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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-T

Date: 14 November 1995

Original: English

IN THE TRIAL CHAMBER

Before: **Judge McDonald, Presiding**
Judge Stephen
Judge Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **14 November 1995**

THE PROSECUTOR

v.

DUŠKO TADIĆ a/k/a/ "DULE"

DECISION ON THE DEFENCE MOTION ON THE PRINCIPLE OF *NON-BIS-IN-IDEM*

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

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

I. INTRODUCTION

Pending before the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations on International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter "Trial Chamber" and "International Tribunal") is the "Motion on the Principle of *Ne-Bis-In-Idem*" filed by the Defence on 23 June 1995 and a "Second Motion on the Principle of *Ne-Bis-In-Idem*" submitted on 4 September 1995 in the matter of The Prosecutor v. Dusko Tadić (Case No. IT-94-1-T). The Prosecutor has opposed this motion in responses filed on 7 July 1995 and 26 September 1995. The hearing on this motion was held before the Trial Chamber on 24 October 1995 and the decision on the motion was reserved to this day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Introduction

1. This motion raises a number of issues under the Tribunal's Statute, (Statute of the International Tribunal (originally published as an annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter "Statute")) as well as under its Rules of Procedure and Evidence (Rules of Procedure and Evidence as amended, (adopted on 11 February 1994 pursuant to Article 15 (IT/32/Rev. 6)(hereinafter "Rules")).

2. In its written submission, the Defence asserts that the prosecution of this case should be dismissed for the following reasons:

(i) a trial of the accused, has already begun in Germany and the proceedings before the International Tribunal constitute a separate prosecution;

(ii) the transfer of the accused to the International Tribunal was contrary to the European Treaty on the Transfer of Proceedings in Criminal Matters of 1972;

(iii) because the International Tribunal may intervene in legal proceedings before national courts, pursuant to Article 9 of the Statute only in a situation covered by Article 10(2) of the Statute; and

(iv) the exercise of jurisdiction by the International Tribunal in this case, pursuant to the procedure provided for in Rule 9(iii) of its Rules, is contrary to the Statute.

3. For these reasons, the Defence asserts that the prosecution of the accused before the International Tribunal violates the principle of *non-bis-in-idem*. The Prosecution submits that the doctrine of *non-bis-in-idem* is not applicable to the case and that the deferral request, the transfer of the accused to the International Tribunal, and the trial of the accused by the International Tribunal are in accordance with Articles 9, 10 and 20 of the Statute and Rules 9 and 12 of the Rules.

4. The oral argument of the Defence was essentially confined to two points. The first was that the principle of *non-bis-in-idem* precludes the prosecution of the accused by the International Tribunal because the earlier proceedings against him in Germany constituted a separate trial which had entered its "final phase". The second was that a "procedural aspect" of this principle would be violated by his trial here because deferral pursuant to Article 9 of the Statute is limited to the situations provided for in Article 10(2) of the Statute. At the hearing, the Prosecutor responded that the *non-bis-in-idem* principle is not violated in this case because the accused has not been tried by the German authorities and that, because there is no violation of the *non-bis-in-idem* principle, the Trial Chamber need not determine whether deferral is limited to the situations envisioned in Article 10(2) of the Statute.

5. Because the Trial Chamber finds that the prosecution of the accused before this Tribunal does not violate the principle of *non-bis-in-idem*, the motion of the Defence is in all respects denied.

B. Trial Of The Accused By The International Tribunal Does Not Violate The Principle Of *Non-Bis-In-Idem*

1. Background

6. On 12 October 1994 the Prosecutor of the International Tribunal made an application to Trial Chamber I, pursuant to Rule 9(iii) of the Rules, for the issue of a formal request from that Trial Chamber to the Government of the Federal Republic of Germany, for deferral to the competence of the International Tribunal of that country's proceedings against the accused, in respect of events in the former territory of Yugoslavia since 1 January 1991. On 3 November 1994 the General Federal Prosecutor of the Federal Supreme Court of Germany issued an indictment at the Supreme Court of Bayern (Bavaria) against the accused for 15 independent charges of aiding and abetting genocide coinciding with offences of murder, or causing grievous bodily harm allegedly committed in the summer of 1992 in the camps of Omarska and Keraterm in Bosnia-Herzegovina. On 8 November 1994 the International Tribunal, based upon the above-mentioned application of the Prosecutor, formally requested the Federal Republic of Germany to defer the case to the International Tribunal. In order to permit it to comply with that request, the German Bundestag, with the approval of the Bundesrat, passed the "Law regulating the cooperation with the International Tribunal for the former Yugoslavia" (hereinafter "Yugoslavia Tribunal Law") on 10 April 1995. On 18 April 1995 the Supreme Court of the State of Bayern deferred the case to the International Tribunal.

7. On 13 February 1995 the International Tribunal confirmed an indictment against the accused charging him in connection with many of the same events which formed the basis of the German indictment. An amended indictment charging him with a total of 36 counts, including grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity was confirmed on 1 September 1995.

8. The deferral of the case took place after a German investigation of the charges against the accused had led to his indictment there but well before any trial of the accused in that country on those charges. While the proceedings may have passed beyond the purely

investigative phase, it is undisputed that the accused had not been tried in the full sense, i.e., he was neither convicted nor acquitted by the German court.

2. No Violation of *Non-Bis-In-Idem* Within The Meaning Of The Statute

9. The principle of *non-bis-in-idem* appears in some form as part of the internal legal code of many nations. Whether characterised as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14(7) of the International Covenant on Civil and Political Rights as a standard of a fair trial, but it is generally applied so as to cover only a double prosecution within the same State. The principle is binding upon this International Tribunal to the extent that it appears in Statute, and in the form that it appears there.

(a) The Accused Has Not Already Been Tried In Germany

10. The deferral which occurred in this case does not raise a genuine issue of *non-bis-in-idem* according to the terms of the Statute, for this principle clearly applies only in cases where a person has **already been tried**.

Article 10 provides:

> "*Non-bis-in-idem*
>
> 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. (Emphasis added).
>
> 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 only if: . . ." (Emphasis added).

11. The proceedings which were instituted against the accused in Germany do not constitute a trial. The Appeals Chamber correctly concluded in an earlier phase of this case that the

accused was never actually tried in Germany. It noted, in reference to the stage of the proceedings in Germany at the time of the application of the Prosecutor, that "the matter has not yet passed the phase of investigation." (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Matter of Dusko Tadić, 2 October 1995, (Case No. IT-94-1-AR72), at para. 52.)

12. The Defence has asserted that the accused was subsequently indicted and that, at the time of his transfer by Germany to the Tribunal, the proceedings against the accused had entered their "final phase". They are correct that the accused was indicted by the German authorities prior to the decision of the International Tribunal on deferral and transfer. The Defence does not explain what significance it attaches to the opening of the "final phase" of the proceedings except to refer to the law of Germany which, it contends, demonstrates that the proceedings had opened. But, whatever its meaning, the Defence has admitted that the proceedings have not progressed so far that the accused has actually been tried as that term is used in the Statute. Thus, a trial of the accused by this Tribunal would not violate the principle of *non-bis-in-idem* set forth in Article 10 of the Statute.

(b). The Accused Could Not Be Retried In Germany After Trial Before This Tribunal

13. The Defence has raised an issue of *non-bis-in-idem* by suggesting that the stage of the proceedings in Germany is such that there is a possibility that the accused might be retried in Germany after being tried by this International Tribunal. If true this would indeed raise an issue of *non-bis-in-idem* under of Article 10 of the Statute. But, having deferred the case of the accused to the International Tribunal, Germany could not proceed to retry him for the same acts after the disposition of his case here. Article 10(1) of the Statute makes this unequivocally clear.

14. If this were not already sufficient guarantee against double jeopardy, the German Government's own rulings on this matter make the situation in that country clear. On 10 April 1995 the German Bundestag, with the approval of the Bundesrat, passed the Yugoslavia Tribunal Law which provides in paragraph 2:

"Relationship with national criminal proceedings

> (1) At the request of the Tribunal, criminal proceedings, insofar as they relate to crimes within its jurisdiction, shall be passed on to the Tribunal at every stage of those proceedings. Should the proceedings passed on have already given rise to a binding sentence, then the further execution of that sentence shall be dispensed with, once the convicted person has been transferred to the Tribunal pursuant to para. 3(1).
>
> (2) Criminal proceedings may no longer be conducted against a person against whom the Tribunal has taken or is taking action for a crime within its jurisdiction if a request has been submitted as per para. 2(1), first sentence." (Emphasis added)[1]

15. As a last guarantee against a retrial of an accused, Rule 13 empowers the Tribunal to issue an order requesting the discontinuance of subsequent retrial by any national court, and then if necessary to ask the United Nations Security Council to prevent such a second trial. Rule 13 provides:

> *"Non bis in idem*
>
> When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council."

16. It is, therefore, clear that the accused does not face the possibility of retrial in Germany on the same charges he faces before the International Tribunal. This establishes that no true issue of *non-bis-in-idem* is raised by the present situation.

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[1] (1) Auf Ersuchen des Gerichtshofes wereden Strafverfahren, soweit sie Straftaten betreffen, die seiner Gerichtsbarkeit unterliegen, in jedem Stadium des Verfahrens auf den Gerichtshof übergeleitet. War in dem übergeleiteten Verfahren bereits rechskräftig auf eine Strafe erkannt worden, so ist von der weiteren Vollstreckung dieser Strafe abzusehen, sobald der Verurteilte dem Gerichtshof gemäß § 3 Abs. 1 überstellt worden ist.

(2) Gegen eine Person, gegen die vor dem Gerichtshof wegen einer seiner Gerichtsbarkeit unterliegenden Straftat verhandelt wird oder verhandelt wurde, kann, wenn ein Ersuchen gemäß Absatz 1 Satz 1 vorliegt, wegen einer solchen Tat ein Strafverfahren nicht mehr geführt werden.

3. No Violation Of *Non-Bis-In-Idem* Within The Meaning Of The International Covenant On Civil And Political Rights

17. While the *non-bis-in-idem* standard of the Statute is the only one which is directly applicable, it can also be confirmed that none of the *non-bis-in-idem* standards found in the other international instrument cited by the Defence would bar the trial of the accused by this International Tribunal.

18. The International Covenant on Civil and Political Rights sets out a norm of *non-bis-in-idem* in its Article 14(7):

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

19. In interpreting this provision the Human Rights Committee has observed "that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." (A.P. v. Italy, No. 204/1986, § 7.3) Thus, this provision is generally applied so as to cover only a double prosecution within the same State, and has not received broad recognition as a mandatory norm of transnational application.

20. Furthermore, as with the Statute's *non-bis-in-idem* provision, this applies only to cases where an accused has already been tried. This essential precondition has not been met in this case.

4. No Violation Of The Principle As Envisioned In The European Convention On The Transfer Of Proceedings In Criminal Matters of 1992

21. The Defence has cited the European Convention on the Transfer of Proceedings in Criminal Matters of 1992 as evidence of the proper judicial procedure for the transfer of a criminal case from one country to another jurisdiction. (Second Defence Motion on the Principle of Ne Bis in Idem, para. 2.1) Article 35 of this treaty sets out a rule of *ne-bis-in-idem*

which applies between the States which are parties to that treaty. The relevant part of that article reads as follows:

> "1. A person in respect of whom a final and enforceable criminal judgement has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:
> (a) if he was acquitted;
> (b) if the sanction imposed:
> (i) has been completely enforced or is being enforced, or
> (ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or amnesty, or
> (iii) can no longer be enforced because of lapse of time;
> (c) if the court convicted the offender without imposing a sanction."

22. The Defence conceded in oral argument that this treaty does not bind this Tribunal. The Trial Chamber notes, however, that even this broader transnational formulation of the principle of *non-bis-in-idem* applies only to a "person in respect of whom a final and enforceable criminal judgement has been rendered". So once again a *non-bis-in-idem* standard proposed by the Defence is inapplicable to the present case for that most basic of reasons.

5. No Violation Of *Non-Bis-In-Idem* Under The Draft Statute Of The International Criminal Court

23. The Draft Statute of an International Criminal Court prepared by the International Law Commission also incorporates the notion of *non-bis-in-idem*. Like all the other *non-bis-in-idem* standards discussed above, Article 42(2) of that draft would preclude the proposed International Criminal Court from trying only a "person who has been tried by another court". (U.N. Doc A/49/10, ILC Report (1994), p. 117.)

24. This review of the authorities leads to the unmistakable conclusion that there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgement on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges. As a result, the principle of *non-bis-in-idem* does not bar his trial before this Tribunal.

C. The Procedures By Which The Tribunal Acquired Jurisdiction Over The Accused Do Not Violate The Principle Of *Non-Bis-In-Idem*

1. An Expanded Notion Of The Principle?

25. While conceding that the accused has not been tried by the German court, the Defence proposes a broader concept of *non-bis-in-idem* which it says can be supported by an analysis of the relationship between Articles 9 and 10 of the Statute. According to this view, *non-bis-in-idem* includes a "procedural aspect" which is violated when a national court defers its proceedings against an accused in order to allow a trial by the International Tribunal in circumstances other than those provided for by Article 10(2) of the Statute.

26. The relevant Articles of the Statute of the International Tribunal read as follows:

> "Article 9 Concurrent jurisdiction
>
> 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.
>
> Article 10 *Non-bis-in-idem*
>
> 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 only 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." (Emphasis added.)

"Rule 9 Prosecutor's Request for Deferral

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

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a 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 such court defer to the competence of the Tribunal."

27. The Defence claims that the Statute permits deferral under Article 9 only under the circumstances described in Article 10(2) which are reflected in Rule 9 (i) and (ii). Defence counsel points out that the application for deferral was based upon Rule 9(iii), a fact which is undisputed. What is disputed, however, is the Defence argument that Rule 9(iii) is somehow inconsistent with the terms of the Statute. The result of that inconsistency, the Defence claims, is that a trial before this International Tribunal after a deferral based on Rule 9(iii) is a violation of the principle of *non-bis-in-idem*.

28. The Prosecution argues that Article 10(2) bears no relation to a deferral request, and that it relates only to the issue of trials before the Tribunal when there has already been a final determination by a national court. The Prosecution rejects the idea of a link between the issues of deferral and *non-bis-in-idem*. The Prosecution stresses that the Defence argument is contrary to the plain language of the Statute, and that if accepted it would provide the accused with a windfall avoidance of prosecution for the serious charges against him.

29. The Defence asserts that this motion it is not another challenge to the primacy of the International Tribunal. They have argued that although they accept that the primacy of the Tribunal has been established in a general way, they do not believe that this precludes them from arguing that the exercise of primacy in this particular case is a violation of the principle of *non-bis-in-idem*. They have maintained that even were their arguments to be accepted, the primacy of the Tribunal would still be respected because the International Tribunal alone may determine whether the circumstances set out in Article 10(2) have been met. The Trial Chamber disagrees. By limiting the authority of the International Tribunal to request deferral to situations described in Article 10(2), the Defence would indeed restrict its primacy.

30. The Trial Chamber is not called upon to decide the legality of deferral under Rule 9(iii), but confines itself to the issue of whether the *non-bis-in-idem* principle has been violated. Since the Trial Chamber has found that the accused was not tried by the German authorities the "procedural aspect" argument of the Defence must fail, for without a prior judgement there simply cannot be an implication of *non-bis-in-idem*.

2. Security Council Statements On Deferral

31. The Defence motion attempts to raise an issue of *non-bis-in-idem* based upon comments made by representatives of members of the Security Council after the adoption of the Statute. In each of the following statements[2] a member of the Security Council comments upon the relationship between the principle of primacy under Article 9 and the *non-bis-in-idem* provisions of Article 10 of the Statute.

Mr. Meriméé (France):

> "Thirdly, we believe that, pursuant to Article 9, paragraph 2, **the Tribunal may** intervene at any stage of the procedure and **assert its primacy**, including from the stage of investigation where appropriate, **in the situations covered under Article 10, paragraph 2".** (Emphasis added.)

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2 (Statements made by representative to the United Nations Security Council, immediately after the adoption of resolution 827 (1993) establishing the International Tribunal. From: Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, held at Headquarters, New York, on Tuesday, 25 May 1993 at 9 PM, U.N. Doc. S/PV.3217, 25 May 1993 at 11, 16, 18-19, 46.)

Mrs. Albright (United States of America)

> "Thirdly, it is understood that the **primacy** of the International Tribunal referred to in paragraph 2 of Article 9 **only refers to the situations described** in Article 10". (Emphasis added.)

Sir David Hannay (United Kingdom)

> "Articles 9 and 10 of the Statute deal with the relationship between the International Tribunal and national courts. In our view, **the primacy of the Tribunal**, referred to in Article 9, paragraph 2, **relates primarily to the courts in the territory** of former Yugoslavia: **elsewhere it will only be in the kinds of exceptional circumstances** outlined in Article 10, paragraph 2, **that primacy should be applicable**". (Emphasis added.)

Mr. Vorontsov (Russian Federation)

> "As we understand it, the provisions of Article 9, paragraph 2, denote **the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case** that is being considered in a national court. But **this is not a duty automatically to refer the proceedings to the Tribunal** on such a matter. A refusal to refer the case naturally has to be justified. We take it that this provision will be reflected in the rules of procedure and the rules of evidence of the Tribunal". (Emphasis added.)

32. Based on the linkage these declarations make between Articles 9 and 10 of the Statute, Counsel for the Defence argues that the issue raised by these States is one of *non-bis-in-idem*. The Defence maintains that Rule 9(iii) is inconsistent with the Statute of the International Tribunal because it allows for deferral in situations not contemplated by the Security Council members whose statements are quoted above.

33. The Trial Chamber takes no position on the interpretation of these statements nor upon their possible legal effect. What is important is that under no conceivable interpretation of these declarations is there even a hint that deferral of a case to this International Tribunal could violate the principle of *non-bis-in-idem*. This Trial Chamber views the special circumstances set out in Article 10(2) of the Statute as a limited exception to its principle of *non-bis-in-idem*.

D. Trial By The International Tribunal After The Deferral In This Case Does Not Threaten Any Other Fundamental Legal Interests Of The Accused

34. The Defence asserts that the accused suffers "material disadvantages" where there is a deferral under circumstances not contemplated by Article 10(2). However, in support of this proposition, it cites primarily the fact that the Tribunal's Rules do not guarantee that the pretrial detention in such a domestic context will be taken into consideration in sentencing. It is true that, on its face, Rule 101(E) on Penalties only requires that a convicted person be given credit for the period, if any, during which that person was detained in custody pending his surrender to the Tribunal or pending trial or appeal. While this Rule does not specifically require that credit is to be given for pretrial detention awaiting the disposition of charges pending in a national court, this is a matter which is best considered by the International Tribunal at the sentencing phase of its proceedings.

35. The only other detriment which the Defence suggests that the accused may have suffered due to the deferral of this case to this International Tribunal by Germany is the delay involved in the reinvestigation and the preparation of the case by a new jurisdiction. Any delay in the conclusion of these proceedings is indeed regrettable, but the delay occasioned by the deferral cannot be said to constitute a significant prejudice to the rights of the accused in this case.

36. This Trial Chamber also considers that there has been no prejudice to the accused from the deferral procedure followed in this case because the accused himself did not oppose that deferral. Now that that deferral has been completed there can be no going back to the status quo ante. Germany has relied upon that deferral to ensure that this International Tribunal will dispose of this case according to its Statute. By its own internal law, passed to facilitate that deferral, Germany is now precluded from proceeding with its charges against the accused. This International Tribunal now has a responsibility to proceed with a trial of the accused.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the motion filed by the Defence, and

PURSUANT TO RULE 72,

HEREBY DISMISSES the motion and **DENIES** the relief sought by the Defence in its Motion on *Ne-Bis-in-Idem*.

Gabrielle Kirk McDonald
Presiding Judge

Dated this fourteenth day of November 1995
At The Hague
The Netherlands