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THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

Case No. IT-99-37-PT

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding

Judge Patrick Lipton Robinson

Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Date Filed: 29 November 2002

THE PROSECUTOR

v.

NIKOLA SAINOVIC

DRAGOLJUB OJDANIC

GENERAL DRAGOLJUB OJDANIC'S

PRELIMINARY MOTION TO DISMISS

FOR LACK OF JURISDICTION:

KOSOVO

The Office of the Prosecutor:

Mr. Geoffrey Nice

Ms. Cristina Romano

Counsel for General Ojdanic:

Mr. Tomislav Visnjic

Mr. Peter Robinson

Mr. Vojislav Selezan

Counsel for Nikola Sainovic:

Mr. Toma Fila

Mr. Zoran Jovanovic

Introduction

1. General Dragoljub Ojdanic respectfully moves, pursuant to Rule 72(A)(i) for an order dismissing the Third Amended Indictment on the grounds that the Tribunal does not have jurisidiction over crimes committed in Kosovo.

2. General Ojdanic recognizes that the Appeals Chamber has ruled in Prosecutor v Tadic, No. 94-1-AR72 (2 October 1995) that the United Nations Security Council had the power to establish the Tribunal pursuant to Articles 39 and 41 of the United Nations Charter, and that the Tribunal had jurisidiction to prosecute Mr. Tadic, a Bosnian national, for offenses committed on the territory of Bosnia and Herzegovina, a United Nations Member. He recognizes that the Trial Chamber is bound by the Tadic decision.[1]

3. He contends, however, that the situation in Kosovo is different because the alleged crimes were committed on the territory of the Federal Republic of Yugoslavia ("FRY") by a national of that country, and that the Federal Republic of Yugoslavia was not a member of the United Nations at the time the Tribunal was created or at the time of the alleged offences.[2]

4. His contentions can be summarized as follows:

a. The United Nations Charter is a multilateral treaty.

b. A treaty is not binding on non-parties.

c. The Federal Republic of Yugoslavia was not a member of the United Nations at the time of the establishment of the Tribunal or at the time of the alleged offences.

d. Therefore, the United Nations Security Council could not confer jurisdiction on the Tribunal to prosecute offences allegedly committed on the territory of a non-member, by nationals of a non-member.

Historical Background

5. The United Nations is the successor to the League of Nations. When the League of Nations was formed, it was recognized that, as a matter of international law, its members could not impose its jurisdiction on a non-member without the consent of that non-member. This was reflected in Article 17 of the Covenant of the League of Nations, which provided that "In the event of a dispute between a Member of the League and a State which is not a Member of the League, the State or States not members of the League shall be invited to accept the obligations of membership in the League for purposes of such dispute."

6. The Permanent Court of International Justice had occasion to interpret and apply Article 17 in a dispute between Finland, a member, and Russia, a non-member. In the Eastern Carelia Case, P.C.I.J., Ser. B, No. 5, at page 27 (1923), the Court ruled that the League of Nations, and thus the Court, had no power to exercise legal jurisdiction over a non-member. The Court said:

> "[Article 17] moreover, only accepts and applied a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with any other States either to mediation or to arbitration, or to any other kind of pacific settlement."

7. In the famous case of S.S. Lotus, P.C.I.J., Ser. A, No. 10 at page 18 (1927), the Permanent Court of International Justice said:

> "International law governs the relations between independent States. The rules of law binding

upon States therefore emanate from their own free will."

8. The same principle was expressed by Judge Negulisco in his dissenting opinion in the case of Jurisdiction of the European Commission of the Danube, P.C.I.J., Ser. B, No. 14 at page 95 (1927) where he said:

"[D]ecisions of the Great Powers, met together as the Concert of Europe,...have never been held to be legally binding upon States not represented in the Concert."

9. It was with this legal background that the United Nations Charter was written and adopted. As the Appeals Chamber recognized in Tadic, the United Nations Charter is a treaty.[3]

10. Article 2(6) of the United Nations Charter provides:

"The Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."

11. Bentwich and Martin's 1950 Commentary on the Charter of the United Nations stated:

"[T]he Charter does not purport to impose legal obligations on non-members. It does, however, impose upon the Organisation itself an obligation to ensure—by persuasion if possible, but by the

> application of force if necessary—the compliance of non-members with the Principles of the United Nations. The former will have to obey not as a matter of law, but as a result of the realities of power."[4]

12. Professor Madeline Morris, in her article, "High Crimes and Misconceptions: The I.C.C. and Non-Party States," concludes that "the prevailing view at the time of the U.N. Charter's adoption was that it was not binding on non-parties."[5]

13. Non-members, such as Switzerland, have consistently taken the view that they are not bound by the U.N. Charter.[6] As one commentator has stated:

> "Article 2(6) is addressed to the United Nations and its members. While members of the organi-zation may be under a charter obligation to ensure that all states act in accordance with the Charter, as a treaty provision this rule still remains *inter alios acta* for the third states which are under no legal duty to comply with it. Indeed, the practice of non-member states shows that they do not consider themselves legally bound by the Charter of the United Nations."[7]

14. The principle that a treaty cannot bind states which are not parties to it has continued to be honored and recognized in international law since the establishment of the United Nations. When commenting on the state of the law of treaties in 1966, the International Law Commission stated:

> "International tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not parties nor modify in any way their legal rights without their consent."[8]

15. When the Vienna Convention on the Law of Treaties was drafted in 1969, it provided very clearly that "A treaty does not create either obligations or rights for a third State without its consent."[9]

16. In his treatise, The Charter of the United Nations: A Commentary, edited by Mr. Christian Rohde, Professor Simma stated:

> "It may be asked whether the Security Council can also proceed against non-member states under Article 39. To the extent that the Security Council decides on recommendations according to the prerequisites of Article 39, the implementation of which does not result in a violation of international law with respect to a non-member state, there may be no misgivings against such a cause of action. On the other hand, to the extent that measures under Article 41 or 42 are in question, no posible justification for such measures exists on the basis of the U.N. Charter with respect to a non-member State.

> It may be asked whether another justification for enforcement measures appears possible. Not infrequently, the legal nature of the U.N. as a global organization is apparently seen as the basis for enforcement measures directed at non-member states. This view does not appear legally supportable, unless one proceeds from a characterization of the U.N. Charter as a constitution of the world."[10](emphasis added)

17. The view taken by the Appeals Chamber in Tadic that the Security Council could create a criminal tribunal competent to exercise jurisdiction of offences in the U.N. member states of Bosnia and Croatia is consistent with these authorities. All of the international courts established under the auspicies of the United Nations or by treaties, such as the International Court of Justice, the Law of the Sea Tribunal, and the World Trade Organization dispute settlement system, have operated under the principle that their jurisdiction is limited to the parties which have so consented.[11]

18. The Appeals Chamber in Tadic found the authority to create the Tribunal to be based upon the Security Council's power under Chapter VII of the United Nations Charter, and specifically, the non-military measures provided for in Article 41.[12] However, Article 41 recognizes that there is no power to impose these obligations on non-members. The Article itself provides that, having decided what measures not involving the use of armed forces are necessary, the Security Council "may call upon the Members of the United Nations to apply such measures." It says nothing about requiring non-members to apply these measures, or surrender some measure of their sovereignty.

19. The Tadic decision also recognized that the powers of the Security Council of the United Nations "cannot, in any case, go beyond the limits of the jurisdiction of the Organization

at large."[13] Since the United Nations does not have jurisdiction to prosecute offenses committed on the territory of a non-member by a national of a non-member, it cannot confer such jurisdiction on this Tribunal.

20. This is the same principle that the United States is advancing about the new International Criminal Court. President Clinton said, when authorizing U.S. signature of the I.C.C. Treaty:

> "In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not."

21. The position of the United States has been that "by conferring upon the I.C.C. jurisdiction over non-party nationals, the I.C.C. would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties...The right of a state to be free from the exercise of exorbitant jurisdiction over its nationals cannot be abrogated by a treaty to which it is not a party."[14]

22. Professor Michael P. Scharf, in criticising the United States position, has noted that in the Ojdanic case, the ICTY is asserting jurisdiction over a national of a state that was not a party to the U.N. Charter—a treaty.[15]

23. General Ojdanic's position is even stronger than that of the United States. In his case, not only is the Tribunal seeking to assert jurisdiction over the nationals of a non-party, but it is seeking to assert jurisdiction over alleged offences committed on the territory of the non-party—the *sine que non* for traditional criminal jurisidiction.

24. In addition, the Tribunal's statute provides for usurping the jurisdiction of the State through "primacy", while the I.C.C. scheme provides for only "secondary" jurisdiction.[16]

25. The historical treatment of the jurisidiction over non-member states or non-parties to treaties demonstrates that the Tribunal cannot lawfully exercise jurisdiction over the offences charged in the Third Amended Indictment.

The Status of the Federal Republic of Yugoslavia as a Non-Member

26. There is some controversy over whether the Federal Republic of Yugoslavia was or was not a member of the United Nations from 1993-99. Indeed, that very issue is currently under submission before the International Court of Justice in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v FRY), I.C.J. Case No. 91.[17]

27. In that and other cases pending before the International Court of Justice, the FRY, United States, United Kingdom, Netherlands, Belgium, Canada, Portugal, and Spain have all taken the position that the FRY was not a member State of the United Nations.[18]

28. This position is supported by the Secretary-General of the United Nations at the time, Boutros Boutros-Ghali, who stated:

> "When the Security Council in 1992 affirmed the new statehood of Bosnia, Croatia, and Slovenia, it also concluded that the Federal Republic of Yugoslavia, which comprised the remaining parts of the old Yugoslavia—Serbia and Monte-negro—could not automatically assume the U.N. membership of the former 'Socialist Federal Republic of Yugoslavia' and that the new regime

would have to apply for membership."[19]

29. On 22 September 1992, the General Assembly adopted resolution 47/1 stating that:

> "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations."

The General Assembly decided that the FRY "should apply for membership in the United Nations."[20] The FRY was not admitted into the United Nations until November 2000, after it reapplied following the defeat of President Milosevic in the Presidential election.

30. Therefore, at the time of the adoption of the statute of the Tribunal in 1993, and the events charged in the Third Amended Indictment in 1999, the Federal Republic of Yugoslavia was not a member of the United Nations. As a former member of the Office of the ICTY Prosecutor (who believes that the FRY remained a member of the United Nations) has noted:

> "[B]ecause the Chapter VII powers of the Security Council are mandatory only for UN member States, one wonders how the imposition of Chapter VII measures on a State which is supposedly no longer a UN member could possibly be justified."[21]

''Universal Jurisidiction'' Does Not Apply

31. An argument can be made that regardless of the FRY's status at the United Nations, General Ojdanic can be prosecuted by the ICTY, or by any nation of the world, under the often-cited and rarely applied doctrine of "universal jurisdiction." There are two reasons why that argument cannot justify the exercise of ICTY jurisidiction over offences in Kosovo.

32. First, the ICTY's mandate limits it to applying "existing international humanitarian law."[22] As recently catalogued in the Separate Opinion of the President of the International Court of Justice in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), ICJ Case No. 121 (14 February 2002), the principle of universal jurisdiction is not part of customary international law and is in fact incompatible with it.[23]

33. Second, even if "universal jurisdiction" exists which allows a State to prosecute for a war crime not committed on its territory or against its nationals, there is no precedent for an international court to exercise such jurisdiction.[24] As Professor Morris states, "This absence of precedent precludes the possibility that delegability [of state powers to an international court] has been affirmatively entailed within the customary law of universal jurisdiction as it has developed through state practice and *opinio juris*."[25]

Conclusion

34. This motion presents a different issue than that decided by the Appeals Chamber in Tadic. Unlike those in Bosnia and Croatia, the events that took place in Kosovo were committed on the territory of a State which was not a member of the United Nations and not subject to the powers of the Security Council. As a result, the Chapter VII powers used to justify the jurisdiction of this Tribunal in Tadic do not operate in the same way on the events in Kosovo.

35. It is respectfully submitted that, as a result, this Tribunal lacks jurisdiction to prosecute General Ojdanic for the offences charged in the Third Superseding Indictment, and that that indictment must be dismissed.

Respectfully submitted,

TOMISLAV VISNJIC

VOJISLAV SELEZAN

PETER ROBINSON

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[1] Prosecutor v Aleksovski, No. IT-95-14/-A (24 March 2000) at para. 113; Prosecutor v Blagojevic et al, No. IT-02-60-AR65 (3 October 2002) Separate Opinion of Judge Hunt, at para 5.

[2] This ground was not raised nor decided by this Trial Chamber in Prosecutor v Milosevic, No. IT-02-54 (8 November 2001)

[3] Prosecutor v Tadic, No. 94-1 (2 October 1995) at para. 28; Goodrich & Hampro, Charter of the United Nations: Commentary and Documents, (3rd ed. 1969) at pp. 20-21: "The U.N. Charter is a multilateral treaty."

[4] Bentwich & Martin, A Commentary on the Charter of the United Nations (1950) at page 14.

[5] Morris, "High Crimes and Misconceptions: The I.C.C. and Non-Party States," 64 Law and Contemporary Problems 13,57 (2001) citing Bentwich & Martin, supra; Goodrich & Hambro, The Charter of the United Nations: Commentary and Documents (1st ed. 1946) at 108-10; Guggenheim, Lehrbuch Des Volkerrechts, (vol 1, 1948) at page 92; Oppenheim-Lauterpacht, International Law, (7th ed 1948) at pp. 928-29; Kunz, "General International Law and the Law of International Organizations," 48 Am. J. Int'l L 456-57 (1953); and Jessup, A Modern Law of Nations (1948) at page 168.

[6] 26 S.J.I.R. 84-88 (1970); 39 S.J.I.R. 264-67 (1983)

[7] Danilenko, Law-Making in the International Community, (1993) at page 60.

[8] Report of the International Law Commission on the Work of its Eighteenth Session, Draft Articles on the Law of Treaties with Commentaries, II Yearbook of the International Commission, 226 (1966)

[9] Article 34.

[10] Simma, The Charter of the United Nations: A Commentary (1994) at Article 39, paras 36-37

[11] Morris, note 4 supra, at 16,19

[12] Para. 35

[13] Para. 28

[14] Morris, note 4 supra, at 27,28

[15] Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position," 64 Law and Contemporary Problems 67,109-110 (2001)

[16] Compare ICTY Article 9(2) with ICC Article 17

[17] In an earlier ruling in this case, Judge Oda, stated in a separate opinion that "I consider that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice." However, the full court found it unnecessary to decide the issue at that time.

[18] Legality of the Use of Force, ICJ cases Nos. 105-110 (2 June 1999); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. FRY, ICJ case no. 91 (11 July 1999).

[19] Boutros-Gahli, Unvanquished, (1999) at pg 49

[20] See also Security Council Resolution 777 (1992)

[21] Boelaert-Suominen, "The International Criminal Tribunal for the former Yugoslavia and the Kosovo Conflict," 837 International Review of the Red Cross 217-252, (last paragraph before heading "Jurisdictional Aspects") (31 March 2000)

[22] Report of the Secretary General, para. 29

[23] The authorities for and against applying "universal jurisdiction" to war crimes are too numerous and lengthy to include in this motion, given the page limitations of this Tribunal's Practice Direction. The Separate Opinion of President Guillaume contains the best arguments against universal jurisdiction and is incorporated by reference herein. Should the Trial Chamber wish to tackle this issue, which was not decided in the Republic of Congo case, it may wish to request supplemental briefing or an oral hearing on this motion.

[24] The Nuremberg and Tokyo Tribunals were based upon "consent" of the states of Germany and Japan, provided by the Allies who occupied those countries. Morris, note 4, supra, at pg. 37

[25] Morris, note 4 supra, at pg. 44. This was also the official position of the United States government as expressed by U.S. War Crimes Ambassador David Scheffer. See Sadat & Carden, "The New International Criminal Court: An Uneasy Revolution," 88 Georgetown Law Journal 381,450, n. 425 (2000)