed by force of arms so that an armed conflict results between the old State and a seceding entity or between the various successor States to the old State, all residents of one of the seceding territories automatically take the nationality of the State created by that secession, irrespective of their wishes (perhaps violently expressed) to remain part of the old State or to become part of one of the other successors. Did persons of West Pakistan ethnic origin living in the old East Pakistan automatically acquire Bangladesh nationality in 1972, so that they could not be regarded as protected persons vis-a-vis the Bangladesh forces while the conflict there lasted? In the case of Bosnia-Herzegovina, before it became an independent State all members of the Bosnian population were citizens of Yugoslavia. It is far from clear that on independence members of the Serb community who opposed that independence should be regarded as having become nationals of Bosnia-Herzegovina, rather than retaining some form of Yugoslav (or perhaps Serbian) citizenship. Such a possibility was, in fact, expressly mooted by the Arbitration Commission of the International Conference for the Former Yugoslavia as early as January 1992.³⁰ Since the Appeals

Chamber has recognized that some aspects of the fighting in Bosnia-Herzegovina were an international armed conflict, it is, to say the least, unfortunate that it has suggested that Bosnian Serb civilians caught up in part of the hostilities which are international in character cannot be protected persons under the Fourth Convention, the more so since this suggestion was not necessary for the decision in the *Tadic* case and the matter appears not to have been fully argued before the Appeals Chamber.

The Appeals Chamber's rejection of the theory that the conflict in the former Yugoslavia should be seen as a single conflict of a wholly international character is controversial. Judge Li dissented from the reasoning of the Chamber on this point.³¹ The decision has also been criticised on this point by Professor Aldrich.³² For the reasons already given, this writer respectfully considers that the decision is correct, even if some of the reasoning on which it is based is open to challenge. It is, however, important to realise the limited nature of the Appeals Chamber's decision. While the Chamber decided that fighting between the Bosnian Government and the Bosnian Serb forces should not automatically be regarded as an international armed conflict, it did not rule out the possibility of such fighting being so characterized. In view of the Appeals Chamber's decision that Article 2 of the Statute was applicable only to offences committed in the course of an international armed conflict (a matter considered in Part III, below), if the Chamber had decided that the fighting between the Government and the Bosnian Serbs was an internal conflict it should have allowed the defendant's appeal in respect of the Article 2 charges, since the Tribunal would have lacked subject-matter jurisdiction in respect of those charges. Instead, the Appeals Chamber dismissed the appeal in its entirety.

It appears, therefore, that the Appeals Chamber intended to leave it for the Trial Chamber at the trial of the defendant to determine whether the activities of the Bosnian Serbs in Prijedor in May-August 1992 were, as a matter of fact, part of the international armed conflict between Bosnia-Herzegovina and the Federal Republic of Yugoslavia (Serbia/Montenegro).³³ That would be so if it could be proved that the Federal Republic had been directly involved.³⁴ While there was, as the Trial Chamber acknowledged, a considerable amount of *material* placed before the Tribunal which pointed to such involvement, this material had not been tendered as *evidence*, in the form of oral testimony or affidavit evidence which could form the basis for a finding of fact. Had the direct involvement of the Federal Republic of Yugoslavia in the fighting between the Bosnian Government forces and the Bosnian Serb forces been proved, the Appeals Chamber would apparently have been prepared to characterize that conflict as an international one to which the full body of international humanitarian law was applicable. That conclusion is supported by the

31 Separate Opinion of Judge Li, paras. 14-20.

32 90 *AJIL* (1996), 64 at 66-7.

33 Judge Sidhwa considered that the Appeals Chamber should formally have remitted this question to the Trial Chamber; separate opinion, paras. 121-4.

34 Appeals Chamber Decision, para. 72, quoted above.

decision (given under Rule 61 of the Tribunal's Rules of Procedure) in the case of *The Prosecutor v. Nikolic*,³⁵ in which Trial Chamber I reached the tentative conclusion that JNA forces had been directly involved in the fighting in the area in question and that the conflict was of an international character. The decision of the Appeals Chamber in *Tadic* should therefore be seen as leaving it open to the Prosecutor to adduce evidence which would establish that the acts alleged in the indictment occurred in the context of an international armed conflict. Since it is understood that the charges under Article 2 of the Statute have not been dropped, it must be presumed that the Prosecutor intends to adduce such evidence at the trial.

While the approach of the Appeals Chamber on this question may appear cumbersome in contrast to the simplicity of the view adopted by the Commission of Experts, it is submitted that the Appeals Chamber was right to take the course that it did. Whether the armed conflict in the course of which the alleged offences are said to have been committed was international or internal in character is, as Judge Sidhwa explained, a mixed question of fact and law. The answer to that question will determine the substantive law against which the defendant's conduct will fall to be judged. In a criminal trial it would be wholly inappropriate for a question of this importance to be determined without full consideration of the evidence.

III. The Grave Breaches Jurisdiction under Article 2 of the Statute

The characterization of the conflict becomes particularly important because the Appeals Chamber rejected the Trial Chamber's interpretation of Article 2 of the Statute. The Trial Chamber had held that, notwithstanding the express reference in Article 2 to grave breaches of the Geneva Conventions, the jurisdiction of the Tribunal under this Article was not limited to conduct which would be categorized as a grave breach of one of the Conventions and thus extended to acts occurring in the course of an internal armed conflict. Not surprisingly the Appeals Chamber held that this interpretation was unsustainable in view of the wording of Article 2 and the commentary in the Secretary-General's report. Article 2 is not a free-standing provision but one which gives the Tribunal jurisdiction in respect of grave breaches of the Conventions. The Appeals Chamber considered that the concept of grave breaches under the Conventions was inseparable from the concept of protected persons and property and that neither concept featured in common Article 3, the only provision in the Conventions applicable to internal armed conflicts.³⁶

It is true that, as the United States pointed out in its *amicus curiae* brief, there are a number of indications that international law may be developing in the direction of

35 Case No. IT-94-2-R61 (20 October 1995). See the article on the *Nikolic* case by Maison in this volume.

36 Appeals Chamber Decision, paras. 79-85.

extending grave breaches jurisdiction to internal armed conflicts. Reference was made, in particular, to the German Manual of Military Law, which includes references to common Article 3 in its list of grave breaches.³⁷ That provision should, however, be seen in the light of the earlier provision of the Manual that German forces are required to comply with the entire body of international humanitarian law in all armed conflicts, internal or international.³⁸ The reference to common Article 3 of the Conventions in the section of the German Manual dealing with grave breaches may therefore be a logical application of this policy on the part of Germany, rather than a statement about the existing state of international law. The United States *amicus curiae* brief is, of course, itself an important piece of State practice which points to the applicability of grave breaches provisions to internal armed conflicts, although the fact that a State pleads a particular principle before an international tribunal obviously cannot, of itself, suffice to make that principle part of international law. The proposals being considered by the Review Conference of the United Nations Weapons Convention to extend the mines protocol to internal armed conflicts and to make certain violations of that protocol grave breaches is a further indication of a trend, although one that may fail to achieve international acceptance.³⁹

These indications of the direction in which the law may be moving must, however, be set against the fact that the two Diplomatic Conferences on Humanitarian Law since the Second World War have treated internal armed conflicts in a markedly different way from international armed conflicts. The 1949 Conference adopted only a single provision on internal conflicts, while the 1974-77 Conference pointedly failed to include in Additional Protocol II any reference to grave breaches, despite the fact that Additional Protocol I developed the scope of grave breaches in the context of international armed conflicts. It is difficult to escape the conclusion that, at least for the present, the concept of grave breaches of the Geneva Conventions and Additional Protocol I is confined to international armed conflicts.⁴⁰

IV. The War Crimes Jurisdiction under Article 3 of the Statute

In contrast to its decision regarding grave breaches, the Appeals Chamber agreed with the Trial Chamber that the jurisdiction of the Tribunal to hear cases concerning violations of the laws and customs of war under Article 3 of the Statute was not confined to international armed conflicts but included violations of humanitarian

37 Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts Manual* (1992), para. 1209. The manual is published with a commentary as Fleck (ed), *Handbuch des Humanitären Völkerrechts in bewaffneten Konflikten* (1994) and in English as Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (1995).

38 Ibid., para. 211. See also Fleck, *op. cit.*, p. 48.

39 See the President's Text, circulated as Document CCW/CONF.I/WP.4*/Rev. 1, 19 January 1996.

40 This was the view of the Prosecutor (text accompanying footnote 10) and is also supported by Professor Meron, *loc. cit.*, note 19, above. Judge Abi-Saab, however, gave an eloquent dissent on this issue.

law applicable to internal armed conflicts. The Appeals Chamber went much further, however, in explaining the legal basis for this decision and in exploring the content of this part of humanitarian law.

In considering whether an individual may be penalised for acts committed in an armed conflict, it is necessary to examine three distinct questions:

(a) were those acts in violation of the rules of international humanitarian law applicable to that category of conflict (the question of substance) ? If so,

(b) does international law impose individual criminal responsibility for those acts, i.e., is such a violation a crime under international law (the question of criminality) ? If so,

(c) who has jurisdiction, to try the individual concerned for such an offence (the question of jurisdiction)?

Much of the confusion in discussing criminal responsibility for acts committed in the course of an internal armed conflict stems from a failure properly to distinguish between these three questions.

A. The Question of Substance

There is no doubt that the acts alleged in the indictment in the *Tadic* case would, if proved, amount to violations of the law applicable to internal or international armed conflicts. All of the allegations concern the killing, torture, rape or cruel treatment of detainees or other persons taking no active part in hostilities. Even if they occurred in an internal armed conflict, they would therefore be in breach of common Article 3 of the Geneva Conventions. The Appeals Chamber, however, took the opportunity of the first case to come before it to explore the whole of the substantive law applicable to internal armed conflicts. In particular, it discussed at length the evolution of customary international law rules relating to the conduct of hostilities (the sphere of what is traditionally known as 'Hague Law') in internal conflicts, notwithstanding that this body of substantive law was not relevant to the *Tadic* case.⁴¹

This part of the Decision examined State practice in a number of cases, including, in particular, the Spanish Civil War, the 'Biafra conflict' in Nigeria and the international reaction to the allegations that Iraq used chemical weapons against Kurdish insurgents during the 1980's. It also considered certain UN General Assembly resolutions, especially Resolution 2444 (1968) and 2675 (1970), which it regarded as applicable to internal as well as international armed conflicts and as being declaratory of customary law. On the basis of this review, the Chamber concluded that there had developed a body of customary international law regulating the conduct of hostilities in internal armed conflicts, the principal features of which were:

(a) rules for the protection of civilians and civilian objects against direct attack; i.e. rules requiring the parties to confine their attacks to military objectives;

41 Appeals Chamber Decision, paras. 96-127.

- (b) a general duty to avoid unnecessary harm to civilians and civilian objects;
- (c) certain rules on the methods and means of warfare, in particular, a ban on the use of chemical weapons and perfidious methods of warfare;
- (d) protection for certain objects, such as cultural property.

The Appeals Chamber denied that in identifying the existence of these rules it was effectively holding that internal armed conflicts were subject to the same rules as those applicable to the conduct of hostilities in international armed conflicts. It considered that the law applicable to internal conflicts was more limited in two respects:

- (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and
- (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.⁴²

Nevertheless, the list of principles and rules identified in the Decision, albeit in broad outline rather than in detail, goes beyond the treaty rules contained in Additional Protocol II (which have not generally been regarded as declaratory of customary international law⁴³) and begins to resemble the main provisions of Additional Protocol I, together with some of the provisions of the weaponry agreements.

The Appeals Chamber's comments on this subject are, of course, *obiter dicta*, since they were not necessary for the ruling on the issues in the *Tadic* case. It is open to question whether the Appeals Chamber was wise to raise such an important matter in this way, rather than waiting for a case which actually required a decision on the content of this part of humanitarian law. It is also doubtful whether the practice discussed in this part of the Decision really sustains some of the inferences drawn from it. There is likely to be broad agreement that the law of internal conflicts includes principles regarding the protection of the civilian population. On the other hand, the suggestion that feigning civilian status in an internal conflict constitutes perfidy appears to be based solely on the decision of the Nigerian Supreme Court in *Pius Nwaoga v. The State*,⁴⁴ a decision which does not really sustain such a conclusion since it was a trial for murder under Nigerian law, rather than for a war crime as such, and the consideration of the significance of the defendants' disguise was peripheral to the decision. It is also noteworthy that the Appeals Chamber has gone further than other bodies by determining that there are rules applicable to internal armed conflicts which are not based upon either common Article 3 or Additional Protocol II. The Statute of the Rwanda Tribunal, adopted by the Security Council in Resolution 955 (1994), to deal with crimes committed in what is clearly an internal

42 Ibid. para. 126.

43 On this subject, see Cassese, 'The Geneva Protocols of 1977 and Customary International Law', 3 *UCLA Pacific Basin Law Journal* (1984), 55 and Greenwood, 'Customary Law Status of the 1977 Additional Protocols' in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991), 93.

44 52 ILR 494 (1972).

armed conflict, confers jurisdiction over war crimes only in respect of breaches of common Article 3 and Additional Protocol II.⁴⁵ Similarly, the Commission of Experts appointed to investigate violations of humanitarian law in the former Yugoslavia, suggested in its final report that:

The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.⁴⁶

Nevertheless, the confirmation by the Appeals Chamber of the existence of a body of customary, Hague law regarding internal armed conflicts is of the greatest importance and is likely to be seen in the future as a major contribution to the development of international humanitarian law. While the content of those customary rules will undoubtedly be the subject of much argument in future cases, the *Tadic* decision has established that the International Tribunal will apply principles derived from (though possibly not identical in content to) those applicable to the conduct of hostilities in international armed conflicts. That is a development which is bound to influence any future consideration of the law of internal armed conflicts.

B. The Question of Criminality

The same is true of the Appeals Chamber's unequivocal affirmation that an individual who violates the law of internal armed conflicts - including both common Article 3 and the customary rules outlined by the Chamber - can incur individual criminal responsibility under international law. That proposition had been questioned in two different, yet closely related, respects. First, it has sometimes been argued that violation of those provisions of the Geneva Conventions and Additional Protocols which are not 'grave breaches provisions' involves the international responsibility of the State concerned but does not amount to a crime under international law on the part of the individuals committing the violation.⁴⁷ That view, however, seems to be based upon a confusion between the question of criminality and the question of jurisdiction. It is true that violations of the Geneva Conventions which are not grave breaches are not subject to the jurisdictional provisions prescribed by the Conventions, in particular the requirement that all States (belligerent or neutral) should either exercise jurisdiction or surrender suspects for trial elsewhere. That does not mean, however, that such violations do not involve individual criminal responsi-

45 Rwanda Statute, Article 4.

46 UN Doc. S/1994/674, para. 52.

47 See, e.g., Kussbach, 'The International Humanitarian Fact-finding Commission' 43 *ICLQ* (1994), 174 at 177 and Plattner 'The Penal Repression of Violations of International Humanitarian Law applicable in non-international armed conflicts', 30 *International Review of the Red Cross* (1990) 409 at 410.

lity. Indeed, there are instances of conduct which would nowadays amount to a violation (but not a grave breach) of the Conventions being prosecuted as a war crime before 1949.⁴⁸ The better view, it is submitted, is that set out in the British *Manual of Military Law*, which states that 'all other violations of the Conventions, not amounting to "grave breaches", are also war crimes'.⁴⁹ This is also the view taken in the International Law Commission's Commentary on the Draft Statute of the International Criminal Court.⁵⁰

Secondly, it has been more widely contended that, whatever may be the position regarding violations of other provisions of the Geneva Conventions, violations of common Article 3 have never been treated as crimes under international law, although such conduct may amount to a crime under the criminal law of most States. Thus, Ms Plattner has suggested that 'international humanitarian law applicable to non-international armed conflicts does not provide for international penal responsibility'.⁵¹ The International Committee of the Red Cross, in its comments on the proposal to establish the International Tribunal, stated that 'according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict'.⁵² A similar view was expressed by the Commission of Experts.⁵³ It is true that the Rwanda Statute expressly confers jurisdiction over individuals accused of violating common Article 3 but this was described by the Secretary-General as an innovation, which 'for the first time criminalises common Article 3'.⁵⁴

Against this view, however, may be set the fact that when the Security Council established the Rwanda Tribunal and adopted its Statute, it considered that it was complying with the principle *nullum crimen sine lege*, but appears to have had no concerns about whether if violations of common Article 3 were crimes under international law. Similarly, the statement by the United States representative at the time of adoption of Resolution 827, regarding the interpretation of Article 3 of the Yugoslav Statute, assumes that violations of common Article 3 were criminal under international law. Moreover, as Professor Meron has shown, there are good reasons why this should be so.⁵⁵ If violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in an attenuated form) to the

48 Thus, exposing prisoners of war to humiliation and insults would be a violation of Article 13(2) of the Third Convention but would not amount to a grave breach. In *Maelzer*, 13 AD 289 (1946) a US Military Commission convicted the German commander of Rome of a war crime for an act of this kind.

49 *Manual of Military Law, Part III* (1958), para. 626. The United States *Field Manual* (1956), paras. 499 and 506 and the Canadian *Draft Manual of the Law of Armed Conflict* (1988), para. 1704, take a similar position.

50 UNGAOR A/49/10, 70-79.

51 *Supra*, note 47, at 414.

52 Preliminary Remarks of the ICRC, 25 March 1993, unpublished.

53 Final report, *supra*, note 46, para. 52.

54 UN Doc. S/1995/134, para. 12.

55 Meron, *supra*, note 19.

context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of a clear indication to the contrary.

The *Tadic* decision nevertheless breaks new ground to the extent that the criminality under international law of violations of the laws of internal armed conflict had not previously been asserted by an international tribunal, or, so far as this writer is aware, by an unequivocal decision of a national court in a State other than that in which the conflict has taken place. The International Law Commission appears deliberately to have left open the question whether 'serious violations of the laws and customs applicable in armed conflict' in Article 20 of the Draft Statute of the International Criminal Court extends to violations committed in internal armed conflicts,⁵⁶ and some States evidently consider that it should not do so.⁵⁷ Does the decision, therefore, offend against the principle *nullum crimen sine lege*, on the ground that to comply with that principle, it is not sufficient that conduct should be prohibited under international law, it should clearly be identified as criminal conduct by the convention? In the opinion of this writer, there is no violation of the *nullum crimen* principle. That principle does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only in respect of whether it constituted a crime under a particular system of law.⁵⁸ The conduct alleged in the *Tadic* indictment manifestly comes within that category.

The decision in *Tadic* that violations of the law of internal armed conflict can lead to individual criminal responsibility is likely to be of considerable influence. Not only will it clearly have an important effect upon future proceedings in the Tribunal but there are signs that it will be reflected in the debates on the International Law Commission's proposals for an International Criminal Court. The International Committee of the Red Cross, whose statements on this subject have undergone a considerable change since 1993, has already called for the Criminal Court to have jurisdiction over such offences.⁵⁹

C. The Question of Jurisdiction

Once the Appeals Chamber had answered the questions of substantive law and criminality, it had no difficulty in concluding that it possessed jurisdiction under Article

56 *Supra*, note 50.

57 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR A/50/22, para. 74.

58 That was the approach taken by the courts in the United Kingdom when they decided that a husband could be convicted of raping his wife, *Regina v. R.* [1992] 1 AC 599 (House of Lords). The European Court of Human Rights rejected a complaint against the United Kingdom in respect of this change in the criminal law, *SW v. United Kingdom*, decision of 27 November 1995, ECHR Reports, Series A, vol. 335-B paras 36 and 42-3. See also Meron, *supra*, note 19.

59 Statement to the Sixth Committee of the UN General Assembly, 1 November 1995, page 3.

3 of the Statute in respect of violations of the laws applicable to internal armed conflicts. Although Article 3 was inspired by the need to ensure that the Tribunal would have jurisdiction in respect of violations of the Hague Regulations regarding Land Warfare, 1907, and the examples of criminal acts given in the text of the Article are taken from that source, it is clear from the Secretary-General's Report and the statements made in the Security Council at the time the Statute was adopted that the list of examples was not meant to be comprehensive and that the jurisdiction conferred was meant to cover violations of all the laws and customs of war, including those not specifically mentioned.

The Appeals Chamber was not, of course, called upon to answer the difficult question whether national courts in other States also possess jurisdiction in respect of violations of the laws of internal armed conflict, although it noted that a Danish court appeared to have done so in one case arising out of the conflict in the former Yugoslavia.⁶⁰

V. Crimes against Humanity under Article 5 of the Statute

The Appeals Chamber also upheld the decision of the Trial Chamber that the Tribunal's jurisdiction in respect of crimes against humanity was not confined to crimes against humanity committed in the course of an international armed conflict. The Appeals Chamber concluded that the limitation on the scope of crimes against humanity which was recognized by the Nuremberg Tribunal did not reflect contemporary international law. No nexus with war crimes or with an armed conflict of any character was required by modern international law and the Statute was, in fact, more restrictive than was necessary in requiring that a crime against humanity had to have been committed in the course of an armed conflict, whether international or internal, in order to come within the jurisdiction of the Tribunal.⁶¹ The Chamber's decision on this point is in accordance with most modern literature on crimes against humanity⁶² and with the International Law Commission's proposed Statute for an International Criminal Court, which makes no mention of a nexus between crimes against humanity and armed conflict.⁶³

VI. Conclusions

The decision in the *Tadic* case is a carefully reasoned and innovative judgment which is likely to have a profound effect upon the development of international humanitarian law, particularly in the field of internal armed conflicts, where it has

60 Appeals Chamber Decision, para. 83.

61 Appeals Chamber Decision, paras. 138-42.

62 See, e.g., Jennings and Watts, *Oppenheim's International Law* vol I (9th ed), 996

63 *Supra*, note 50, at 76.

developed both the substantive law and the concept of criminality. For the most part, it is a welcome decision, the innovative aspects of which should prove beneficial in the long term. It remains to be seen how the questions of the characterization of the conflicts in the former Yugoslavia and the elaboration of the detail of the 'Hague law' of internal armed conflicts is handled in subsequent decisions of the Tribunal.