The Rules of Procedure and Evidence of the ICTY

Keywords: indictment; International Criminal Tribunal for the Former Yugoslavia; procedure; proceedings; sentencing.

1. INTRODUCTION

In accordance with Article 15 of its Statute, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted its Rules of Procedure and Evidence on 11 February 1994.[1] This text entered into force on 14 March 1994. It is essential not only for the Tribunal itself in its present work in The Hague, but also as a reference for any other international criminal courts and tribunals currently existing or forthcoming.[2] Largely inspired by the national rules of adversarial systems, the Rules rightly put the emphasis on the rights of the accused. However, they must also ensure the protection of victims and witnesses and, generally, the efficiency of the Tribunal, objectives that cannot be addressed on an international level in the same manner as on a national level.[3] Moreover, all of these objectives must be reconciled in order to guarantee a fair trial. As Trial Chamber II of the ICTY emphasized in its response to the prosecutor's request for protection of victims and witnesses in the *Tadić* case, "[a] fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."[4]

Being confronted with the facts, especially since the beginning of the 'active phase' of its work,[5] the Tribunal felt that the initial balance

1. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32 (1994).
2. According to Article 14 of the Statute of the International Tribunal for Rwanda, the Rules of the ICTY will be adopted as its own rules of procedure and evidence, with the required modifications.
3. *See, e.g.,* Case No. IT-94-1-T, Protective Measures for Victims and Witnesses, 10 August 1995, para. 65: "[t]he International Tribunal has no police force that can care for safety of witnesses once they leave the premises of the International Tribunal. The International Tribunal has no long-term witness protection programme nor the funds to provide for one. In any event, any such programme could not be effective in protecting family members of witnesses in cases in which the family members are missing or held in camps."
4. *Id.*, para. 55.
5. *Id.* The first accused, Dragan Nikolić, was indicted on 4 November 1994. A hearing for

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between improving the efficiency of the Tribunal and due regard to the rights of the accused had to be modified. The many amendments and revisions to the Rules permitted an evolution towards more realism.[6] This new perception of what an international tribunal is led to the latest version of 23 April 1996. This version thus reflects the appearance of Rules that are genuinely adapted to the international context in which they take place. This can be observed in the successive steps of the procedure before the Tribunal.

In addition to dealing with procedures before the Tribunal, the Rules also deal with the Tribunal's organization and functioning. However, with respect to the functions of the President, the Chambers, the Prosecutor, and the Registry, the Rules mostly confirm the provisions of the Statute.[7]

2. PRE-TRIAL PROCEEDINGS

2.1. Primary jurisdiction of the Tribunal over national jurisdiction

While the Statute mentions the primary (first) jurisdiction of the Tribunal in the context of the principle *non bis in idem* (Article 10), the Rules more logically detail the proceedings in Part Two, which is entitled "Primacy of the Tribunal" and details the question of *non bis in idem* (Rule 13). Indeed, after indictment and deferral to the ICTY, a case can neither be tried nor retried before a national court. Conversely, the Tribunal may deal with cases already heard by national courts, because jurisdiction of the Tribunal prevails over national jurisdiction. Such a principle of primacy seems to be

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deferral was held on 8 November 1994 in the Tadić case.

6. The Rules were amended on 5 May 1994, 4 October 1994, revised on 30 January 1995, amended on 3 May 1995, 6 October 1995, 18 January 1996, and lastly on 23 April 1996. This study is based on this last version: UN Doc. IT/32/Rev.8 (1996).

7. For a systematic analysis of the first version, *supra* note 1, in connection with the pertinent provisions of the Statute and international instruments of protection of human rights, *see* V. Morris & M. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, A Documentary History and Analysis (1995). For commentaries on the creation of the Tribunal and the Statute, *see, e.g.*, E. David, *Le Tribunal International Pour l'ex-Yougoslavie*, 25 RBDI 565 (1992); J.C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 78 (1993); Th. Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AJIL 78 (1994); and A. Pellet, *Le Tribunal Criminel International Pour l'ex-Yougoslavie - Poudre aux Yeux ou Avancée Décisive?*, 98 RGDIP 7 (1994).

a consequence of the concept of 'international public order', which Trial Chamber I found especially justified in the case of individuals "in position of authority."[8]

Thus, the prosecutor can request any state in which the courts are investigating a crime within the jurisdiction of the Tribunal to forward "all relevant information" (Rule 8). He may also ask a Trial Chamber to issue a formal request for deferral of the case to the Tribunal (Rules 9 and 10). Such a request takes place in three instances:

1. the act would be characterized as an ordinary crime at the national level;
2. lack of impartiality or independence of national courts; and
3. the case is closely related to questions that 'may have implications for investigations or prosecutions before the Tribunal'.

The primacy of the Tribunal also involves the possibility of transferring an accused to the Tribunal, as in the *Tadić* case. All these proceedings presuppose that national legislations - like national extradition provisions - will not constitute an obstacle (Rule 58), in which case state responsibility would be involved, since all states have the duty to cooperate and "comply without undue delay with any request for assistance or an order issued by a Trial Chamber" (Article 29 of the Statute).[9] In the *Tadić* case, Trial Chamber II urged the German authorities to comply and invited them to take all necessary measures.[10]

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8. Case No. IT-95-5-D, Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina, 16 May 1995, paras. 24-25.
9. This is also true for *de facto* entities. *See* the definition of 'state' adopted for that purpose in Rule 2 as amended on 30 January 1995: "[a] State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not."
10. Case No. IT-94-1-D, Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal, 8 November 1994 (Operative Part, at 11). The legislation concerning the relations with the Tribunal has been adopted by the German Parliament on 31 March 1995. Dusko Tadić was transferred to The Hague on 24 April 1995.

2.2. Indictment

The Prosecutor conducts the enquiries and decides whether to prosecute. He then assumes the most important responsibility for the success of the mission of the Tribunal, that of ensuring the rights of suspects (Rule 42) and those already accused (Rule 63). In both cases, the questioning is either tape-recorded or video-recorded (Rule 43).

Once the indictment has been prepared by the Prosecutor, it must be submitted to a judge for review before it will be effective (Rule 47). The judge can confirm or dismiss each count. The Prosecutor can amend the indictment, but once the indictment is confirmed by a judge, it may only be amended by leave of the confirming judge or, if at trial, by leave of the Trial Chamber (Rule 50). In order to ensure a fair trial, an amendment to Rule 50, dated 18 January 1996, effects a further appearance of the accused after his initial appearance (pursuant to Rule 62), to enable him to enter a plea on the new charges. In practice, the question arose how deeply the indictment should be reviewed. As Judge McDonald, analysing her own function, pointed out:

> [i]n a sense, the Judge is then discharging a function akin to that of an examining magistrate (*juge d'instruction*) or of a grand jury helping to ensure that the prosecutor will not be frivolous or wilful.[11]

Such an evolution is positive, as it helps to assure that nobody will be prosecuted without strong *prima facie* evidence. It may also constitute a way to at least partly control the activities of the Prosecutor, as his strategy may appear unclear.[12]

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11. Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, at 3. *See also* notes 3-6, *supra*. One may refer to the French *Chambre d'accusation*-type proceedings or the English committals. This approach is also favoured in the Draft Statute on an International Criminal Court, Report of the International Law Commission (ILC), UN Doc. A/49/10 (1994), Commentary under Art. 27(1).

12. *See* the dubious-looking interview of Prosecutor R. Goldstone in *Le Monde*, 2 February 1996, at 2. To speak of 'reconciliation' before any judgment - in a context of genocide - is nothing more than a plea in favour of impunity. It is, of course, too early to draw conclusions about the general policy of the prosecutor. However, through the doctrine, the NGOs, and public opinion, there is sufficient means to judge the prosecutor's conduct. For example, with respect to the latest indictments, the prosecutor largely underlined that the Tribunal was indicting persons responsible for committing crimes against Serbs as well as against Bosnians. Crimes are to be prosecuted *without regard* to the nationality of neither the victims nor that of the accused. Moreover, as the ICTY will not be able to prosecute all crimes, it is to be

The confirmation of the indictment is usually followed by the issuance of an arrest warrant (Rule 55), which is transmitted by the Registry to "an appropriate authority or international body" with an "order for [the accused's] prompt transfer to the Tribunal in the event that he be taken into custody by that authority or international body" (Rule 59 *bis*). These last measures were added in the modification of 18 January 1996, to make clear that the Registry was competent for the transmission and that 'international bodies' such as the Implementation Force (IFOR) had to cooperate as well as states.[13]

After the indictment, all information is subject to disclosure (Rules 66 to 68). However, Rule 70 allows confidentiality for information provided to the prosecutor "on a confidential basis", most likely by states. As this information is "used solely for the purpose of generating new evidence", and as the defence is still authorized to challenge the evidence itself, this does not endanger the fairness of the procedure.

2.3. Procedure of Rule 61

The report of the Secretary-General rejected the French proposal to authorize trials *in absentia*, a procedure that was strongly contested by the United States and other states. It could have permitted the Tribunal to react appropriately to the failure to execute the arrest warrants, provided it had given sufficient guarantees.[14] Such an advantage has been rightly understood by the Islamic Countries Conference, among others, which presented an alternative project.[15] Taking these proposals into account, the judges decided to create a procedure in cases where arrest warrants have not been executed, the now well-known Rule 61. It seems to constitute a substitute to the process *in absentia*, but without a judgment.

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hoped that the prosecution - to set an example - will decide to indict individuals primarily with regard to their hierarchical position, and not in order to demonstrate that all the parties were somehow involved in crimes, which is in not a judicial task.

13. *See* Order of Judge Jorda that Copies of the Indictments and Arrest Warrants [...] Be Transmitted to IFOR, 24 December 1995.
14. UN Doc. S/25266 (1993), para. 108. The Human Rights Committee accepts trials *in absentia* with strict observance of the rights of the defence. *See* UN Doc. HRI/GEN/1 (1992), at 15. Ordinarily, the core group of nations that have an inquisitorial style in their process culture have this form of trial, e.g., Belgium, France, and The Netherlands, and they are quite common there.
15. *See* UN Doc. S/25504 (1993), para. III(7), at 4.

In case of failure to execute a warrant, if the prosecutor satisfies the confirming judge that he "has taken all reasonable steps to effect personal service" *and* has tried to inform the accused by way of publication in newspapers (Rule 60), the judge may order that the indictment be submitted to a Trial Chamber. This Trial Chamber then makes another review of the indictment, in order to issue an *international* arrest warrant transmitted to all states: in effect, the accused becomes an international fugitive.[16] This procedure could have been very neutral and formal, but the Rule has been modified twice, reinforcing each time its character as a 'substitute' to trial *in absentia*. The revision of 30 January 1995 allows the prosecutor to "call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge" (Rule 61 (E)). The amendment of the Rules of 18 January 1996 made clear that the release of the procedure is in the hands of the confirming Judge, and not in those of the prosecutor. This ensures that the prosecutor has made every possible effort to obtain execution of the warrant. Moreover, the first procedures brought pursuant to this Rule have proved that the Trial Chamber intended to exercise broad powers, reviewing the *prima facie* character and appropriateness of the counts chosen by the prosecutor in the indictment, but also completing or modifying them.[17] Such a broad interpretation of the power of a Chamber under the Rules and the Statute is legitimated by its judicial function and by the examination of witnesses at public hearings.

If the Trial Chamber concludes that the failure to execute the warrant is due to a lack of cooperation by a state, the President of the Tribunal "shall notify"[18] the Security Council "in such manner as he thinks fit".[19] In the *Nikolić* case, this notification had some effect on Resolution 1019 (1995), which was, however, a bit disappointing inasmuch as the Serbian-Bosnian administration of Pale was not clearly designated, or only in a very general manner.[20]

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16. Since the last amendment, the Trial Chamber can also order states to freeze the assets of the accused, upon request of the Prosecutor or *proprio motu*.
17. Case No. IT-94-2-R61, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 25.
18. In other cases of lack of cooperation, the President has the opportunity, but not the obligation, to do so; *see, e.g.*, Rule 59, Failure to Execute a Warrant or Transfer Order.
19. However, this permits him to recommend the measures he thinks more appropriate.
20. *See* UN Doc. S/RES/1019 (1995), paras. 8-9.

3. THE TRIAL

3.1. Procedure before Trial Chambers

An initial appearance before a Trial Chamber takes place just after the transfer of the accused. The accused must decide whether to enter a plea of guilty or not guilty on each count (Rule 62).[21] In case of a plea of guilty, there is only one pre-sentencing hearing, to ascertain and ensure that the accused understands the facts. In case of a plea of not guilty, the Trial Chamber instructs the Registrar to set a date for trial.

Before the process opens, both parties have the opportunity to move before a Trial Chamber for preliminary motions, without interlocutory appeal, except for dismissal of an objection based on lack of jurisdiction (Rules 72 and 73). The *Tadić* case, which is the only case thus far to have arrived at this stage of the procedure, gave rise to many defence motions concerning jurisdiction, the principle *non bis in idem,* and the form of the indictment, while the Prosecutor asked the Trial Chamber to take measures of protection for some victims and witnesses.[22] The trial began on 7 May 1996. Even though this case is the first to come to trial, the Rules concerning the proceedings before Trial Chambers (Part Six) have already been modified.

The proceedings before a Trial Chamber are public except for deliberations (Rule 78) and those based on cross-examination. However, closed sessions can be ordered (Rule 79) for protection of public order or morality, protection of victims and witnesses (also Rule 75), and protection of the interests of justice.[23] In order to effectuate examination, any refusal of a witness to answer constitutes a contempt of the Tribunal (Rule 77). The case of contempt of the Tribunal has been widened to "any person

21. The first plea of guilty occurred in the Erdemović case, at the public hearing of 31 May 1996 (transcript forthcoming). But as the accused declared that he was "forced" to commit mass killings during the ethnic cleansing of Srebenica, the question may arise at the pre-sentencing hearing whether this claim constitutes a mitigating circumstance or, in effect, a plea of not guilty. Moreover, a psychiatric analysis may be ordered.

22. Case No. IT-94-I-T, Defense Motions, 23 June 1995. For a commentary on the decisions of the Tribunal, *see* G.H. Aldrich, *Jurisdiction of the International Criminal Tribunal for Former Yugoslavia*, 90 AJIL 64 (1996); and H. Ascensio & A. Pellet, *L'Activité du Tribunal Pénal International Pour l'ex-Yougoslavie (1993-1995)*, 41 AFDI (1995).

23. *See* Case No. IT-94-1-T, *supra* note 2.

who attempts to interfere with or intimidate a witness", which may include a party as well and is necessary to preserve the fairness of the debates. Some other amendments also concerned the testimony of witnesses: the Chamber may permit a child, even if he does not understand the nature of a solemn declaration, to testify if he is considered mature enough (Rule 90(C)), and the Tribunal is empowered to hear witnesses detained by a state and temporarily transferred to the detention unit of the Tribunal (Rule 90 *bis*). The proceeding of transfer of detained witnesses has been used in an unusual manner for General Djukić and Colonel Krsmanovic, the former being indicted after his transfer as a witness.[24] In order to achieve such a result, a rule allowing transfer and detention of *suspects* was missing, but has been added in the last version of 23 April 1996 (Rule 40 *bis*). It certainly constitutes a better guarantee for the rights of the defence.

With regard to evidence other than the testimony of witnesses, it is worth noting that confessions are presumed to have been free and voluntary if they were given during questioning by the prosecutor (Rule 92), that evidence of a "consistent pattern of conduct" may be admissible in the interest of justice (Rule 93), and that "[a] Trial Chamber shall not require the proof of facts of common knowledge but shall take judicial notice thereof" (Rule 94). Rule 96(ii), providing that, in cases of sexual assault, consent shall not be allowed as a defence has been clarified as follows:

> consent shall not be allowed as a defence 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 the victim did not submit, another might be subjected, threatened or put in fear.[25]

The judgment is rendered by the majority of the Judges, and separate or dissenting opinions may be added (Rule 88).

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24. *See* Case No. IT-96-19-Misc.1, Transfer Order for General Djordje Djukić and Colonel Aleksa Krsmanovic, 12 February 1996, and Case No. IT-96-20-I, Decision on the Review of the Indictment, 29 February 1996. Actually, the Tribunal was put in a very difficult situation by the states participating in the 'contact-group', which, in the context of the Roma agreements, urged Bosnia-Herzegovina to transfer the two alleged criminals to The Hague for political reasons and before any indictment.

25. To add opinions to a judgment in *criminal* matters, even if permitted by Article 23 of the Statute, is still very shocking for jurists of civil law, as a criminal sentence is supposed to reflect the position of society as a whole against the individual.

3.2. Appellate proceedings

The proceedings before a Trial Chamber apply *mutatis mutandis* on appeal (Rule 107). Either party has 30 days to appeal a judgment or sentence (Rule 108(A)). The delay is 15 days for the expedited appeals procedure provided by Rules 108(B) and 116 *bis* (added) for appeal from a judgment dismissing an objection based on lack of jurisdiction, for a decision on contempt of the Tribunal, or for a decision on false testimony (Rule 91). Rule 117(C), providing that "in appropriate circumstances the Appeals Chamber may order that the accused be retried according to law", confirms that the Tribunal's appeals procedure will oscillate between a 'real' appeal, i.e., the Appeal Chamber rendering a definitive judgment on facts and law, and a '*cassation*'.[26]

4. Sentencing and Post-trial Proceedings

4.1. Sentencing

Once the accused is found guilty, the Trial Chamber has to determine the penalty. The penalty may only include imprisonment and not the death penalty.[27] The Chamber has to refer to "the general practice regarding prison sentences in the courts of the former Yugoslavia" (Article 24 of the Statute and Rule 101), but can take into account other factors as well, such as any aggravating or mitigating circumstances (Rule 101). The first requirement ensures the conformity of the procedure with the general principle of law *nulla poena sine lege*, the second the concept of fairness.

The Chamber, holding a special hearing, may order restitution of property (Rule 105). One may wonder whether such measures could be operative, as most of the takings of property were collective and not individual. However, Rule 105 provides sufficient tools to achieve this goal: takings of property are linked to the *crime* of which the convicted person has been found guilty, and the Rule applies even if such property

26. In a system of '*cassation*', the judgment is 'broken' (*cassé*) if it made a wrongful application of the law; consequently, the case must be retried by another court.
27. *See* Report of the Secretary-General, UN Doc. S/25704 (1993), paras. 111-112.

is in the hands of third parties. Moreover, Rule 106 provides for compensation of victims based on the judgment finding the accused guilty, but presupposes that victims would be allowed by national legislation to bring such an action before a national court or other 'competent body'. It is to be hoped that such procedures will be used widely, since justice aims at giving back to everyone what is due to him or her (*suum cuique attribuere*).

4.2. Post-trial proceedings

The place of imprisonment is to be chosen by the Tribunal from a list of states that have indicated their willingness to accept convicted persons (Article 27 of the Statute and Rule 103). It is not rare for a national sentence to be served in another state; for instance Andorran sentences in criminal matters are served in France.[28] But with regard to the ICTY, sentences may be served in different countries, which means different treatments for the convicted persons. In order to avoid grave inequalities, imprisonment is subject to supervision by the Tribunal itself or an organ designated by it (Rule 104).

The President of the Tribunal, in consultation with the judges, determines the appropriateness of pardon or commutation of sentence from which the convicted person may benefit under national law (Article 28 of the Statute and Rules 123 to 125). The President has to discharge this function in such a manner as to avoid unequal treatment for "similarly-situated prisoners" (Rule 125). It will nevertheless be difficult to entirely avoid unequal treatment, unless the Tribunal tries to develop some kind of coordination between the different states concerned.[29]

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28. It is worth noting that, according to the European Court of Human Rights, the state under whose jurisdiction the sentence is served does not have to review the conformity of the trial procedure with the Convention, except if the sentence is the result of a "flagrant denial of justice" (Drozd and Janousek *v.* France and Spain, 240 Eur.Ct.H.R. (Ser. A), para. 110 (1992)). The same solution may apply for the sentences of the ICTY served in member states of the European Convention on Human Rights.

29. A way to get out of the conundrum would be to refuse any pardon or commutation, which could be described as an equal treatment. Actually unequal treatment also occurs as a consequence of the application of the 'universal jurisdiction principle' (for such an application, *see, e.g.*, the judgment of the Danish High Court of 25 November 1994 against Refik Sarić, responsible for acts of violence in a Croat detention camp in Bosnia-Herzegovina) or, more generally, when several states are competent to prosecute the same crimes. In this respect, the ICTY has made progress, as the Rules provide for some kind of centralization and supervision concerning the treatment of the prisoners.

After a definitive judgment, the prosecutor, within one year, or the defence, without delay, can request review if new facts have been discovered. If the judges who pronounced the judgment agree that the new information constitutes a decisive factor, the Chamber can pronounce a further judgment after hearing the parties (Rules 119 and 120).

These proceedings tend to envisage the ICTY in the long-term. But the Tribunal could easily be suppressed by a new resolution of the Security Council or a refusal of the General Assembly to provide financing. The Rules then suggest that any attempt to suppress the Tribunal would necessitate measures to transfer the responsibility for post-trial proceedings to other organs with the same guarantees, in order to preserve the rights of the convicted person.

5. CONCLUSION

The work of the ICTY in respect of its Rules, as amended and revised, constitutes a very positive contribution to the development of international law. Far from being vain and idealistic, it provides operative measures to ensure fair trials. Concerning pre-trial proceedings, the Rules give effect to the primacy of the Tribunal over national jurisdiction and permit a reaction to failure by a state to execute a warrant of arrest, using the procedure laid down in Rule 61. At trial, they establish a delicate balance between the rights of the accused and those of the victims and witnesses. They also try to secure fair treatment for the convicted persons, determining the most adequate sentence and supervising the imprisonment. Having analysed the Rules of Procedure and Evidence, one cannot disagree with the Appeals Chamber declaring in the *Tadić* case:

> [a]n examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules

> of procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.[30]

Moreover, the practice of the Tribunal, using its Rules of Procedure and Evidence, has already proven that it was possible to create an international criminal procedure that functions effectively and in conformity with the highest standards of international human rights law. Concerning the Yugoslav crisis itself, such work will be appreciated by all those who think that the creation of an international tribunal was an adequate response to the atrocities committed in former Yugoslavia, and that the persons allegedly responsible for the gravest crimes committed in Europe since World War II have to be prosecuted and, if guilty, punished.

Hervé Ascensio[*]

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30. Case No. IT-94-I-T, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 46.

* Research assistant and tutor at University of Paris X, Nanterre, France. The author also contributed to the brief of *Amicus Curiae* submitted by the French NGO *Jurists Without Borders* in the Tadić case (appeal, jurisdiction).