
Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

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This report on current developments in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ('Tribunal') covers three main issues: the Tribunal's subject matter jurisdiction; the elements of certain crimes within the Tribunal's jurisdiction; and the Tribunal's authority to order states and individuals to provide evidence.

1 Subject Matter Jurisdiction

The basic legal framework for determining the Tribunal's subject matter jurisdiction under Articles 1, 2, 3 and 5 was delineated by its Appeals Chamber in *Prosecutor v. Tadic* ('*Tadic Jurisdiction Decision*'). This framework was applied and further developed in the final judgment of Trial Chamber II in that case ('*Tadic Judgment*').

In the *Tadic Judgment*, the Trial Chamber found that the conditions for the exercise of jurisdiction by the Tribunal — i.e., the existence of armed conflict and a sufficient nexus between the acts of the accused and the conflict — were present.

A Grave breaches

One of the most controversial aspects of the *Tadic Judgment* is its treatment of the requirements for the application of the grave breaches regime embodied in Article 2 of the Tribunal's Statute. Applying the standards set out in the *Tadic Jurisdiction Decision*, the majority of the Trial Chamber held that the Tribunal did not have jurisdiction under Article 2 because the victims of the defendant's alleged crimes were not protected persons under the relevant Geneva Convention. To be a 'protected person'

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the victim must be in the hands of a country of which he or she is not a national. Since the defendant's alleged victims were Bosnian citizens who were imprisoned in camps run by the Bosnian Serb army (also Bosnian nationals), the Prosecutor had to show that the latter were effectively controlled by an external power, in this case, Yugoslavia. The majority of Trial Chamber II found that the Prosecutor had failed to show effective control of the Bosnian Serbs by Yugoslavia and that the grave breaches regime embodied in Article 2 of the Tribunal's Statute did not apply to the case.

The Trial Chamber's presiding judge disagreed with this view. In her separate and dissenting opinion Judge McDonald argued that the Prosecutor had met the extraordinarily high 'effective control' standard set by the majority and that, in any event, such a showing was not necessary.

B Common Article 3

With respect to Article 3 of the Tribunal's Statute, which covers the laws and customs of war, the Trial Chamber held that it had jurisdiction over the violations of common Article 3 to the Geneva Conventions with which the defendant was charged. The Appeals Chamber had previously held that, so long as certain criteria were met, this body of law was covered by Article 3 of the Tribunal's Statute. The Trial Chamber found that the prohibitions of common Article 3 (i.e., murder, taking hostages, outrages upon personal dignity, judgment and sentencing without trial by a regularly constituted court providing fair trial guarantees) were sufficiently serious to satisfy the criteria enunciated by the Appeals Chamber.

The Trial Chamber further found that the conditions embodied in common Article 3 for its application had been met. It had already held that the defendant's acts were committed within the context of an armed conflict and had a close connection to the conflict. The final criteria for the application of common Article 3 was also satisfied because all of the defendant's alleged victims were either civilians or had been placed *hors de combat* by detention.

C Crimes against Humanity

The legal requirements for the charges of crimes against humanity were extensively discussed by the Trial Chamber. The Chamber noted that it had jurisdiction over crimes against humanity only 'when committed in armed conflict'. In the Chamber's view, this meant that in addition to occurring in the course or duration of an armed conflict, the act had to be linked geographically to the conflict and it must not be done for purely personal motives of the perpetrator.

With respect to the second requirement for crimes against humanity — i.e., that the crime be 'directed against any civilian population' — the term 'civilian' was interpreted broadly. The Chamber concluded that the presence of persons actively involved in a conflict (such as members of resistance movements) should not prevent the characterization of a population as civilian.

The Trial Chamber emphasized the collective nature of crimes against humanity. It was necessary that the acts be widespread (i.e., committed on a large scale) or

systematic (i.e., committed pursuant to a preconceived plan or policy). The Chamber further held that, under the Tribunal's Statute, the acts must be undertaken on discriminatory grounds. Such a policy of discrimination did not need to be formalized and could be deduced from the way in which the act occurred. The final general requirement for crimes against humanity was that the perpetrator must have knowledge of the wider context in which the act occurred.

In the *Tadic* case, the general requirements for the applicability of Article 5 described above were fulfilled.

2 Elements of the Crimes

In examining the Tribunal's subject matter jurisdiction, both the *Tadic Jurisdiction Decision* and the *Tadic Judgment* addressed the general elements of the categories of crimes listed in Articles 2, 3 and 5. Several specific crimes are listed within each of these articles. From among these specific crimes, the Trial Chamber discussed the elements of the following: cruel treatment; inhumane acts; persecution; and murder.

3 The Tribunal's Authority to Order States and Individuals to Produce Evidence

In the *Blaskic* case, the Tribunal was required to decide on the extent of its power to issue binding orders, such as subpoenas, to states and individuals, including high government officials. The defendant, Blaskic, was a high-level military commander whose responsibility for acts committed by his subordinates lay at the core of the case against him. Military documents were highly relevant to establishing or disproving the chain of command, the degree of control exercised by Blaskic over the troops and the extent to which he was cognizant of the actions undertaken by his subordinates.

In order to obtain such documents, which were in possession of Croatia, a judge of the Tribunal issued a subpoena addressed to the state and its defence minister. The Croatian government challenged the subpoenas arguing that the Tribunal had acted *ultra vires* in that it was only empowered to make requests for assistance and that such requests could only be directed to a state and not to a specifically named high government official.

The Trial Chamber that heard Croatia's application affirmed the Tribunal's authority to issue subpoenas, both to states and to high government officials. In its decision, the Chamber adopted a teleological approach: it concluded that the Tribunal had the inherent power to issue a subpoena because such power was necessary for the exercise of its functions as a criminal judicial institution with jurisdiction over individuals charged with serious offences. The Trial Chamber noted that there was no controversy over its authority to issue a subpoena where the receiving party of the subpoena was an individual. The fact that a person identified as being in possession of documents was an official of a state did not, in the Trial Chamber's view, preclude the

issuance of a subpoena addressed to him or her personally. Since the Tribunal was a Chapter VII enforcement mechanism as well as a criminal court, it was not required to conform to standard methods of international cooperation, whereby individual officials might not be addressed.

The Trial Chamber's decision was substantially revised on appeal. The Appeals Chamber held that the Tribunal did not have the power to issue a subpoena against a state. In the view of the Appeals Chamber, the term subpoena as used in the Tribunal's Rules should be narrowly construed as referring exclusively to binding orders addressed by the Tribunal, under threat of penalty, to individuals acting in their private capacity. In light of the basic structure of the international community, subpoenas could not be addressed to states. The Tribunal did, however, have the authority under Article 29 of its Statute to issue binding orders and requests to states.

The Appeals Chamber also diverged from the Trial Chamber in holding that the Tribunal did not have the power to address subpoenas to state officials acting in their official capacity. According to the Appeals Chamber, it was a well-established rule of customary international law that such officials were mere instruments of a state and their official action could only be attributed to the state.

Finally, the Appeals Chamber affirmed the Trial Chamber's conclusion that the Tribunal had the authority to issue binding orders to individuals acting in their private capacity.

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