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PRESS RELEASE

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CASE No. IT-94-1-T / DEFENDANT: Mr. Dusko Tadic

The Trial Chamber consisting of Judge McDonald (Presiding), Judge Stephen and Judge Vohrah today issued its Decisions on two preliminary motions pending before it. The first was a Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor on 18 May 1995 and the second a Motion on the Jurisdiction of the Tribunal filed by the Defence on 23 June 1995.

Both motions were of considerable importance as it was the first time that these issues had been before the International Tribunal for consideration.

The Motion for Protective Measures for Victims and Witnesses

The first motion, which was heard *in camera* on 21 June 1995, sought protective measures of five different types: those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media; those seeking protection from retraumatization by avoiding confrontation with the accused; those seeking anonymity, whereby victims and witnesses would not be identified to the accused or to his lawyers; certain miscellaneous measures for individual witnesses; and finally a general request to prevent witnesses who are victims of the conflict in the former Yugoslavia being photographed, recorded or sketched while entering or leaving the Tribunal building.

The Defence agreed to a number of the measures requested but objected in particular to the grant of anonymity, arguing that it infringed the right of the accused to a fair and public trial. Two *amicus curiae* briefs were filed, one from Professor Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom and a joint brief was filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green and Sara Hossain, on behalf of a number of human rights organizations in the United States.

After examining the pleadings and the powers of the Tribunal as set out in the Rules and Statute of the Tribunal, the Trial Chamber went on to consider the sources of law that the

Tribunal should apply when interpreting the Statute and the Rules. The Trial Chamber concluded that, in determining where the balance lies between an accused's right to a fair and public trial and the protection of witnesses, the Tribunal must interpret those documents within the context of its own unique legal framework, while having regard, where appropriate, to the jurisprudence of other judicial bodies such as the European Court of Human Rights.

The Trial Chamber then examined the requests for confidentiality, that is protection from public disclosure, recognizing that in so doing, it was establishing legal precedent for future applications. The Trial Chamber found that, where special considerations existed, justification for confidentiality could be found in many jurisdictions. In the context of the conflict in the former Yugoslavia, sufficient consideration could be found in the fear of reprisals, especially in light of the inability of the Tribunal to guarantee the safety of the witness due to the lack of a fully-funded and operational witness protection programme. The Trial Chamber therefore granted the protective measures sought by the Prosecutor and ordered that the names and details of six witnesses will not be released to the public and that their evidence shall be given in closed sessions. However, in view of the public purpose of the Tribunal, the Trial Chamber also ordered that edited recordings and transcripts of these sessions will be made available after review by the Victims and Witnesses Unit.

The Trial Chamber then looked in particular at the position of victims and witnesses of cases of sexual assault. The Trial Chamber was satisfied that, for certain witnesses, it was appropriate to try to minimize the possibility of retraumatization by permitting them to give evidence without seeing the accused, either by use of screening or other appropriate methods in the courtroom, or by use of closed circuit television.

Turning to the issue of anonymity, Judge Stephen, who has delivered a separate opinion, approached the matter somewhat differently than the majority of the Trial Chamber. Judge McDonald and Judge Vohrah reviewed the general principles in order to reach certain guidelines for the factors to be taken into account when balancing the competing interests before the Tribunal and concluded that there must be a real fear for safety, with an objective basis. The testimony of the witnesses must be important to the Prosecutor's case and there must be no evidence that the witness is untrustworthy in any way. The lack of any operative witness protection programme is also relevant. Finally, any measures taken must be strictly necessary so that the accused suffers no undue avoidable prejudice. There must also be procedural protections in place to counterbalance the acknowledged restriction of the right to examine the witnesses against the accused. These include ensuring that the judges can observe the demeanour of the witness, that the judges know the identity of the witness, that

the defence be allowed to question the witness fully on matters unrelated to identity and, finally, the identity of the witness should be revealed when there are no longer reasons to fear for the safety of the witness.

The majority of the Trial Chamber then applied these guidelines to the situation of each individual witness and determined that anonymity was justified in respect of three of the witnesses and that this would not prejudice the accused's right to a fair trial. The Trial Chamber noted that if, in the future, it were to consider that the need to assure a fair trial outweighed this testimony, it has the capacity to exclude the evidence and not consider it in reaching its finding on the merits. Judge Stephen's opinion would deny general anonymity to witnesses so far as the accused and counsel are concerned.

Finally, the Trial Chamber ruled upon the various miscellaneous requests before it, ordering, among other matters, that the protected witnesses in this case should not be photographed, recorded or sketched while in the precincts of the Tribunal.

The Motion on Jurisdiction

The Motion on Jurisdiction was heard over two days, on 25 and 26 July 1995. The Defence asserted (a) that the Tribunal was improperly established; (b) that the grant of primacy in the Statute to the Tribunal was improper; and (c) that the Tribunal lacked subject matter jurisdiction under Articles 2, 3 and 5 of the Statute to try the accused.

The Prosecutor challenged all parts of the Defence motion, asserting that the establishment of the Tribunal was a legitimate exercise of power by the Security Council under Chapter VII, that the Tribunal may not, in any event, review the actions of the Security Council and that the Tribunal has primary jurisdiction over the accused under the Statute. An *amicus curiae* brief was submitted by the Government of the United States of America, which generally supported the position of the Prosecutor.

The Trial Chamber found that it lacked competence to review the decision of the Security Council to establish the Tribunal and that the question of the appropriateness of establishing the Tribunal raises non-justiciable issues which are not subject to judicial review. Nevertheless, the Trial Chamber addressed the submissions of the Defence as to the power of the Security Council and the lawfulness of the creation of the Tribunal and found the challenges to be without merit.

The Trial Chamber also found that the conferral of primacy of jurisdiction on the Tribunal does not violate international law and that, in any event, the accused had no *locus standi* to raise the issue of violation of State sovereignty.

Addressing the various challenges to subject matter jurisdiction, the Trial Chamber examined the arguments raised in respect of each of the Articles of the Statute of the Tribunal in turn.

In considering Article 2 of the Statute, the Trial Chamber found that the element of internationality is not a jurisdictional criterion of the offences charged and accordingly did not rule upon the nature of the armed conflict in the region nor on the Prosecutor's alternative contention that the "grave breaches" provisions of the 1949 Geneva Conventions apply as a result of certain agreements entered into by various parties to the conflict.

Similarly, the Trial Chamber held that the character of the conflict, whether international or internal, does not affect the subject matter jurisdiction of the Tribunal under Article 3, finding that the term "laws or customs of war" applies to both international and internal armed conflicts. The Trial Chamber determined that the minimum standards of Common Article 3 of the Geneva Conventions apply to the conflict in the former Yugoslavia, regardless of its character, and that the prosecution of the accused for those offences does not violate the principle of *nullum crimen sine lege*.

Finally, the Trial Chamber found that the language of Article 5 of the Statute is clear and unambiguous and thus, although the Trial Chamber considered that no *nexus* is required in customary international law between crimes against humanity and war crimes or crimes against peace or indeed between crimes against humanity and an armed conflict, there is, however, a requirement for a *nexus* with an armed conflict, either international or internal, for the offence to fall within the jurisdiction of the Tribunal.

The Trial Chamber therefore dismissed the motion and denied the relief sought. The parties have fifteen days from today in which to file notice of interlocutory appeal against the Decision on jurisdiction.

The full English text of the two Decisions is available now from the Press and Information Office of the Tribunal. An official French translation and a translation into the language of the accused will also be available shortly.
