1. ARTICLES

International Criminal Tribunal for the Former Yugoslavia
Recent Developments

by **Morten Bergsmo,** The Hague

The International Criminal Tribunal for the Former Yugoslavia faced a number of practical, financial and structural problems during 1994, the first calendar year of its existence. While 14 HRLJ 371-373 (1993) carried a note on the origin and establishment of the Tribunal, the present note briefly describes how the Tribunal has subsequently developed and attempted to address these problems.

I. Prosecutor

It took considerable time until the first Prosecutor of the Tribunal, Mr. Ramon Escovar-Salom of Venezuela, was appointed by the Security Council in resolution 877 (1993) of 21 October 1993. In early February 1994, before Mr. Escovar-Salom took up his obligations as Prosecutor, he withdrew from his position in order to pursue political office in Venezuela. However, on 20 January 1994, before Mr. Escovar-Salom left the Tribunal, he had recommended to the Secretary-General that Mr. Graham T. Blewitt be appointed Acting Deputy Prosecutor, to which the Secretary-General agreed in late January 1994. On his arrival in The Hague, Mr. Blewitt, then Director of the War Crimes Prosecution Support Unit under the Australian Attorney General, immediately began the preliminary organization of the Office of the Prosecutor on 21 February 1994. The Acting Registrar, Professor Theo van Boven of the Netherlands, had taken up his duties on 25 January 1994.

In the first annual report of the Tribunal submitted by its President to the Security Council and the General Assembly in accordance with Article 34 of its Statute,[1] the "unfortunate turn of events whereby the Prosecutor-designate withdrew"[2] and the ensuing delay in appointing his successor is described as "a major blow to the Tribunal", referring to "matters which, pursuant to the statute and the rules of procedure and evidence, should be handled by the Prosecutor".[3] The United States Ambassador to the United Nations, Ms. Madeleine K. Albright, used even more forceful words: "The victims of atrocities in the former Yugoslavia have not been well-served by the resulting delay. ... Never again should the pursuit of justice by this body be so stymied".[4]

A five-month stalemate in the Security Council followed Mr. Escovar-Salom's withdrawal, during which more than one permanent member of the Council is said to have indicated in closed Council meetings that it would use the veto power to block the appointment of various candidates being discussed. It was reported that the Council wanted a consensus candidate. A sudden initiative led to the unanimous appointment by the Security Council on 8 July 1994 in resolution 936 (1994) of Mr. Richard J. Goldstone, then Judge on the Appellate Division of the South African Supreme Court, as Prosecutor.[5] The news of his appointment was received positively by the media and relevant international agencies in the light of his previous position as Chairman of the Standing Commission of Inquiry regarding the Prevention of Public Violence and Intimidation in South Africa. Hopes were raised that he would pursue his mandate in an uncompromising and principled way. Mr. Goldstone took up his duties in The Hague on 15 August 1994.

II. Organization and staffing

By the time of Mr. Goldstone's arrival, the Acting Deputy Prosecutor's recruitment efforts had given tangible results and there was already a group of prosecutors and investigators in The Hague working on the first investigations. However, the initial task of setting up the Prosecutor's Office had proved exceptionally challenging and time consuming, primarily for organizational and budgetary reasons. In the words of the Tribunal's first annual report: "The Office of the Prosecutor has had to invent itself".[6] Other than the Acting Deputy Prosecutor, the first lawyer did not start working for the Office until the second week of May 1994, the first investigator in June, and the substantial investigative work did not commence until early July 1994. It was only in May 1994, "following repeated requests from the Tribunal",[7] that the Acting Registrar of the Tribunal was delegated the authority to appoint staff (up to the first director level, i.e. D-1) on behalf of the Secretary-General from the United Nations in New York, following which the recruitment process "improved dramatically".[8] It proved particularly difficult to hire experienced and well-qualified investigators, which led the Acting Deputy Prosecutor to turn to governments for assistance. Several governments responded positively, leading in some cases to the secondment of investigators

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[1] For the full text of the Statute, *see* 14 HRLJ 211 (1993).

[2] Cf. UN document A/49/342 and S/1994/1007 (hereinafter cited as "the first annual report of the Tribunal"), paragraph 37. The report covers the period from 17 November 1993 to 28 July 1994.

[3] *Ibid.*

[4] As quoted by Reuters, 8 July 1994, BC cycle, page 5.

[5] *See below* at page 469.

[6] Cf. *op. cit.* (note 2), summary, page 7 of the English version.

[7] *Ibid.* (note 2), paragraph 149.

[8] *Ibid.*

to the Office. Those employed on United Nations staff contracts with the Tribunal have, in the main, 12-month contracts, since the General Assembly has yet to make budgetary provisions for the longer term. However, provided they "undertake their duties and responsibilities in an efficient and proper manner, it is intended that the contracts will be renewed".[9]

By the end of 1994, the total number of persons working for the Tribunal was just under 140 – the 11 judges excluded – about 30 of whom were seconded personnel from Denmark, the Netherlands, Norway, Sweden, the United Kingdom and the United States. The seconded personnel are engaged on the basis of special service agreements between the donating state and the Tribunal.[10] About 75 persons were working for the Prosecutor's Office by late December 1994, at which time all of the Tribunal's 108 regular posts provided for by the 1994 financial allocations had been filled.

The revised estimates for 1995 as suggested by the Secretary-General to the General Assembly[11] involve a staff increase from 108 to 260, judges and seconded personnel excluded, constituting a total of 152 new posts, 88 of which are in the professional category and above. However, no decision has been made by the General Assembly on the staffing table suggested by the Secretary-General.

III. Finance

In its first annual report the Tribunal expressed that it had been "impeded by the unsatisfactory funding arrangements, which have, in particular, greatly hindered recruitment of staff. ... The question of financing has had the strongest practical impact upon the establishment of the Tribunal and its operations".[12]

Whilst the Security Council established the Tribunal, the General Assembly decides on its financing. Article 32 of the Statute prescribes that the expenses of the Tribunal "shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations". In resolution 47/235 of 21 October 1993 the General Assembly requested the Secretary-General to present "detailed cost estimates for the International Tribunal" during the next session, before 31 December 1993. The Secretary-General's subsequent report of 8 December 1993[13] concludes with an estimated requirement of US $33,200,000 for the biennium 1994-1995. In its report on this estimate of 15 December 1993,[14] the Advisory Committee on Administrative and Budgetary Questions (ACABQ) recommended that "the Secretary-General be authorized to enter into commitments not exceeding US $5.6 million for the first six months of 1994", until a decision is made on the mode of financing after the review and approval of the Fifth Committee (Finance) of the General Assembly. This amount was authorized by the General Assembly by its decision 48/461 of 23 December 1993.

The ACABQ turned again to matters pertaining to the Tribunal in March 1994. The Committee prepared a six page report[15] of 29 March 1994 on the conditions of service of Tribunal members and the revised estimates in response to two submissions by the Secretary-General pursuant to General Assembly resolution 47/235: First, a report of 16 December 1993 on the conditions of service and allowances of the members of the Tribunal,[16] and secondly, an addendum to the 8 December 1993 report[17] on revised estimates.[18] Furthermore, the President of the Tribunal, Professor Cassese, forwarded a letter to the Fifth Committee of the General Assembly on 18 February 1994, which provided a status report of the efforts to establish the Tribunal and appealed for "the continued support of the States Member of the United Nations. The question of whether the Tribunal can, in fact, accomplish the task before it is now largely in the hands of the various Member States and bodies of the United Nations. The crux of the matter is the budget".[19]

In its 29 March 1994 report, the ACABQ returned to the issue of the General Assembly's prerogative under Article 17 of the Charter, saying that "questions relating to conditions of service, which are issues having administrative and budgetary implications, should be brought to the General Assembly for its action before final action is taken in any other forum".[20] The ACABQ deferred action on the conditions of service of the judges of the Tribunal pending "further experience with regard to the precise nature of the requirements of the Tribunal and the work of the judges".[21] The report concludes by recommending that the Secretary-General "be author-

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[9] *Ibid.* (note 2), paragraph 155.

[10] Under these agreements the secondees are considered as independent contractors. They are not staff members of the United Nations. The United Nations "is not responsible for any expenses in relation to the loan of personnel by the donor, the provision of office and other facilities necessary for the performance of the services required, including the cost of any travel and other related expenditures incurred on official business for the United Nations"; cf. the Secretary-General in Un document A/C.5/49/42, paragraph 114. Germany and Zimbabwe have pledged the secondment of one and two persons respectively to the Tribunal.

[11] Cf. UN document A/C.5/49/42 of 5 December 1994, Table 3, pages 7-8 in the English version.

[12] Cf. *op. cit.* (note 2), summary, page 7 of the English version. Describing the "substantial and detrimental effect" of the limited funding, the report mentions as a consequence of the Tribunal's inability to enter into long-term commitments that it "could not recruit experienced staff and personnel other than on short-term contracts, thus restricting the choice considerably"; cf. *ibid.*, paragraph 35.

[13] *See* UN document A/C.5/48/44.

[14] *See* UN document A/48/765.

[15] *See* UN document A/48/915.

[16] *See* UN document A/C.5/48/36.

[17] Cf. UN document A/C.5/48/44, *op. cit.* (note 13).

[18] *See* UN document A/C.5/48/44/Add.1.

[19] Cf. UN document A/C.5/48/68 of 24 February 1994, page 2 of the English version.

[20] Cf. UN document A/48/915, *op. cit.* (note 15), paragraph 8. And in paragraph 7: "The Committee is of the opinion that, had it had an opportunity to review the administrative and budgetary aspects of the statute of the International Tribunal before it was adopted, it would have made recommendations to the General Assembly on conditions of service of the judges of the Tribunal taking into account, *inter alia*, ... the exclusive mandate of the Tribunal and its duration ...". The concerns of the ACABQ echo paragraph 3 of UNGA resolution 47/235 of 14 September 1993 in which the General Assembly "*[e]xpresses concern* that advice given to the Security Council by the Secretariat on the nature of the financing of the International Tribunal did not respect the role of the General Assembly as set out in Article 17 of the Charter".

[21] Cf. UN document A/C.5/49/11, paragraph 5. On 18 October 1994, the Secretary-General submitted a note to the General Assembly on the condition of service and allowances of the judges of the Tribunal, with concrete suggestions on pension and survivor's benefits, i.e. A/C.5/49/11.

ized to enter into further commitments not exceeding $11 million until 31 December 1994".[22]

In resolution 48/251 of 13 May 1994 the General Assembly endorsed the above recommendation and provided for a further US $5,400,000 allocation for the period until 31 December 1994, totalling US $11,000,000 for 1994,[23] and authorized for the Secretary-General to enter into a contract for Tribunal premises and to recruit personnel for terms extending beyond 1994.[24] In July 1994 the Tribunal signed a four-year lease for office premises in The Hague.

In a substantial performance report[25] with revised estimates for the biennium 1994-1995 issued by the Secretary-General on 5 December 1994 pursuant to the above mentioned General Assembly resolution 48/251, the Secretary-General informed the Assembly that the requirement for the 1994-1995 biennium is US $10,780,000 for 1994 (which is within the amount authorized by the Assembly in resolution 48/251) and US $28,378,600 for 1995. The matters raised in this report will be considered by the ACABQ and the General Assembly early in 1995.[26] However, the ACABQ had a preliminary consideration of the report during which it met on 14 December 1994 with the Prosecutor and Acting Registrar of the Tribunal and with representatives of the Secretary-General and discussed the requirements of the Tribunal for the first three months of 1995. In response to the ACABQ's request, the Secretary-General advised the Committee that the requirements for the first three months of 1995 would amount to US $7,000,000, about one-fourth of the total estimate requested for 1995. The ACABQ recommended that the Assembly "approve an additional amount of $7 million to allow the International Tribunal to continue its activities through 31 March 1995",[27] and that "the authority to enter into contractual arrangements for staff for periods of up to one calendar year should be continued".[28] On 21 December 1994, the Fifth Committee of the General Assembly approved the recommendation of the ACABQ without a vote, and decided that the Assembly will "resume consideration of the issue before 28 February 1995".[29]

It still remains for the General Assembly to decide on the mode of financing the expenses of the Tribunal,[30] as well as allocating adequate and predictable[31] funding for the last nine months of the 1994-1995 biennium and beyond so that the Tribunal can function in accordance with its objectives and as an effective response to the abundance of serious violations of international humanitarian law committed in the former Yugoslavia.

IV. Trust Fund

General Assembly resolution 47/235 "*[i]nvites* Member States and other interested parties to make voluntary contributions to the International Tribunal both in cash and in the form of services and supplies acceptable to the Secretary-General".[32] A voluntary Trust Fund was established and by December 1994 a total of US$ 5,641,967 had been donated by 13 states.[33] Malaysia, Italy and Pakistan are the countries which have contributed most to the Fund, followed by the United States, Canada and Norway, whilst some of the wealthiest countries of the world have not yet contributed to the Fund. It is expected that the Trust Fund will "supplement the assessed budget of the Tribunal including through acquisition of library equipment and supplies, installation of a court management system, including a computerized archiving system, and victim and witness protection".[34]

The Governments of the United Kingdom and the United States have contributed equipment to the Tribunal. The American contribution of a computer package for the Office of the Prosecutor is substantial, valued at up to US $2,300,000.

V. Rules of Procedure and Evidence

On 11 February 1994, at the end of the Tribunal's second session (17 January to 11 February 1994), the Tribunal adopted the Rules of Procedure and Evidence,[35] "for which no modern precedent exists",[36] in fulfillment of its obligation under Article 15 of the Statute. These Rules regulate "the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses",[37] as well as orders and warrants, the appointment of counsel, and the necessary structure for the functioning and organization of the Tribunal. The Rules provide the legal framework "necessary to enable the Tribunal to conduct its investigatory and judicial tasks on a day-to-day basis".[38] As the Nuremburg and Tokyo trials have limited precedent value,[39] the Tribunal, in this "pioneering work in the field on international criminal law",[40] took into consideration the major legal systems of the world, adopting in the formulation of the Rules more of an adversarial than inquisitorial approach, although "the Tribunal tried to capture the international character of the Tribunal".[41]

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[22] Cf. UN document A/48/915, paragraph 21.

[23] Cf. paragraph 9.

[24] Cf. paragraph 10.

[25] *See* UN document A/C.5/49/42.

[26] Cf. UN document A/49/790, paragraphs 4, 5 and 8.

[27] *Ibid.*, paragraph 8.

[28] *Ibid.*

[29] Cf. UN GA Press Release GA/AB/2981, 21 December 1994, page 8.

[30] Cf. UN document A/49/790, paragraph 9.

[31] In the words of the first annual report of the Tribunal: "For the Tribunal to be able to work effectively, its budget needs to be certain in all respects", cf. *op. cit.* (note 2), paragraph 8.

[32] *Ibid.*, paragraph 7.

[33] The countries are, with the amount in US$ indicated in parenthesis: Cambodia (5,000), Canada (168,280), Hungary (2,000), Ireland (6,768), Liechtenstein (2,985), Malaysia (2,000,000), Namibia (500), New Zealand (14,660), Norway (130,000), Pakistan (1,000,000), Spain (13,725), Italy (1,898,049), and the United States (400,000).

[34] Cf. report by the Secretary-General to the General Assembly, UN document A/C.5/49/42, paragraph 116.

[35] UN document IT/32 of 14 March 1994 = 15 HRLJ 38 (1994).

[36] Cf. President Antonio Cassese, in the preface of the United Nations publication containing the Statute and the Rules of Procedure and Evidence, Sales number E/F.94.IILP.1.

[37] Cf. Article 15 of the Statute = 14 HRLJ 212 (1993).

[38] Cf. the first annual report of the Tribunal, *op. cit.* (note 2), paragraph 38.

[39] They had a total of eleven and nine rules of procedure, respectively, with a mechanism through which procedural problems were resolved by individual decisions of the Tribunal.

[40] *Ibid.*, paragraph 39.

[41] Cf. the first annual report of the Tribunal, *op. cit.* (note 2), paragraph 53, which continues: "Only measures on which there is broad agreement have been adopted, thus reflecting concepts that are generally recognized as being fair and just in the international arena. The Tribunal has also attempted to strike a balance between the strictly constructionist and the teleological approaches in the interpretation of the Statute". The judges of the →

The Rules confirm the obligation of states to co-operate with the Tribunal pursuant to Article 29 of the Statute, and to take the necessary steps to comply with its orders. Such steps include "the enactment of national legislation where necessary to remove any impediment which may exist to the surrender or extradition of suspects or accused. In cases of inaction or refusal to co-operate, the Tribunal will report the matter to the Security Council for such action as the Security Council may wish to take".[42]

Since their adoption, the Rules have been amended on two occasions in accordance with Rule 6. First, the wording of Rule 96 (ii) on cases of sexual assault was amended on 5 May 1994 from "consent shall not be allowed as a defense" to:

> "consent shall not be allowed as a defense if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear."

Secondly, Rule 70 on matters not subject to disclosure was amended on 4 October 1994 when it was given a sub-paragraph (B) which provides:

> "If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information."

VI. Rules of Detention

On 5 May 1994, during the third session of the Tribunal (25 April to 5 May 1994), the Tribunal adopted the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal[43] (Rules of Detention), thus devising a regime for detention of those who will appear before the Tribunal as accused. These Rules apply to accused on remand awaiting trial and "a separate group comprised either of those convicted by a trial chamber but awaiting appeal, or convicted of perjury or contempt by one of the chambers. For practical reasons, all persons convicted by a trial chamber for any of the offenses provided for in the statute will remain in the Detention Unit for the 30-day period allowed for service of notice of appeal under the rules of procedure and evidence and will be transferred to other institutions only if no such notice of appeal is given".[44]

The Rules of Detention deal with the management of the Detention Unit, the rights of detainees, and the removal and transport of detainees. The Rules were drafted against the background of the existing body of international standards created by the United Nations[45] as a set of basic guidelines for states, as well as other international instruments.[46] The Rules are based on three basic principles: First, all persons awaiting trial "must be presumed innocent until found guilty and be so treated";[47] second, respect for their human dignity necessitates humane treatment "at all times while in the detention unit and that all their fundamental physical, moral and spiritual needs"[48] are met; and third, no discrimination shall be practiced or tolerated in the Detention Unit.

The Detention Unit is located near the seat of the Tribunal in the Netherlands, within a government prison, but under the exclusive control and supervision of the United Nations.

VII. Other elements of the legal infrastructure

The Acting Registrar prepared, in consultation with the judges, the Directive on Assignment of Defence Counsel (Directive No. 1/94)[49] in time for the Tribunal's fourth session (18-29 July 1994). This Directive governs "the procedure for assignment of defense counsel, the status and conduct of assigned counsel, the calculation and payment of fees and disbursements and the establishment of an advisory panel"[50] which will be consulted by the Registrar or the President on questions concerning the assignment of counsel. Articles 18 and 21 of the Statute ensure the suspect during investigation and the accused the right to legal assistance from a counsel of his own choice or, if he has insufficient means, to free legal assistance from the Tribunal.

The United Nations and the Government of the Netherlands have entered into a headquarters agreement which formalizes the presence of the Tribunal in The Hague.[51] The Agreement was signed on 29 July 1994, after the Security Council had given its approval on 25 July 1994.[52] Most of its 29 articles relate to the normal questions of diplomatic or international relationships. Both the 1946 Convention on the Privileges and Immunities of the United Nations[53] and the 1961 Vienna Convention on Diplomatic Relations[54] apply. The Tribunal enjoys the status normally granted to diplomatic missions and international organizations. However, some provisions are unique due to the nature of the Tribunal, primarily concerning the movements of the accused, counsel and witnesses into and within the Netherlands.

VIII. First indictment

On 7 November 1994, the Prosecutor served the first indictment of the Tribunal by charging Mr. Dragan Nikolic of Bosnia-Herzegovina with wilful killings, unlawful imprisonment, torture, persecution on

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Tribunal were assisted in the drafting exercise by the United Nations Office of Legal Affairs as well as "extensive proposals made by States and by a number of non-governmental organizations"; cf. *op. cit.* (note 2), paragraph 55.

[42] Cf. UN Press Communiqué IT/30, 11 February 1994, page 2 of the English version.

[43] UN document IT/38/Rev.3 of 10 May 1994, to be published in 16 HRLJ No. 1-2 (1995).

[44] Cf. the first annual report of the Tribunal, *op. cit.* (note 2), paragraph 102.

[45] The 1977 United Nations Standard Minimum Rules for the Treatment of Prisoners, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the 1990 Basic Principles for the Treatment of Prisoners.

[46] The European Prison Rules, issued by the Council of Europe in 1987.

[47] *Ibid.*, page 30, paragraph 100.

[48] *Ibid.*

[49] Cf. UN document IT/73/Rev.1 of 1 August 1994, *see* full text below at page 469.

[50] Cf. the first annual report of the Tribunal, *op. cit.* (note 2), paragraph 134.

[51] Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.

[52] *See* the letter from the President of the Security Council to the Secretary-General of that day, UN document S/1994/849.

[53] Cf. UNGA resolution 22A (I).

[54] Cf. United Nations *Treaty Series*, Vol. 500, No. 7310.

discriminatory grounds, and inhuman acts in violation of several provisions of the Statute.[55] According to the indictment, Mr. Nikolic committed the crimes in question in a detention camp known as Susica Camp in Vlasenica Municipality in central Bosnia-Herzegovina during the summer and early autumn of 1992. According to procedural Rule 47 (A), the Prosecutor forwarded on 1 November 1994 the indictment together with supporting material to the Acting Registrar for confirmation by a judge. On 4 November 1994, the indictment was reviewed by Judge Elizabeth Odio Benito, the judge assigned by the President to review indictments that month,[56] who confirmed the indictment and signed warrants of arrest.[57] On 7 November 1994, the Acting Registrar, pursuant to procedural Rule 55 (B), transmitted the arrest warrants, the indictment and a statement of the rights of the accused to the Government of the Republic of Bosnia-Herzegovina and the Bosnian-Serbs in the town of Pale, as the accused may be residing at a place controlled by the Bosnian Serbs.

Procedural Rule 57 provides that "[u]pon the arrest of the accused, the state concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned and the Registrar." By the end of December 1994, it was still not clear when Mr. Nikolic would be transferred to the Tribunal.

IX. Request for deferral

On 11 October 1994, the Prosecutor presented to one of the Trial Chambers[58] an application for deferral of the German investigation against Mr. Dusan Tadic to the competence of the Tribunal in accordance with procedural Rule 9 (iii). The application proposes that a formal request be issued by the Tribunal to the Government of Germany that the German court involved with the Tadic investigation in Germany defer to the competence of the Tribunal, which in practical terms means that the investigation and possible prosecution of the case be "taken over" by the Tribunal.

Rule 9 (iii) reflects the Tribunal's concurrent jurisdiction with, and primacy over, all national courts "in respect of both the investigation and prosecution of persons whose alleged offenses fall within its competence".[59] It provides that the Prosecutor may propose that a request for deferral be made when "what is in issue" in an investigation instituted in a national court "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 stated in his application that the Tadic case "is important to the prosecution of those persons responsible for committing the serious violations of international humanitarian law which occurred ... in the Prijedor region of Bosnia-Herzegovina", and that the relevant crimes committed by Mr. Tadic in connection with the Bosnian Serb take-over of Prijedor Municipality "would provide a clear illustration of a plan for the widespread and systematic destructive persecution against the civilian population of the region (commonly referred to as 'ethnic cleansing')".[60] The application also argued that his investigation involved "potential co-offenders who may not be amenable to the jurisdiction of Germany" and "many additional witnesses outside Germany" who have been interviewed by the Prosecutor's Office.

On 8 November 1994 the Trial Chamber held its public hearing to consider the Prosecutor's application. This was the first public hearing of the Tribunal. In his submission to the Tribunal hearing, the Prosecutor used the opportunity to quote the International Court of Justice and the General Assembly in describing the events in the former Yugoslavia since 1991, the reason why the United Nations made its first attempt "to enforce international law",[61] saying that those events shock "the conscience of mankind ... and is contrary to moral law and the spirit and aims of the United Nations".[62] He continued by saying that "a policy was executed in Prijedor which involved the widespread and systematic persecution of the non-Serb and particularly the Muslim community".[63] He anticipated that "within a short time indictments will be submitted by [him] to the Registrar against Tadic and other persons who have been identified as having been involved in the 'ethnic cleansing' policy in the Prijedor [Municipality]",[64] and that "the involvement of Tadic in the factual circumstances under investigation by [his] Office is very significant and it will adversely affect the investigation and prosecution of other individuals if Tadic is prosecuted in Germany".[65]

In its decision of 8 November 1994 the Tribunal, pursuant to procedural Rule 10, granted the Prosecutor's application, and formally requested "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".[66] In response to the Government of Germany's expression of its acceptance in principle of the primacy of the Tribunal, but that it is unable to comply immediately with the provisions of a formal order for deferral due to conflict with the municipal laws and Germany's Constitution, the Tribunal invited 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".[67] It concluded by requesting the German Government to "forward to the International Tribunal the results of its investigation and a copy of the records of its national court".[68]

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[55] The Prosecutor of the Tribunal Against Dragan Nikolic Also Known As "Jenki" Nikolic, case number IT/94/2/I, *see* full text below at page 480.

[56] Cf. procedural Rule 28 = 15 HRLJ 41 (1994).

[57] Cf. procedural Rule 55 (A) = 15 HRLJ 43 (1994).

[58] Whose members were Judge Adolphus Karibi-Whyte, presiding judge, Judge Elizabeth Odio Benito, and Judge Claude Jorda.

[59] Cf. The Prosecutor's submission to the hearing on the deferral application, page 2 of the English version.

[60] Cf. An Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadic Also Known by the Names Dusan "Dule" Tadic, page 2 of the English version.

[61] Cf. the Prosecutor's submission to the hearing on the deferral application, *op. cit.* (note 59), page 2 of the English version.

[62] *Ibid.*

[63] *Ibid.*, page 4 of the English version.

[64] *Ibid.*, page 6 of the English version.

[65] *Ibid.*, page 7 of the English version.

[66] Cf. 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), case number IT/94/1/D, III – Decision, pages 13-14 of the English version = below at page 488.

[67] *Ibid.*, page 14 of the English version = below at page 488.

[68] *Ibid.*= below at page 488.

X. New Registrar

The term of service chosen by the Acting Registrar came to an end in late December 1994. On the occasion of his departure from the Tribunal, Professor van Boven emphasized that it "was in no way the result of misgivings about the Tribunal nor prompted by lack of faith in the institution or in the United Nations. He simply wanted to return to university life in order to carry on academic work, to continue a number of expert activities in the field of human rights and to be 'a master of his own agenda'".[69]

It was no easy task to find a replacement for Professor van Boven, a distinguished international human rights scholar and defender, but on 29 December 1994 it was announced that Mrs. Dorothee Margrete Elisabeth de Sampayo Garrido-Nijgh had been appointed the new Registrar. She is Acting Vice President of the Court of Appeals in The Hague, and in that capacity she has been responsible for co-ordinating and directing one of the penal chambers of that Court. She has also served as a diplomat in the Dutch Foreign Service.

[69] Cf. UN Press Release CC/PIO/PB-TVB of 19 December 1994.

2. DECISIONS and REPORTS

UN Human Rights Committee (UN-HRCee), Geneva/New York

Decision of 31 October 1994 – Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning **Communication No. 539/1993** – *Submitted by:* Keith Cox – *State party concerned*: Canada

Extradition to the United States to face the possible imposition of the death penalty not considered to violate the CCPR / Cox v. Canada

(full text)*

«**1.** The author of the communication is Keith Cox, a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6, 7, 14 and 26 of the International Covenant on Civil and Political Rights. The author had submitted an earlier communication which was declared inadmissible because of non-exhaustion of domestic remedies on 29 July 1992.[1]

The facts as submitted by the author:

2.1 On 27 February 1991, the author was arrested at Laval, Québec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the state of Pennsylvania on two charges of first degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty, although the two other accomplices were tried and sentenced to life terms.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec, on 26 July 1991, ordered the author's extradition to the United States of America. Article 6 of the Treaty provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed."

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act.

2.4 Concerning the course of the proceedings against the author, it is stated that a *habeas corpus* application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991. On 25 May 1992, he abandoned his appeal, considering that, in the light of the Court's jurisprudence, it was bound to fail.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

The complaint:

3. The author claims that the order to extradite him violates articles 6, 14 and 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to "the death row phenomenon", i.e. years of detention under harsh conditions, awaiting execution.

Interim measures:

4.1 On 12 January 1993 the Special Rapporteur on New Communications requested the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an

* Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.

[1] CCPR/C/45/D/486/1992 = 13 HRLJ 352 (1992).