

# Yugoslav War Crimes Tribunal declares to have jurisdiction to try tadic

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Goran Jelasic were also indicted.

The indictments place the United Nations in the position of both prosecuting the Bosnian Serbs and negotiating with them. For instance, as the indictment was announced, General Mladic was meeting near the Bosnian enclave of Zepa with the U.N. commander for Bosnia, Lieut. Gen. Rupert Smith.<sup>2</sup>

The indictment details the shelling two months before the indictment of an outdoor cafe in the "safe area" of Tuzla that left 195 people dead or wounded and the seizure the next day of nearly 300 U.N. peacekeepers for use as human shields as outrageous breaches of the Geneva conventions.<sup>3</sup>

At the tribunal officials conceded that little likelihood exists that many of the accused would face trial. Neither Serbia nor the self-styled republic of the Bosnian Serbs recognize the tribunal's jurisdiction and both refuse to hand over subjects.

The indictments mean that the defendants will now risk arrest if they travel outside friendly territory as they have in the past to attend peace talks.

According to Christian Chartier, the tribunal spokesman, U.N. members must cooperate with the tribunal and implement its decisions. Cooperation includes acting on the warrant for their arrest.

An unanswered issue is whether U.N. troops, such as those now in Bosnia, may arrest anyone indicted by a U.N. court. Apparently, such legal implications are in need of clarification.<sup>4</sup>

An important legal consideration is that the defendants are not subject to any statute of limitations, and they may lead to prosecution anywhere in the world.<sup>5</sup>

## **B. Yugoslav War Crimes Tribunal Declares to Have Jurisdiction to Try Tadic**

by André Klip<sup>6</sup>

On August 10, 1995, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY) dismissed the Defense motion of June 23, 1995 in the case against Duscko Tadic (Case No. IT-94-1-T) for lack of jurisdiction, declaring that it has jurisdiction and is competent to try crimes committed in the former Yugoslavia.

The Defense filed an appeal. The appellate proceedings will be held in September before the Appeal Chamber of the Tribunal. When the Appeal Chamber confirms the Trial Chamber's decision, the latter will subsequently hear arguments on the other two preliminary motions of the Defense, on violation of the principle *ne bis*

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<sup>2</sup> *Id.*

<sup>3</sup> Drozdiak, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Aryeh Neier, *War Crime Doesn't Pay*, WASH. POST, July 30, 1995, at C2, col. 1.

<sup>6</sup> Dr. André Klip is a lecturer in (international) criminal law of Utrecht University, The Netherlands.



*in idem* and on the form of the indictment.<sup>15</sup> Decisions on these two motions might be taken in October or November. The Tribunal dismissed the Defense's motion on the Court's lack of jurisdiction on the following grounds.

Paragraphs 1-44 of the Decision of the Trial chamber deal with the submissions of the Defense regarding the legality of the establishment of the Tribunal. It regards these not as properly open for consideration since they go to the unreviewable lawfulness of the actions of the Security Council and not to its jurisdiction. However, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonable aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law.

The establishment of an international criminal tribunal does not depend on a treaty. A Security Council resolution may form its basis. The Tribunal has no authority to investigate the legality of its creation by the Security Council. It is not a constitutional court. "The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (par. 8)

In reaction to the Defense's submissions that the establishment of the Tribunal is not a measure as provided for in Article 39 of the United Nations Charter to maintain and restore peace, the Trial Chamber holds that Resolution 827 was novel only in the means adopted but not in the object sought to be attained. It is not relevant that the establishment of a criminal court was never considered in a similar situation.

With regard to the independence and impartiality of the Tribunal, the Trial Chamber states that the question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The *jus de non evocando*, that an accused be tried by a regularly established court, has no application when what is in issue is the exercise by the Security Council of powers conferred upon it by the Charter.

Paragraphs 45-83 of the Decision deal with what the Trial Chamber calls "truly matters of jurisdiction." The element of internationality of the conflict in which the crimes were committed forms no jurisdiction criterion of the offenses created by Article 2 of the Statute of the International Tribunal. Even if it did, the Trial Chamber sees clear indications in the great volume of material before it that the acts alleged in the indictment were in fact committed in the course of an international armed conflict.

The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 of the Statute because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or internal. Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.

Jurisdiction under Article 5 of the Statute (crimes against humanity) does not require a nexus with the existence of an armed conflict of an international nature. The crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.

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<sup>15</sup> See on the three motions of the Defense, André Klip, *Yugoslav War Crimes Tribunal Hears Important Preliminary Motions*, 11 INT'L ENFORCEMENT L. REP. 325 (Aug. 1995).