

ANNEX

Case No. IT-94-1-D

In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal

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 (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)

Considering the Application dated 12 October 1994 as amended on 8 November 1994 ('the Application'), filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ('the International Tribunal'),

Noting that the Trial Chamber has been designated by the President of the International Tribunal pursuant to Rule 9 of the Rules of Procedure and Evidence ('the Rules') of the International Tribunal to determine the Application,

Having read and considered the Application and the Declaration of Michael J. Keegan dated 11 October 1994 ('the Declaration') annexed thereto,

Having heard the Prosecutor at a public sitting held at The Hague on 8 November 1994,

Having granted leave to representatives of the Government of the Federal Republic of Germany to appear at the said hearing as *amicus curiae*, and having heard such representatives,

Having granted leave to Mr. Sklebitz, Counsel for the said Dusko Tadic, to appear at the said hearing as *amicus curiae*, and having heard Mr. Sklebitz.

I. Application

1. This is an application by Richard J. Goldstone, Prosecutor of the International Tribunal, made pursuant to Rule 9(iii) of the Rules. The Application is for the issue of a formal request from this Trial Chamber to the Government of the Federal Republic of Germany for the deferral to the competence of the International Tribunal of the investigation of the activities of one Dusko Tadic, also known as Dusan 'Dule' Tadic, by the Government of the Federal Republic of Germany, in respect of events in the former territory of Yugoslavia since 1 January 1991, pursuant to Rule 10 of the Rules.

2. In the Application, the Prosecutor has stated that the said Dusko Tadic was arrested and taken into custody by the Government of the Federal Republic of Germany on 13 February 1994 on suspicion of having:

- (i) aided and abetted the commission of genocide at Omarska in the former Yugoslavia in 1992;
- (ii) compelled another person to murder three individuals at Omarska on 15 or 18 June 1992;
- (iii) assaulted and tortured Muslim detainees at Omarska in June 1992,

contrary to the law of the Federal Republic of Germany.

3. The said Dusko Tadic has now, on 3 November 1994, been indicted by the Government of the Federal Republic of Germany. The Government of the Federal Republic of Germany is still investigating the above allegations. Notwithstanding that national courts are vested with concurrent jurisdiction by Article 9 of the Statute of the Tribunal, the Prosecutor, relying on Rules 8 and 9 of the Rules, is proposing that a formal request be issued to the Government of the Federal Republic of Germany, pursuant to Rule 10 of the Rules, to defer its proceedings against the said Dusko Tadic to the competence of the International Tribunal, and to provide the Prosecutor with all information concerning the investigation of the case.

4. The Prosecutor states that the information required will further assist in the investigations of the allegations against the said Dusko Tadic, which include potential co-offenders and accomplices who may not be amenable to the jurisdiction of the Federal Republic of Germany.

5. The Prosecutor also states that he has several witnesses outside Germany already interviewed by him who would be called upon to give evidence before the International Tribunal, in the event of the investigation proceeding to a prosecution, and that the investigation of the Prosecutor relates to additional offences alleged to have been committed by the said Dusko Tadic which are not part of the investigations already undertaken.

6. In conclusion, the Prosecutor states that the case of Dusko Tadic is significant for the investigations being undertaken against other persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 and, in particular, those in the Prijedor area.

7. The Government of the Federal Republic of Germany, appearing as *amicus curiae*, has expressed its acceptance in principle of the primacy of the International Tribunal but has referred to its inability 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.

8. Mr Sklebitz, representing Dusko Tadic, and appearing as *amicus curiae*, has asserted that he has no objection to the deferral to the primacy of the International Tribunal but that he has as yet no knowledge of the charges contained in the indictment against the said Dusko Tadic. Counsel for the said Dusko Tadic could not express any opinion concerning the possible charges to be made by the Prosecutor.

II. Discussion

9. Article 8 of the Statute of the International Tribunal extends its territorial jurisdiction to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters, beginning on 1 January 1991. Article 9 of the Statute provides as follows:

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.

However, the right to primacy can only be exercised on a formal request to the national court to defer to the competence of the International Tribunal. The Rules provide the modus for the exercise of the right.

10. Rule 9 of the Rules provides as follows:

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the national courts of any State:

- (i) ...
- (ii) ...
- (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.

11. To comply with the enabling provisions for grant of the Application, the Prosecutor must therefore 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 implications and common significant factual or legal questions, for the Prosecutor.

12. The Prosecutor has indicated that his Office is investigating allegations of serious violations of humanitarian law in the Prijedor region (according to sources including the report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992)). It is in the framework of these investigations that the Office of the Prosecutor became aware of the crimes alleged to have been committed by the said Dusko Tadic in the Prijedor region as well as of his arrest in Germany. The Prosecutor is considering the submission of one or more indictments against individuals involved in these serious breaches of international humanitarian law in the Prijedor region.

13. The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by Counsel for Dusko Tadic, that the said Dusko Tadic is the subject of an investigation instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof.

14. Reading the Declaration and, among others, the averments in paragraphs 6.1-6.8 thereof, and the documents referred to therein, clearly supports 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. The Trial Chamber refers in particular to portions of paragraphs 6.4 to 6.8 of the Declaration.

Eye witness accounts identify TADIC as being personally involved in and directing the transfer of non-Serbs from the villages to the camps. He is identified as conducting interrogations and beatings of prisoners at both the military barracks at Prijedor and in the camps...

and

Eye witness accounts identify TADIC as being personally involved in the forced removal of Muslims from the villages in the Prijedor area and the looting and destruction of Muslim houses. TADIC was observed to be wearing a military uniform on these occasions and was noticeably in charge of whatever group was involved with him, whether it be during ethnic cleansing of villages or the torture and murder of prisoners in the camp. During the forced removal and transfer of non-Serbs from the villages of the Kozarac area, TADIC and other individuals acting as Serbian soldiers in the attack were witnessed to have summarily executed several unarmed non-Serbs (among the victims were two brothers) as those individuals were complying with the Serbian demands to leave their villages and move toward Prijedor City.

and

At the Trnopolje camp TADIC was witnessed, on more than one occasion, to have been involved in the raping of Muslim women. On one occasion in the Summer of 1992, TADIC was witnessed to have arrived at the Trnopolje area riding on a tank with a group of Serbian soldiers. TADIC and the soldiers were then involved in the rape of some Muslim women at a house outside the camp.

and

It was at the Omarska camp ... that TADIC's actions were the most serious. Eyewitness accounts place him at the camp on almost a daily (or nightly) basis during the period the camp was open, from late May 1992 until mid-August 1992. At the camp he was normally observed wearing a military uniform. On occasion he would wear a black mask. However, due to his notoriety, physical appearance, and his voice, he was well recognized even on those occasions when he wore the mask. TADIC beat and tortured prisoners on a daily basis and is personally responsible for the murder of more than ten prisoners... The beatings/torture were accomplished using a variety of weapons, including: truncheons, iron bars, rifle butts, wire cables, and knives... Among the most widely witnessed events that TADIC was involved in was the murder of Emir Karabasic, Jasmin Hrnjic and Enver Alic. In June 1992, those prisoners were brutally beaten and tortured by TADIC and others, using metal rods, truncheons and knives, to the point of unconsciousness. TADIC then forced a fourth prisoner to drink motor oil from the garage and then bite off the testicles of the unconscious prisoners.

and

TADIC did not hold a routine position at the camp but was brought in or allowed in for the specific purpose of torturing and killing those non-Serbs perceived to [be] part of the leadership or a prominent part of the Muslim or non-Serb community. His daily presence in the camp involved the beating, torture and murder of prisoners. He had the authority to direct the actions of those men who accompanied him and of known camp guards.

15. These allegations are not disputed by the Government of the Federal Republic of Germany.

16. Counsel for Dusko Tadic expressed, in general terms, reservations concerning the allegations put forward by the Prosecutor.

17. The Prosecutor feels that the International Tribunal is the appropriate forum to deal with the Tadic Case, taking into account the seriousness and nature of the crimes committed, and the legal points which will be raised in connection therewith (questions of international interpretation of the concept of armed conflict and the nature and manner of their proof).

18. Consequently, it is clear to the Trial Chamber that, with reference to the investigations being carried out by the Prosecutor, the case of Dusko Tadic involves the same crimes, namely:

- (i) genocide, through the policy of ethnic cleansing, and crimes against humanity, such as assault, murder, rape and persecution based on religious grounds;
- (ii) the case of Dusko Tadic cannot be separated from the cases of other alleged co-offenders;
- (iii) the role of Dusko Tadic and his status in the local militia are indispensable elements to show the role of other alleged co-offenders;

and

- (iv) 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 criminal plan, were judged in national courts and others before this International Tribunal.

19. The Trial Chamber notes the argument raised by the Government of the Federal Republic of Germany as to the potential conflict between its national law and any formal request for deferral which may be issued by this Trial Chamber. In this respect, the Trial Chamber refers the Government of the Federal Republic of Germany to Article 29 of the Statute of the International Tribunal. Furthermore, a Note from the Secretary-General of the United Nations, addressed to all Member States, and dated 2 June 1993, drew particular attention to the obligations of States under paragraph 4 of Security Council Resolution 827 (1993) to cooperate fully with the International Tribunal and its organs and to 'take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligations of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute'.

20. This statement by the Secretary-General reflects the well-established principle of international law that a State cannot avoid compliance with its international obligations by invoking its municipal law. This principle has been affirmed in a number of decisions, in one of the very first of which, in 1925, the Permanent Court of International Justice stated that it was relying on a principle:

which is self-evident, 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 fulfilment of the obligations undertaken. (*Advisory Opinion, Exchange of Greek and Turkish Populations*, P.C.I.J., Series B, No. 10, 20)

III. Decision
The Trial Chamber
Based on the Foregoing Determines as Follows:

considering all the matters before it and addressed in the public hearing, and *considering* the requirements contained in Rule 9(iii) of the Rules, **the Trial Chamber consisting of Judge Karibi-Whyte, as Presiding Judge, Judge Odio-Benito and Judge Jorda**, being seized of the Application made by the Prosecutor, **HEREBY GRANTS** the said Application,

FORMALLY REQUESTS the Federal Republic of Germany to defer to the International Tribunal the criminal proceedings currently being conducted in its national courts against the said Dusko Tadic,

INVITES the Federal Republic of Germany to take all necessary steps, both legislative and administrative, to comply with this Formal Request and to notify the Registrar of the International Tribunal of the steps taken to comply with this Formal Request, and

REQUESTS that the Government of the Federal Republic of Germany forward to the International Tribunal the results of its investigation and a copy of the records of its national court.

The Trial Chamber requests the Registrar of the International Tribunal to notify the Government of the Federal Republic of Germany of this its decision and order.

Dated this 8th day of November 1994,

The Hague

Adolphus Karibi-Whyte
Presiding Judge
Trial Chamber I