089

3297

SCSL - 2003 - 11 - PT
(3297 - 3323)

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 26 January 2004

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PT

PROSECUTION RESPONSE TO ADDITIONAL SUBMISSIONS PERTAINING TO THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: THE NATURE OF THE ARMED CONFLICT

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Walter Marcus-Jones, Senior Appellate Counsel
Mr Christopher Staker – Senior Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel
Ms Kathryn Howarth, Legal Intern

Defence Counsel:
Mr Michiel Pestman
Mr Victor Koppe
Mr Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PT

PROSECUTION RESPONSE TO ADDITIONAL SUBMISSIONS PERTAINING TO THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: THE NATURE OF THE ARMED CONFLICT

I. INTRODUCTION

1. On 14 November 2003 a Preliminary Motion was filed on behalf of the Accused Moinina Fofana (the "**Accused**") entitled Preliminary Defence Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict (the "**Preliminary Motion**")[1]. On 24 November 2003 the Prosecution filed a Response thereto (the "**Prosecution Response**")[2] and on 30 November the Defence filed a Reply to the Prosecution Response (the "**Defence Reply**")[3]. On 10 December 2003 the Trial Chamber, acting pursuant to Rule 72(E) of the Rules of Procedure and Evidence (the "**Rules**"), refer the Preliminary Motion to the Appeals Chamber. On 12 January 2004, pursuant to Rule 72(G)(i), the Defence filed a document entitled Additional Submissions pertaining to the Preliminary Motion based on lack of jurisdiction: The nature of the armed conflict ("**The Additional Submissions**").

2. The Prosecution files this Response to the Defence document entitled "Additional Submissions pertaining to the preliminary motion based on lack of jurisdiction: the nature

---

1 Registry Page ("RP") 1320-1334
2 RP 2472-2828
3 RP 2918-2941

of the armed conflict" (the "**Additional Submissions**")[4] dated 12 January 2004 and filed on behalf of Moinina Fofana.

3. The Defence argues essentially that the Special Court lacks subject matter jurisdiction to deal with crimes listed in Articles 3 and 4 of the Statute, on the basis that "jurisdiction under these provisions is limited to internal armed conflicts", while the conflict in Sierra Leone in the period covered by the Indictment was, according to the Defence, international in character. The Prosecution relies on the arguments and authorities set out in the Prosecution Response, which are not repeated in the present filing. The present document sets out additional arguments and a summary of the Prosecution position in response to the Defence Reply and the Defence Rule 72(G)(i) Submissions. For the reasons given in the Prosecution Response and the reasons set out below, the Preliminary Motion should be dismissed.

II. ARGUMENT

4. For the avoidance of doubt, the position of the Prosecution is as follows:

   (1) It is not necessary for the Prosecution to prove that the conflict was internal or international. This does not form part of the jurisdictional criteria of the offences under Articles 3 and 4 of the Statute.

   (2) The Prosecution is only required to prove that an armed conflict existed and that the alleged violations were related to that conflict.[5]

   (3) In any event, as argued at paragraph 11 of the Prosecution Response, all the crimes applicable under conflicts of an internal character are applicable under conflicts of an international character but not vice versa.[6]

   (4) Moreover, Articles 3 and 4 of the Statute apply to both international and internal conflicts, for the reasons stated in paragraphs 6-11 of the Prosecution Response.

---

[4] RP 3120-3137

[5] See, *Archbold; International Criminal Courts, Practice, Procedure & Evidence*, Chapter 11, Section IV, 11-27, referring particularly to common Article 3.

[6] Ibid. Chapter 11, Section IV, 11-26: "The separation between the laws applicable to international and internal conflicts has, however, increasingly been viewed as blurred. Under the Geneva Conventions and Additional Protocols many of the same war crimes are prohibited in both kinds of conflicts. For example, crimes during internal conflict are also crimes during international conflict; the lesser is thus included in the greater".

(5) Furthermore, the distinction between internal and international conflicts is largely irrelevant as regards war crimes. The Defence, at paragraphs 14-15 of the "Preliminary Motion" and paragraphs 15-16 of the "Defence Reply" overplay the "fundamental" nature of the distinction between international and internal conflict. This distinction, as recognized in case law, through extra-judicial opinion and in academic commentary, is now largely academic.[7] The distinction in International Humanitarian Law between international and non-international conflict now speaks principally to the formal legal basis on which to base such prosecution and not to the substantive justification underlying prosecution. In other words the substantive concern has shifted since the time the Fourth Geneva Convention and Additional Protocols were drafted. The nature of conflict has changed[8] and has become of less significance, whilst the humanitarian concerns of International Humanitarian Law relating to harm to victims has grown in significance. What remains therefore is a largely formalistic requirement; that in order to prosecute these crimes, what is needed is a legal instrument; the legal instrument utilized depends on the nature of the conflict. Here a determination was made by the drafters of the Statute that the conflict was internal, therefore the legal instruments selected, for formalistic purposes, were those referring principally to internal conflict.

(6) If, contrary to the Prosecution's submission, the criminal responsibility of the Accused were to depend on establishing the non-international character of the armed conflict, this as stated at paragraphs 13-14 of the "Prosecution Response" would be a matter of evidence to be established at the trial.

---

[7] See merely by way of example, *Prosecution v Tadic; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 "Tadic: Jurisdiction Decision"*. There the Appeals Chamber found that Article 3 of the Statute of the ICTY included common Article 3 to the Geneva Conventions and that the prohibitions contained in common Article 3 are applicable under customary international law to all conflicts, whether international or internal: "with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant" (*Tadic, Jurisdiction Decision*, para 102). Geoffrey Robertson QC, *Crimes Against Humanity, The Struggle for Global Justice* (Penguin, London), page 190: "It was the achievement of international human rights law, by the time of the Tadic case in 1996 to render largely academic this difference between 'international' and 'internal' atrocities although the distinction may still have some significance".

[8] In other words, at the time the Geneva Conventions were drafted a sharp distinction was made between international state based conflict and internal conflict. (This distinction was followed in the Additional Protocols). The nature of conflict has changed and can no longer be considered in such rigid terms. (Some argue that it has never in fact been this clear cut). Further, the substantive significance associated with this distinction has waned as the substantive concerns of international law and international relations have evolved.

(7) This issue is patently being raised by the Defence as a preliminary challenge to the jurisdiction of the Court. However, at the same time, the Defence at paragraph 10 of their additional submissions argues that establishing the nature of the conflict is an element of the crime to be made out under Articles 3 and 4 of the Statute. In this regard, the argument made by the Defence is logically incoherent. If the nature of the conflict is an element of the crime to be proved at trial, which the Prosecution does not concede, then the Defence need not raise this argument in the form of a preliminary challenge to jurisdiction. Indeed to do so is a misuse of the processes of the court. If issues need to be determined upon evidence, then, on the Defence's own arguments, they should be determined at trial and not by way of a preliminary challenge to the jurisdiction.

(8) Moreover, the fact that the Defence should not be permitted to raise such a challenge at this stage, is further underlined by paragraphs 14-62 of the Additional Submissions of the Defence entitled "**evidence as to the nature of the conflict**".

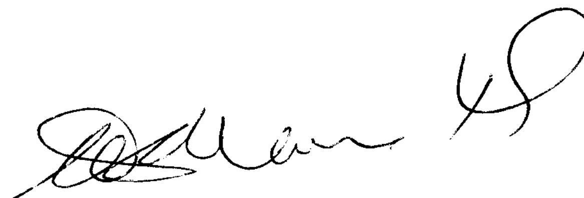
III. CONCLUSION

5. For the aforementioned reasons dealt with more fully in the Prosecution Response, the Prosecution submits that the arguments of the Defence are wholly misconceived and that the Defence submission that the Special Court lacks jurisdiction to try the Accused in relation to Articles 3 and 4 of the Statute should be rejected in its entirety.

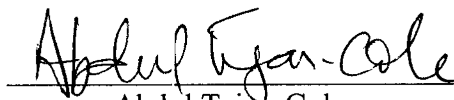
Freetown 26 January 2004

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor



Walter Marcus-Jones
~~Senior~~ Appellate Counsel



Abdul Tejan-Cole
Appellate Counsel

PROSECUTION INDEX OF AUTHORITIES

1. *Archbold International Criminal Courts, Practice, Procedure & Evidence* [Extract].

2. *The Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* IT-94-1-AR72, 2 October 1995, Appeal Chamber [extract].

3. Geoffrey Robertson QC, *Crimes Against Humanity, The Struggle for Global Justice* (Penguin: London) [extract].

ANNEX 1:

Archbold International Criminal Courts, Practice, Procedure & Evidence [Extract].

3304

Archbold

International Criminal Courts
Practice,
Procedure and Evidence

S305

AUSTRALIA
Law Book Co.
Sydney

CANADA AND USA
Carswell
Toronto

HONG KONG
Sweet & Maxwell Asia

NEW ZEALAND
Brookers
Wellington

SINGAPORE AND MALAYSIA
Sweet & Maxwell
Singapore and Kuala Lumpur

A CIP catalogue record for this book is available from the British Library

ISBN 0 421 77270 0

No natural forests were destroyed to make this product; only farmed timber was used and replanted

All rights reserved.
Crown Copyright material is reproduced with the permission of the Controller of HMSO and the Queen's Printer for Scotland.
No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior written permission, except for permitted fair dealing under the Copyright, Designs and Patents Act 1988, or in accordance with the terms of a licence issued by the Copyright Licensing Agency in respect of photocopying and/or reprographic reproduction. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgement of author, publisher and source must be given.

©
Sweet & Maxwell Limited
2003

be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed."

There is no "prisoner of war" status in internal conflict, and Additional Protocol II does not contain any provisions on the subject.

In the Judgment in the *Delalic et al.* case, the Trial Chamber considered whether any of the victims qualified as prisoners of war, holding that it is difficult, on the evidence presented to it, to conclude that any of the victims ... satisfied these requirements. While it is apparent that some of the persons detained ... had been in possession of weapons and may be considered to have participated to some degree in 'hostilities', this is not sufficient to render them entitled to prisoner of war status" (para. 269). In addition, the Trial Chamber was not convinced that the ... detainees constituted a *levée en masse*. This concept refers to a situation where territory has not yet been occupied, but is being invaded by an external force, and the local inhabitants of areas in the line of this invasion take up arms to resist and defend their homes ... Article 4(A)(6) undoubtedly places a somewhat high burden on local populations to behave as if they were professional soldiers" (para. 270).

The Chamber noted that in international armed conflict there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war ... he or she necessarily falls within the ambit of Convention IV" (para. 271). Also see Article 50 of Additional Protocol I; Article 5 of Geneva Convention IV; and Article 5 of Geneva Convention III, which requires that where there is any doubt whether a person belongs to any of the recognised prisoner of war categories, he must be granted the protection of the Convention until his status is determined by a competent tribunal.

[The next paragraph is § 11–26.]

C. Offences Prohibited in all Conflicts

11–26 As mentioned above, the laws prohibiting war crimes have traditionally been divided between those applicable to international (inter-State) and to internal (domestic) armed conflicts. Most notably, the scheme of the 1949 Geneva Conventions distinguishes between breaches punishable during international conflict and the more limited set of rules that apply during non-international conflict as provided for in Article 3 common to all four of the Geneva Conventions. The 1977 Protocols additional to the Conventions re-enforce this classification: Additional Protocol I applies to international armed conflicts, whereas Additional Protocol II applies to internal armed conflicts.

The separation between the laws applicable to international and internal conflicts has, however, increasingly been viewed as blurred. Under the Geneva Conventions and Additional Protocols many of the same war crimes are prohibited in both kinds of conflicts. For example, crimes during internal conflict are also crimes during international conflict; the lesser is thus included in the greater.

11–27 More significantly, it is now accepted that certain rules apply irrespective of the nature of the conflict. The Appeals Chamber's *Tadic* Jurisdiction Decision established that while Article 2 of the ICTY Statute undoubtedly applies only to international armed conflicts, this does not mean that Article 3 of the Statute therefore applies only to internal conflicts. Article 3 incorporates all serious violations of international humanitarian law other than the offences specifically

mentioned under the Statute's other heads of jurisdiction *ratione materiae* (see *Tadic* Jurisdiction Decision, paras 89–93). The Appeals Chamber found that Article 3 of the Statute included common Article 3 to the Geneva Conventions and that the prohibitions contained in common Article 3 are applicable under customary international law to all conflicts, whether international or internal: "with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant" (*Tadic* Jurisdiction Decision, para. 102). Violations of these rules may be charged under Article 3 of the ICTY Statute for any armed conflict, irrespective of its character. The Prosecutor is, therefore, only required to prove that an armed conflict existed and that the alleged violations were related to such a conflict. It is not necessary for the Prosecutor to specifically prove that the conflict was either international or internal.

Not all rules governing international armed conflict have been extended to apply to internal conflict. When the extension has occurred it has not "taken place in the form of a full and mechanical transplant . . . rather, the general essence of those rules, and not the detailed regulation the may contain, has become applicable to internal conflicts" (*Tadic* Jurisdiction Decision, para. 126). Article 3 of the Statute thus includes both violations that apply to all conflicts (such as Common Article 3) and those that apply only in international armed conflict. The other offences which can be charged under Article 3 of the Statute irrespective of the nature of the conflict are unlawful attacks on civilians and civilian objects, including cultural property (see *Tadic* Jurisdiction Decision, para. 127).

V. GRAVE BREACHES OF THE GENEVA CONVENTIONS

A. WILFUL KILLING

11–28 The elements of the grave breach of wilful killing were set out in the *Celebici* case (*Prosecutor v. Delalic et al.*, Judgment, Trial Chamber, November 16, 1998). The accused were charged with both "wilful killing" under Article 2 and with "murder" under Article 3, a common practice followed in numerous other cases. The Trial Chamber first determined that there is no qualitative distinction between the two concepts; they differ only in the jurisdictional requirements. The rationale the Trial Chamber followed was that the primary purpose behind common Article 3 was to extend the elementary considerations of humanity to internal conflicts. Therefore, just as it is prohibited to kill protected persons in international armed conflict, "so it is prohibited to kill those taking no active part in hostilities which constitute an internal armed conflict. In this spirit of equality of protection, there can be no reason to attach meaning to the difference of terminology utilised in common article 3 and the articles referring to 'grave breaches' of the Conventions" (para. 423).

11–29 As for the elements of the grave breach of "wilful killing", the Trial Chamber held in respect of the physical act required that the death of the victim constitutes the *actus reus*, the substantial cause of which is the act or omission of the accused. In respect of the *mens rea* the Trial Chamber concluded as follows:

> "the Trial Chamber is in no doubt that the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life" (para. 439).

It is important to note, as the Trial Chamber Judgment in *Delalic et al.* demonstrated, that there are numerous ways of describing the elements of "wilful

ANNEX 2:

The Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, Appeal Chamber [extract].

6491 3309

UNITED
NATIONS

D 6491 - D 6413

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-AR72

Date: 2 October 1995

Original: English

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**

THE PROSECUTOR

v.

DUŠKO TADIĆ a/k/a/ "DULE"

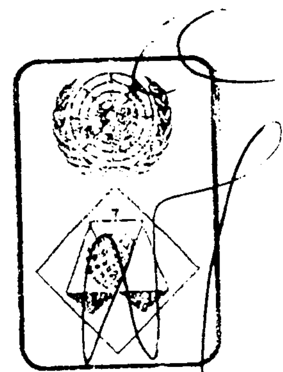
DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

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

Counsel for the Accused:

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



99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

"[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:

> (1) The intentional bombing of civilian populations is illegal;
>
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
>
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (League of Nations, O.J. Spec. Supp. 183, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army*, *in* Mao Tse-Tung, 4 SELECTED WORKS

(1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women". (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army*, in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [*sic*]. It also expects the rebels – and makes an urgent appeal to them to that effect – to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention *[sic]* is being respected, particularly in the matter of the treatment of prisoners and the ban

> against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in American Journal of International Law (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major-General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (*See* A.H.M. Kirk-Greene, 1 CRISIS AND CONFLICT IN NIGERIA, A DOCUMENTARY SOURCEBOOK 1966-1969, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (*see* New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (*See* Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities thus confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102).

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to

apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms". (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)[3]

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed

---

[3] "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el artículo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayoría de la población y estén orientados a defender sus libertades fundamentales."

ANNEX 3:

Geoffrey Robertson QC, *Crimes Against Humanity, The Struggle for Global Justice* (Penguin: London) [extract].

3316

GEOFFREY ROBERTSON QC

Crimes Against Humanity

THE STRUGGLE FOR GLOBAL JUSTICE

SECOND EDITION

PENGUIN BOOKS

3317

For Julius and Georgina

PENGUIN BOOKS

Published by the Penguin Group
Penguin Books Ltd, 80 Strand, London WC2R 0RL, England
Penguin Putnam Inc., 375 Hudson Street, New York, New York 10014, USA
Penguin Books Australia Ltd, 250 Camberwell Road, Camberwell, Victoria 3124, Australia
Penguin Books Canada Ltd, 10 Alcorn Avenue, Toronto, Ontario, Canada M4V 3B2
Penguin Books India (P) Ltd, 11, Community Centre, Panchsheel Park, New Delhi – 110 017, India
Penguin Books (NZ) Ltd, Cnr Rosedale and Airborne Roads, Albany, Auckland, New Zealand
Penguin Books (South Africa) (Pty) Ltd, 24 Sturdee Avenue, Rosebank 2196, South Africa

Penguin Books Ltd, Registered Offices: 80 Strand, London WC2R 0RL, England

www.penguin.com

First published by Allen Lane 1999
Published in Penguin Books with new material 2000
Second edition 2002
1

Copyright © Geoffrey Robertson 1999, 2000, 2002
All rights reserved

The moral right of the author has been asserted

Typeset by Rowland Phototypesetting Ltd, Bury St Edmunds, Suffolk
Printed in England by Clays Ltd, St Ives plc

Except in the United States of America, this book is sold subject
to the condition that it shall not, by way of trade or otherwise, be lent,
re-sold, hired out, or otherwise circulated without the publisher's
prior consent in any form of binding or cover other than that in
which it is published and without a similar condition including this
condition being imposed on the subsequent purchaser

3318

THE GENEVA CONVENTIONS

THE 1949 CONVENTIONS

There was one final achievement of humanitarian law before the Cold War set in to ferment conflicts of a kind which the post-war peacemakers failed to envisage. The four Geneva Conventions of 1949 state the principles of international law as they had by then emerged in relation to the treatment of: sick and wounded combatants on land (I) and at sea (II), prisoners-of-war (III) and civilians (IV).

The 1949 Geneva Conventions provide:

I 'For humane care of sick and wounded combatants on land', irrespective of their race, religion or politics; immunity for hospitals and medical personnel and army chaplains; special recognition of the role of the Red Cross and Red Crescent organizations.

II Similar provisions applied to those 'wounded, sick or shipwrecked at sea', with detailed rules for the immunity of hospital ships.

III 'Rules for securing the humane treatment of prisoners-of-war', protecting them from being used for military labour or in medical experiments or as objects of public insult or curiosity. Use of POWs as hostages in combat zones (i.e. to deter enemy fire) is absolutely forbidden, as is torture or any form of coercion designed to extract information. The prisoner must give his name, rank, regimental number and date of birth: on thus achieving POW status he is entitled to 'be quartered under conditions as favourable as those for the forces of the detaining power' and to have nutritious food, warm clothing and bedding, and permission to pray and to smoke. POWs are to receive monthly pay (75 Swiss francs for generals, 8 Swiss francs for privates) and must be allowed to receive food parcels and send and receive mail. They must be given one musical instrument of their choice (a requirement in memory of the music at Terezin and other ghettos). They must be permitted to organize discipline in their own camps, and to make formal complaints about their treatment.

3319

IV 'For the Protection of Civilian Persons in Time of War'. This Convention secures humane treatment for persons in occupied territories and those who have been interned on suspicion of involvement in resistance movements. The former class of 'protected persons' are entitled to respect for their family and customs and religion, and women are guaranteed protection from rape and forced prostitution. Civilians must not be used for reprisals or as hostages, or as forced labourers or subjects of mass deportations. The occupying power cannot punish civilians for activities prior to the occupation, and is entitled to execute them only for acts of spying, sabotage or murder.

These Conventions begin, most importantly, with three articles which are common to each of them. The first (common Article 1) pledges respect for the Convention 'in all circumstances', thereby excluding any excuse of national necessity or self-defence. Common Article 2 applies the Convention rules not only to declared wars but to 'any other armed conflict' arising among the parties, and requires signatories to abide by the rules even if other states do not (thus excluding a familiar reservation to previous treaties entered by states only prepared to stick to the rules as long as their enemies did). The point at which 'armed conflict' begins, thereby attracting the Geneva regime, is not defined. It would require hostile acts by an army rather than a police force, and would seem to exclude occasional border skirmishes and destabilizing tactics which did not involve the use of force.

It is important to note that the Geneva Convention scheme which state parties promise to enforce by tracking down individuals suspected of 'grave breaches' and putting them on trial applies only to crimes committed in the course of international armed conflict. Although common Article 3 promises a minimum of humane treatment in 'armed conflict not of an international character' to all civilians and non-combatants, this promise comes without an enforcement mechanism for breaches, however grave. This is because in 1949 no state was prepared to allow international law to intrude upon its sovereignty when it came to putting down insurgencies and armed revolt. Genocide apart, states were not ready to concede to the international community a jurisdiction by treaty to punish their officials

3320

for torture or other brutalities inflicted upon citizens within their own borders. It was the achievement of international human rights law, by the time of the *Tadić Case* in 1996, to render largely academic this difference between 'international' and 'internal' atrocities although the distinction may still have some significance. For example, the Geneva Conventions with their 'grave breaches' regime did not apply to the civil war in Afghanistan between the Taliban and the Northern Alliance until October 2001 when the United States intervened with B52s and turned the fight into an international armed conflict. Even then, the US denied that Convention III was applicable to Taliban and al-Qaida fighters captured on the battlefield, since the former were not in a military uniform and the latter were, in addition, under no clear chain of command (see chapter 12). Common Article 3 extends the promise of a minimum standard of humanity to wars that are not declared, and to violent insurgencies, internecine struggles and armed resistance to state power (although not to riots, criminal disorder or sporadic outbreaks of civil disturbance). There has been some dispute over the level of internal violence covered by common Article 3: there would have to be fighting between two armed forces with the rebels having a sufficiently organized command structure to impose Convention discipline.

Common Article 3 is apt to protect all non-combatants who are caught in the crossfire of a civil war. It specifically prohibits murder, torture, hostage-taking, 'outrages upon personal dignity' and extra-judicial executions, and covers any military, police or guerrilla action which has the deliberate result of killing or maiming civilians or prisoners. It applies to the 'High Contracting Parties to the Conventions', which means virtually every state, and must also as a matter of customary law apply by analogy to the leaders of organized guerrilla forces, since those who seek forcibly to control the state take on the basic humanitarian duties of the government they wish to supplant.

Common Article 3 helps to integrate human rights with the law of war. It was no mean achievement to persuade colonial powers that their right to put down rebellions should be limited by some basic humanitarian duties to citizens and to injured rebels. Nuremberg idealism played some part (as, more craftily, did the Soviet Union's desire for a propaganda stick with which to beat Western states

opposed to the rebellions it was fomenting in their colonies). Asian countries, led by Burma, opposed the article on the ground that it was bound to 'incite and encourage insurgency', apparently by encouraging rebels to believe they would be protected from summary execution and by giving their causes some form of legitimacy by making *them* subject to international legal obligations. At a sensible level, common Article 3 does no more than record the obligation undertaken by all state parties to observe basic human rights in times of conflict, thereby imparting to conflicts within a state an obligation recognized in wars between states.[6] The position has been confused, however, by a 1977 protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) which covers similar ground to common Article 3. Here because the provisions were meant to state international law the diplomats who did the drafting were much more careful, and clearly wished to take a step backwards. Their definition of armed conflict is much narrower (the rebel force must possess troops and control territory).

Each state has a duty, under articles common to the four Conventions which deal with 'repression of abuses and infractions', to search out suspects alleged to have committed 'grave breaches' of the Conventions and to put them on trial, regardless of their nationality. 'Grave breaches' are crimes so serious that in 1949 states were prepared, by ratifying the Conventions, to undertake to put the suspect on trial themselves or to extradite him to a country prepared to do so. They do *not* encompass crimes against common Article 3 committed in civil war, but include the following crimes if committed in *international* conflict:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly.[7]

This is, inevitably, a 'catch as catch can' approach, in which few in practice are caught. Occasionally, ratifying states have acted to bring their own officers to justice – Lieutenant Calley for the My Lai massacre in Vietnam, for example. In Calley's case, however, politics (in the form of President Richard Nixon) intervened to ensure that justice was not done. Calley was properly convicted of complicity in

the deaths of seventy innocent Vietnamese villagers by ordering his troops to 'waste them': he personally shot a 2-year-old child. He was sentenced to life imprisonment, which Nixon ordered to be reduced to three years. Calley served only three days in prison, spending his sentence at his home on a military base, replete with live-in lover.

Convention III (treatment of prisoners-of-war) and Convention IV (treatment of civilians) adopt an enforcement mechanism through the agency of 'protecting powers' – one nominated by each combatant – tasked with visiting prisons and war zones and generally monitoring the treatment of persons caught up in the conflict. This was always an unworkable idea (adopted from the role played by 'seconds' at a duel) and has generally been ignored: in only four conflicts have 'protecting powers' been appointed, and their role has been limited to exchanges of diplomatic niceties. More helpful work on the ground has been done by the International Committee of the Red Cross (ICRC), whose role is written into the Conventions (common Article 3 gives it a right to enter into battlefields and war zones). However, the Red Cross, to justify this privilege, makes a fetish of its commitment to confidentiality, both in observations within war zones and in its dealings with governments and militias. Its present ethics of humanitarian intervention (which are not shared by other aid agencies) require its workers to turn a blind eye to human rights violations, in the belief that their silence is the price of being invited back, or into the next war zone. It has declined for this reason to allow its employees, and even former employees, to give evidence to the Hague and Arusha Tribunals, which have upheld this privilege against testifying although it deprives them of valuable first-hand accounts of atrocities and reliable evidence against those responsible. The problem is important, since Red Cross officials always acquaint commanders with evidence of atrocities being committed by their troops, and if they take no action then these commanders will be guilty of command responsibility for any war crimes those troops subsequently commit. Their conviction, however, may depend on evidence from the Red Cross officials – who will refuse to breach confidence. The ICRC was permitted to inspect the prison at Guantanamo Bay, but its report, presented to the US authorities, could not be made public, despite international concern over the conditions in which the detainees were

being kept. In these circumstances, ICRC inspection is a very limited safeguard.

THE 1977 PROTOCOLS

The Geneva Convention system comprised a fine set of rules for the protection of the victims of war, but said nothing sensible about enforcement. In 1974, the Swiss government (which a cynic might think to have profited from these Conventions rather more than the victims of war) issued invitations to a diplomatic talk-fest which lasted on and off for three years and resulted in even more rules and even less prospect of enforcing them. As a drafting exercise, Protocols I and II serve to update the language of the 1949 Conventions and to elaborate, in particular, the duties owed to civilian populations by military commanders. Protocol I summarizes, in Article 35, the three basic rules of war:

(1) In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
(2) It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
(3) It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Rule 3 is elaborated in some detail, confining bombardment to military targets in the hope of minimizing civilian casualties and avoiding damage to churches, historic monuments or other cultural property. Special provision is made for the treatment of spies and mercenaries (the latter making their first appearance in these treaties) and henceforth warring parties must take care not to cause serious damage to the natural environment. Specially defined protection is given to refugees, women and children, and even to journalists, who on the production of an identity card from their government are to be accorded civilian status so long as they take no action inconsistent with that status (a reference, presumably, to shooting for one side, not to the common journalistic practice of propagating one side's disinformation).