

Appeals Chamber Yugoslav War Crimes Tribunal Confirms Jurisdiction

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(with five levels of negotiation); the requirement of unanimity; the lack of control by the Court of Justice and the involvement of the European Parliament; differences between European Member States on common positions and actions; and the slowness of the other instrument used, i.e., conventions. A requirement is the clarification of objectives, such as in the drug policy area.

The Commission commented on proposed improvements in the operation of criminal cooperation within the Community as follows:

(1) *Institutional Framework*--Due to the problems of the intergovernmental method, a recommendation is the extension of Community competence, if not completely at least partially, to cover the areas under the third pillar (e.g., asylum, immigration, the fight against drugs, fraud, civil legal cooperation and customs cooperation). Transparency and democratic control should apply for areas that are not brought under EU competence.

(2) *Role of Different Institutions*--The Commission proposes to extend its right of initiative to fields where it does not have such a right, such as cooperation in criminal law, customs cooperation and police cooperation. Adequate consultation procedures of the European Parliament should be established. The European Parliament should be more systematically informed. Appeal should exist to the Court of Justice for all acts of a binding nature. Recourse should be available to the Court of Auditors for budgetary control of funds intended for the third pillar.

(3) *Decision-making and Instruments*--The unwieldy nature of unanimity, as required for the three instruments used (common positions, joint actions and conventions), requires the examination of the possibility of introducing into some areas "voting rules that do not require unanimity". At present, the requirement of unanimity blocks for years and even decades initiatives in criminal matters.

(4) *Council Working Structure*--The Council should simplify greatly the existence of five levels of decision and can do so without modification of the Community Treaty.

The Commission supports a differentiated approach that permits progress without the participation of all European Members, such as through the Schengen Convention "as a first step towards the objective of an area of freedom and security." However, the possibility of deepening between some Member States should not lead to opting out or to the fragmentation of the Community process. The Commission's proposals bear watching, both for their own importance and as potential models for other economic integration groups that are endeavoring to develop more streamlined mechanisms to strengthen criminal cooperation (e.g., the Caribbean Common Market and Community).

X. LAW OF WAR

A. Appeals Chamber Yugoslav War Crimes Tribunal Confirms Jurisdiction

by André Klip²

On October 2, 1995, in a decision on the Defense motion for interlocutory appeal on jurisdiction (IT-94-1-

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AR72), the Appeals Chamber confirmed the Trial Chambers decision of August 10, 1995¹¹ that the International Tribunal has jurisdiction to try Dusko Tadic.²¹ However, the reasoning behind the appeals decision differs in certain aspects from that of the Trial Chamber. Appended to the decision of the Appeals Chamber are Separate Opinions of Judges Li, Abi-Saab and Sidhwa. Judge Deschênes appended a Separate Déclaration.

With still two preliminary motions outstanding before the Trial Chamber³¹ the fundamental matter of the jurisdiction of the International Tribunal was decided first. The Appeals Chamber held that this should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. The Chamber raised the question whether the higher interest of justice would be served by a decision in favor of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. It therefore decided that the jurisdiction of the Appeal Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

Contrary to the Trial Chamber the Appeals Chamber regarded the question whether the establishment of the International Tribunal was lawful as a relevant question which requires an answer. The Statute does not limit the International Tribunal to examine its own competences. The Chamber made a difference between the powers of a constitutional court and the question whether the Tribunal can examine its own jurisdiction.

The Chamber reformulated constitutional arguments of the defense as follows:

1. Was there really a threat to the peace justifying the invocation of Chapter VII of the United Nations Charter as a legal basis for the establishment of the International Tribunal?
2. Assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. In the latter case, how can the establishment of a criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

With respect to the first question the Chamber saw a wide discretion for the Security Council in determining what constitutes a threat to peace. However, the Security Council is not unbound by law. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be.

In the eyes of the Appeals Chamber the language of Article 39 was quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

The Appeals Chamber then dealt with the question whether Chapter VII can serve as a basis for the

¹¹ See André Klip, *Yugoslav War Crimes Tribunal Declares to Have Jurisdiction to Try Tadic*, 11 INT'L ENFORCEMENT LAW REPORTER 371 (Sept. 1995).

²¹ For background on the appellate court decision, see *Yugoslav War Crimes Appeals Chamber Upholds Tribunal's Jurisdiction*, 11 INT'L ENFORCEMENT L. REP. 452 (Nov. 1995).

³¹ A hearing in the Trial Chamber on the Defense motions on the form of the indictment and the violation of the principle *ne bis in idem* took place on October 24, 1995. Decisions on these motions are expected in November.



establishment of a Tribunal. Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. The Appeals Chamber finds the legal basis for the establishment of the International Tribunal in Article 40 of the United Nations Charter. According to the Appeals Chamber it is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve the use of force. It is a negative definition.

The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter. The principle function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers. The question whether the establishment of the International Tribunal was an appropriate measure in the meaning of the Charter may not be judged *ex post facto* by their success or failure to achieve their ends (the restoration of peace).

The Appeals Chamber accepts the submissions of the Appellant that also the International Tribunal has to be established by law. Contrary to the Appellant it is convinced that the Tribunal meets these requirements. However, this must not be determined according to national standards because these find no application in an international setting. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up the Tribunal. An examination of the Statute of the International Tribunal and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law.

The second part of the decision of the Appeals Chamber deals with the question whether the exercise of primacy of the International Tribunal over national courts was justified. Contrary to the Trial Chamber, the Appeals Chamber is of the opinion that an accused, being entitled to a full defense, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defense based on violation of State sovereignty. Although the Appellant recognized the right to plead State sovereignty, this does not mean that his plea must be favorably received. In the opinion of the Appeals Chamber it would be a travesty of law and a betrayal of the universal need for justice should the concept of State sovereignty be allowed to be raised successfully against human rights. When an international tribunal such as the present one is created, it must be endowed with primacy over national courts.

The Appeals Chamber recognizes that the Appellant has a right to be tried by his national courts under his national laws, a *jus de non evocando*, but questions whether that right is exclusive. This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal.

Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. The nexus required by common Article 3 of the Geneva Convention is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.



The Appeals Chamber then deals with the question whether the Statute refers only to international armed conflicts. It identifies that the parties to the conflict apply the Geneva Conventions, although they also seem to regard the conflict as internal. The Appeals Chamber concludes that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute, and that they intended to empower the Tribunal to adjudicate violations of humanitarian law that occurred in either context.

In the interpretation of Article 3 of the Statute the Appeals Chamber holds that the article may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 of the Statute. Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; and (iv) violations of agreements binding upon parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law. Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

The Appeals Chamber specifies the conditions to be fulfilled for Article 3 to become applicable: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Like the Nürnberg Tribunal in 1946, the Hague International Tribunal accepts individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts.

The conclusion of the Appeals Chamber reads: "In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied."

In the context of the question whether Article 5 of the Statute (Crimes against humanity committed in armed conflict, whether international or internal in character) violated the *nullum crimen sine lege* principle, the Appeals Chamber held that by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*. Therefore, Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts.

In a Separate Opinion by Judge Li, it states that the doctrine of competence 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 the tribunal. With regard to the question whether Article 3 of the Statute is applicable both in an internal as in an international conflict, Judge Li is of the opinion that there is neither a general practice of states, nor an acceptance of the general practice as law by states, as is required to establish a customary rule of international law.



Judge Abi-Saab states in his Separate Opinion that one of the merits of the decision is the finding that "grave breaches" are subsumed in the "serious violations of the laws or customs of war," which resituated the Statute within the modern trend recognizing the essential identity of the legal regime of violations of the two strands of the *jus in bello*. However, in the opinion of Judge Abi-Saab 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. The division between the two articles is artificial. Article 2 should be applicable, even when the incriminating act takes place in an internal conflict.

In his 75-page Separate Opinion Judge Sidhwa sees a difference between the competences of the International Tribunal and the International Court of Justice. Unlike the International Court of Justice, whose exercise of jurisdiction is by consent, this Tribunal's jurisdiction over persons is obligatory. To put it squarely, the accused has a right to be heard and the Tribunal the right to examine the matter on the principle of *competence de la competence*. The separate opinion of Judge Sidhwa deals with the considerations of the decision in detail and with further references.

In a Separate Declaration appended to the decision, Judge Deschênes expressed his concern about the non-availability of French translations. Contrary to the Statute and the Rules of Procedure, the Appeal decision is rendered in English, which will also be the only authentic version.

XI. INTERNATIONAL FRAUD

A. British Investigate International Frauds

On October 25, 1995, the media carried news of at least two international fraud investigations involving fraudulent financial documents, indicating continuing proliferation of financial fraud schemes.¹

One investigation by British fraud squad officers concerned a program involving a \$200m "blocked funds letter" scam while a second involved "Codex UN," a scam that marketed financial documents falsely alleged to be guaranteed by the UN. The latter fraud is thought to have been sold to several wealthy individuals in Singapore, the UK and Europe, who invested up to \$500,000 each.

The Codex UN investment program enticed persons by claiming that Codex "is a committee of and acting for and on behalf of the United Nations".²

During the third week of October 1995, the Metropolitan Police Fraud Department arrested three persons who are thought to have been involved in brokering blocked funds letters. All three have been released on police bail.

Potential investors in the Codex UN scam were assured that Upon Commitment, which must be a minimum of \$100m, Codex/United Nations will issue their Agreement/Guarantee making the Beneficiary (the investor) an irrevocable undertaking for a gross annual percentage return of 192 per cent." They allegedly were told that "the Investment Programme is handled by Top 50 World Banks."

¹ For background see William Lewis, *Fraud Probe on Phoney Scheme*, FIN. TIMES, Oct. 25, 1995, at 11, col. 7.

² *Id.*