The First Steps of the International Criminal Tribunal for the Former Yugoslavia

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The International Criminal Tribunal for the Former Yugoslavia,[1] which was established by Security Council Resolution 827 of 25 May 1993 and held its first plenary session on 17 November 1993, became fully operational as a judicial body in November 1994 with two measures. These were: I. the indictment and the warrants of arrest issued against Dragan Nikolic, a former commander of the Susica camp in the Republic of Bosnia-Herzegovina and II. the request for deferral by the Federal Republic of Germany of the criminal proceedings being carried out in its national courts in the matter of Dusko Tadic.

This paper will analyze the most relevant legal questions which have been raised by these measures and try to outline the way in which the International Tribunal dealt with them by applying the provisions of the Statute[2] and of the Rules of Procedure and Evidence.[3]

I. The Nikolic Case

The first indictment which was issued by the Prosecutor of the International Tribunal raises two problems worth examining: firstly, the Prosecutor's classification of the same offences under different headings; secondly, the transmission of a warrant for arrest to a non-State entity such as the Bosnian Serb administration in Pale, for execution in the territory controlled by that entity.

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1 It will hereinafter be called the International Tribunal.

2 The Statute of the International Tribunal is Annex to the UN Secretary-General's Report S/25704, 3 May 1993, which was approved by Security Council Resolution 827.

3 Adopted by the International Tribunal on 11 February 1994 (UN Doc. IT/32, 14 March 1994), reprinted in 33 ILM (1994) 493.

6 EJIL (1995) 134-143

1. The indictment against the Serb Dragan Nikolic was framed by the Prosecutor and transmitted on 4 November 1994 for confirmation to the competent Judge (E. Odio Benito from Costa Rica), i.e., the Judge previously designated by the Tribunal's President. In it, Nikolic was charged with grave breaches of the Fourth Geneva Convention of 1949, violations of the laws or customs of war and crimes against humanity. The indictment contains twenty-four counts almost all of which are framed in the alternative. This form of indictment tends to be chosen by the prosecution when a person is accused of an offence but it is not obvious which offence he has committed.[4] In the indictment against Nikolic, for example, the killing of eight detainees is characterized both as a grave breach of the Fourth Geneva Convention (in this case, described as 'wilful killing' according to Article 2(a) of the Statute) and as a violation of the laws or customs of war (referred to as 'murder' and said to be covered by Article 3 of the Statute, though not specifically set out in this article), as well as a crime against humanity, contrary to common Article 3(1)(a) of the Geneva Conventions (again described as 'murder' according to Article 5(a) of the Statute). The choice of the Tribunal's Prosecutor for alternative counts appears to be linked to the question of the nature of the conflict in which such acts were committed: is the conflict internal or international? If the judges are satisfied that at the time and in the place of the commission of the offence the armed conflict was *international*, Nikolic may be found guilty of a grave breach of the Fourth Geneva Convention; however, if the conflict is deemed to be *internal*, Nikolic may be convicted for crimes against humanity or a violation of common Article 3 of the Geneva Conventions. Therefore, it will be for the Trial Chamber to choose the count it considers to be the most appropriate to the offence, in the light of the character of the armed conflict in which the offence took place. In any event, it would seem that the defendant might be convicted of only one of the offences framed in the alternative.

2. After the confirmation of the indictment by the competent Judge and the issue of the warrants of arrest, the Registrar of the International Tribunal transmitted the documents to the 'national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him in a language he understands and that he be cautioned in that language' (Rule 55(B)). In this case, the Registrar forwarded the warrants for the arrest of Nikolic to the Republic of Bosnia-Herzegovina and to the Bosnian Serb administration in Pale, as the accused was supposed to be residing in one of these places. The fact that the territory under the administration of Pale has not been recognized as a State by the international community and that Rule 55(B) does not mention non-State entities as possible addressees of arrest warrants might have led the Registrar to consider transmitting the documents to the authorities of Serbia-

4 C.J. Emmins, *A Practical Approach to Criminal Procedure* (3rd ed., 1985) 57.

Montenegro. Such a decision, however, would probably have been inappropriate, considering the interruption of the relations between Pale and Belgrade (although the commission of the offences in question dates back to the time when the Bosnian Serbs were supported by Belgrade). In order to prevent an argument that the transmission of the arrest warrant to the administration of Pale amounts to an implicit recognition of the statehood of the territory, it is hoped that Rule 55(B) will be amended so as to cover non-State entities as possible addressees of arrest warrants.

II. The Tadic Case

1. The Serb Dusko Tadic was arrested on 13 February 1994 in Munich after claims by Muslim refugees to the effect that he was one of the authors of the atrocities committed in the Prijedor region of Bosnia-Herzegovina. The German authorities conducted investigations on Tadic and indicted him under German law[5] for genocide on 7 November 1994. Meanwhile, during an investigation of serious violations of humanitarian law in the Prijedor area, the Deputy Prosecutor of the International Tribunal became aware of the alleged claims against Tadic. Since the Tadic case appeared to relate to a crime falling within the jurisdiction of the International Tribunal, the Prosecutor requested the German Government pursuant to Rule 8[6] to forward all relevant information in respect of that investigation. On the basis of the file which Germany had promptly handed over, the Prosecutor deemed that the Tadic investigation was closely related to and involved significant factual and legal questions relevant to his investigations concerning Prijedor. The Prosecutor therefore filed an application (12 October 1994) to the Trial Chamber according to Rule 9[7] proposing that a formal request for deferral in the matter of Tadic be issued to Germany.

The Prosecutor's application was considered by the Trial Chamber[8] in the public hearing of 8 November 1994 in which representatives of the Government of Germany as well as the counsel for Tadic appeared as *amici curiae* pursuant to Rule 74.[9] The Trial Chamber upheld the Prosecutor's application and issued a formal

5 Interestingly, paragraph 220a of the German Penal Code criminalizes genocide irrespective of the place of commission of the offence and the nationality of the offender.

6 It reads as follows: 'Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the national courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 29(1) of the Statute'.

7 For the relevant text of the Rule see the following page.

8 The Trial Chamber was composed of Judge A. Karibi-Whyte, presiding Judge, Judge E. Odio Benito and Judge C. Jorda.

9 Rule 74 provides as follows: 'A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber'.

request to Germany to defer to the International Tribunal the proceedings concerning Tadic and to forward the results of the investigation. In addition, it invited the German Government to fill a legislative and administrative gap which was preventing it from complying with the formal request. This gap is discussed below.

2. On what grounds did the Trial Chamber request the deferral of a case pending before German courts? Could the request of the International Tribunal give rise to a conflict of jurisdiction with Germany – which was certainly entitled to investigate and prosecute a person apprehended in its territory for crimes regulated by its legislation?

In Article 9,[10] paragraph 1, the Statute of the International Tribunal sets out the concurrent jurisdiction with national courts, but specifies in paragraph 2 that the International Tribunal shall have 'primacy' over national courts and may request a national court to defer to its competence at any stage of the procedure. This provision is not intended to preclude the exercise of a State's jurisdiction over serious violations of international humanitarian law committed in former Yugoslavia. On the contrary, domestic courts may lighten the burden of the work of the International Tribunal by conducting criminal proceedings against persons arrested on their territory and suspected of breaches of international humanitarian law.[11] The Statute empowers the International Tribunal to request the deferral of a case to its competence only *in general terms* and does not set forth the possible reasons for deferral. Such reasons are specified in Rule 9.

According to Rule 9,

> Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the national courts of any state:
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> (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
>
> (ii) there is lack of impartiality or independence or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
>
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,
>
> the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that the national court defer to the competence of the Tribunal.

10 Article 9 provides:
'1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'

11 See UN Secretary-General's Report, at 16, para. 64-65.

Rules 9 (i) and (ii) are an almost *verbatim* repetition of Article 10[12] of the Statute dealing with the principle of the *non-bis-in-idem*. According to it, a person who has already been tried by a domestic court for serious violations of international humanitarian law may be proceeded against by the International Tribunal only if at least one of the conditions established in Rule 9 (i) or (ii) is fulfilled.[13] As to Rule 9 (iii), its broad formulation leads us to focus on the manner in which the Prosecutor on the one hand and the Trial Chamber on the other interpreted that ground for deferral in the first case in which this rule has been referred to, i. e. the Tadic case.

The Prosecutor made clear in the public hearing[14] that he was considering the issue of several indictments against persons who were involved in serious violations of humanitarian law in the Prijedor region of Bosnia-Herzegovina and that Tadic was among them. In that area a policy of ethnic cleansing had been carried out in 1992. This is attested to the Declaration of attorney M.J. Keegan annexed to the Prosecutor's Application. The Prosecutor specified that in the preparation of the indictments he would

> rely on the evidence of the witnesses located by the German investigators in Germany and other witnesses who have been located and interviewed by members of the staff of [his] Office in Germany and elsewhere.[15]

The indictments would also include additional 'serious offences in respect of which the German authorities have no evidence and the other accused will be persons who are outside Germany'.[16] Furthermore, the legal questions which would probably arise in the course of the trial against Tadic would arise also in a trial against his co-offenders.[17] Finally, as far as the factual questions are concerned, the events which

12 Article 10 establishes that:
'1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal if:
(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served'.

13 It should be remarked that Article 10 prohibits national courts from trying persons for the same acts for which they have already been tried by the International Tribunal without exception, whereas there are exceptions to the prohibition on the International Tribunal from re-trying acts already tried by national courts. Thus, the Statute deals in an asymmetrical way with the principle of *non-bis-in-idem*.

14 See the preliminary version of the *Transcript of the First Public Hearing*, Case No. 1 of 1994, 8 November 1994, (hereinafter referred to as *Transcript)* at 5-9.

15 *Transcript*, at 8.

16 Ibid.

17 Ibid., at 9.

occurred in the Prijedor area in 1992 are part of an important investigation by the Office of the Prosecutor.[18] The Prosecutor concluded that the Tadic case clearly fell under subsection (iii) of Rule 9 and consequently proposed to the Trial Chamber to forward a formal request for deferral to Germany.

The Trial Chamber took up the reasons for deferral set forth by the Prosecutor and expatiated on the interpretation of Rule 9 (iii). In particular, it pointed out that to grant the application in the matter of Tadic the Prosecutor had to establish that:

a) there is an investigation currently being conducted by the Prosecutor into crimes within the jurisdiction of the International Tribunal alleged to have taken place in the Prijedor region of Bosnia-Herzegovina;
b) a national investigation or criminal proceedings has been instigated against the said Dusko Tadic by the Government of the Federal Republic of Germany in respect of crimes alleged to have taken place in the said Prijedor region;
c) the issue in the national investigation or criminal proceedings is closely related to, or may have implication and common significant factual or legal questions, for the Prosecutor.[19]

The Trial Chamber then satisfied itself that the Prosecutor was investigating crimes committed in Prijedor, including those allegedly committed by Tadic; that several indictments were to be submitted from that investigation; that both the Government of Germany and the counsel for Tadic had confirmed that Tadic was subject to criminal proceedings in German courts and finally that the Declaration of M.J. Keegan, annexed to the Prosecutor's Application,

> clearly [supported] the claim that the issues in the proceedings instituted by the Government of the Federal Republic of Germany against the said Dusko Tadic involve significant factual or legal questions which have an impact on the investigations instituted by the Prosecutor in respect of serious violations of international humanitarian law in the Prijedor area.[20]

The Trial Chamber determined also that the Tadic case involved crimes covered by the investigation being conducted by the Prosecutor in Prijedor, namely genocide and crimes against humanity, and that there was a close link between the Tadic case and the cases of other alleged co-offenders.. In light of the foregoing, the Trial Chamber stated that

> this International Tribunal would not be acting in the proper interests of justice if some of these serious violations of international humanitarian law committed in the same territory and during the same period of time by alleged co-offenders, who are party to the same

18 Ibid., at 9-10.
19 Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the matter of Dusko Tadic, 8 November 1994, (hereinafter mentioned as Case No. IT-94-1-D) at 7, para. 11.
20 Ibid., at 8, para. 14.

> criminal plan, were judged in national courts and others before this International Tribunal.[21]

3. As to the relief of the formal request for deferral, the Rules of Procedure and Evidence offered various possibilities. Pursuant to Rule 10(A) a request may be issued to a national court to defer to the competence of the Tribunal, i.e.,

> If it appears to the Trial Chamber seized of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate...

Nonetheless, a legal obstacle needed to be considered by the Trial Chamber before the request for deferral was issued: the inability of Germany to

> comply immediately with the provisions of any formal order for deferral that may be issued by the International Tribunal, due to a conflict with the municipal laws and the Constitution of the Federal Republic of Germany.[22]

The conflict at issue concerns the non-enactment of implementing legislation in the German territory, notwithstanding the decision of paragraph 4 of Security Council Resolution 827 (1993) that

> all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.[23]

Since the adoption of Resolution 827 on the basis of Chapter VII of the UN Charter, the attention of States has been often drawn to the obligation of close cooperation with the International Tribunal. In particular, the principle was affirmed in the Note from the UN Secretary-General of 2 June 1993[24] and in a letter of the President of the International Tribunal dated 30 November 1993. The letter pointed out the necessity for States a) to indicate the authority to which requests emanating from the International Tribunal should be submitted and b) to take legislative and regulatory measures to implement the Statute. So far, Germany has designated the Ministry of Justice as the competent organ to deal with the International Tribunal's orders but has failed to adopt implementing legislation to give effect to measures.

The debate on the duty to enact domestic provisions implementing international obligations, and in particular United Nations resolutions, has been lengthy and is still ongoing. The German Constitution does not deal with the question of receiving

21 Ibid., at 12, para. 18.
22 Ibid., at 5, para. 7.
23 Article 29 refers to the cooperation and judicial assistance of States with the International Tribunal in the 'investigation and prosecution of persons accused of committing serious violations of international humanitarian law' and obliges States to abide 'without undue delay' by the orders issued by a Trial Chamber.
24 Note SCA/8/93(7), 2 June 1993.

binding resolutions of international organizations into municipal legislation[25] and a large body of the legal literature (including German scholars) share the view that the Security Council resolutions passed under Chapter VII of the UN Charter have a binding character but are not self-executing.[26] Their formal reception into domestic law would therefore be indispensable to give them effect[27] in the territory of Germany. As a result of the non-incorporation of UN Resolution 827 into its municipal system, could Germany be held responsible for breaching an international obligation (considering also Rule 58 which affirms that the States' duty to cooperate with the International Tribunal 'shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned')? The Statute only stipulates that in case of failure to comply with a request for deferral, the Trial Chamber may ask the President to report the matter to the Security Council,[28] which is entitled to take any measure it considers to be appropriate, including enforcement actions.

4. The Trial Chamber reacted quite firmly to the legislative obstacle which prevented Germany from abiding by its obligations with regard to the International Tribunal. The representatives of the German Government, who appeared before the

25 Among the European countries only the Constitutions of the Netherlands (Articles 92-95 of the 1983 Constitution), Ireland (Article 29.4.3 of the 1972 Constitution) and Portugal (Article 8.3 of the 1977 Constitution) stipulate that binding acts of International Organizations are automatically incorporated into domestic laws.

26 See Soerensen, 'General Principles of Public International Law', *RCADI* (1960-III) 120ff.; Waldock, 'General Course on Public International Law', *RCADI* (1962-II) 128ff.; Skubiszewski, 'Enactment of Law by International Organizations', 41 *BYbIL* (1965-66) 188-274; Lauterpacht, 'Implementation of Decisions of International Organizations through National Courts', in S. Schwebel (ed.), *The Effectiveness of International Decisions* (1971) 57; Pinto, 'Les résolutions des organisations internationales. A propos des rapports entre le droit interne et le droit international', in M. Bothe, R.E. Vineusa (eds), *International Law and Municipal Law* (German-Argentinian Constitutional Law Colloquium) (1979) 173-78; C. Schreuer, *Decisions of International Institutions before Domestic Courts* (1981); Kunig, 'The Relevance of Resolutions and Declarations of International Organizations for Municipal Law', in G.I. Tunkin, R. Wolfrum (eds), *International Law and Municipal Law* (German-Soviet Colloquium on International Law) (1988) 59-78. In the few cases in which domestic courts were faced with the principle of the implementation of Security Council resolutions *ex* Art. 41, they have always affirmed the binding character of these resolutions under Article 25 of the UN Charter, but have never proceeded to their application as the resolutions were not incorporated into the internal law: see *Diggs v. Shulz*, US Court of Appeals DC, 31 October 1972, 470 F.2d 461, cert. den. 411 US (1973) 931; *Bradley v. The Commonwealth of Australia and the Post-master-General*, 10 September 1973, Australian Law Reports, Vol. I, (1973) 241, 52 ILR (1979) 1; *Diggs v. Dent*, US Dist. Ct. DC, 13 May 1975, 14 ILM (1975) 797.

27 See *contra* the position of Conforti, 'Cours général de droit international public', *RCADI* (1988-V) 48ff. translated into English: *International Law and the Role of Domestic Legal Systems* (1993) 32ff.; *Le Nazioni Unite* (1994) 19 and J.A. Carrillo-Salcedo, *El Derecho Internacional en un Mundo en Cambio* (1984) 149ff.

28 Obviously the President can have recourse to this measure only in extreme cases; otherwise the effectiveness of the International Tribunal might be questioned and it would lose credibility.

Trial Chamber as *amici curiae* in the public hearing of 8 November 1994, were asked to give an explanation for the legislative position of their Government.

Mr. Wilkitzki answered that the Government of Germany 'has not remained inactive since May 1993 and waited for the hearing to be organized'. He went on to say the following:

> I would point out that [...] the Statute contains a number of new items and entails a number of duties under international law which are something quite unknown for a national state and which also requires thorough preparation. In the Summer of last year we started to prepare our legislation. Then, as you probably know, there was an encounter of the Member States of the Council of Europe in Strasbourg in September last year, which also was intended to clarify the question as to how these duties [under] international law could be implemented, and all representative Member States at the time came to the conclusion that, because of the fairly concise nature of the Statute, it would be advisable to wait for the issue of the Rules of Procedure before national implementation Rules would be issued. This is what we have done.[29]

Mr. Wilkitzki also stated that since the issuing of the Rules of Procedures of the International Tribunal in Spring 1994 the Federal Ministry of Justice had prepared several drafts on internal implementing legislation but that the legislative proceedings were hastened only after the application for deferral by the International Tribunal's Prosecutor. In fact, before the Prosecutor's application, the German Government 'did not have the impression that there was any duty which had to be fulfilled immediately which we could not already comply with'.[30]

However, although it had been pointed out both by the Trial Chamber and the representatives of the German Government that there was no controversy between the International Tribunal and the German authorities,[31] the Trial Chamber referred in its decision to the duty incumbent on Germany to adopt implementing legislation on the strength of Article 29 of the Tribunal's Statute, paragraph 4 of Security Council Resolution 827 and the Note from the UN Secretary-General of 2 June 1993. It further recalled the well-established principle that a State cannot invoke national rules to justify the breach of an international obligation. The Trial Chamber quoted in this respect the Advisory Opinion of the Permanent Court of International Justice on the *Exchange of Greek and Turkish Population*. This opinion affirmed the 'self evident principle' according to which

> a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.[32]

29 *Transcript*, at 30-31.
30 Ibid., at 31.
31 Besides, Germany had always submitted any information in due time when requested and affirmed that it would do so in the future too.
32 PCIJ, Series B, No. 10, at 20.

5. The decision of the Trial Chamber appears to be correct and well-balanced insofar as it requested Germany to 'defer to the International Tribunal the criminal proceedings currently being conducted in its national courts against the said Dusko Tadic'[33] and to 'forward to the International Tribunal the results of its investigation and a copy of the records of its national court'.[34] The Trial Chamber did not order Germany to discontinue the proceedings forthwith, as it was aware of Germany's inability to comply with such a request. Nor did it order the surrender of Tadic, since a confirmed indictment and an arrest warrant would have been necessary and they could not yet be issued according to German law. However, the Trial Chamber invited Germany to 'take all necessary steps, both legislative and administrative, to comply with this Formal Request and notify the Registrar'[35] of the measures adopted. No time-limit was fixed for the forwarding of the documentation or the enactment of implementing legislation, yet Rule 11 is clear on the point by providing that the State to which an order for deferral has been notified must 'file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the order'. Notification by the German Government that implementing legislation is on the agenda of the Parliament would possibly 'satisfy' the Trial Chamber of the goodwill of the State.[36]

6. To sum up, the first decision of the Trial Chamber appears to be tightly argued and persuasive. It is important in that the Chamber has elaborated on and clarified the requirements contained in Rule 9 (iii), thus setting a precedent as regards conflicts of jurisdiction which might arise in the future following other requests for deferral. At the same time the Chamber has provided compelling reasons for the duty of Germany to pass implementing legislation and has rightly stressed the wide acceptance of the principle whereby international obligations prevail over national legislation.

It now appears that other indictments will follow shortly and trials will commence in Spring 1995. Thus, the international community is starting to dispense justice with regard to appalling crimes which have all too often remained unpunished in the past.

33 Case No. IT-94-1-D, at 14.
34 Ibid.
35 Ibid.
36 On 4 November 1994 a Government Bill dealing with the warrants for arrest and the warrants for transfer to the International Tribunal was reportedly presented to the Second Chamber of the *Bundesrat* along with the request that the shortened legislative procedure be applied.