



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

Case No.: IT-95-5/18-T

Date: 7 December 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 7 December 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S MOTION CHALLENGING THE LEGAL VALIDITY
AND LEGITIMACY OF THE TRIBUNAL**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER 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 (“Tribunal”) is seised of the Accused’s “Motion Challenging the Legal Validity and Legitimacy of the International Criminal Tribunal for the Former Yugoslavia,” filed on 26 November 2009¹ (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused argues that the United Nations Security Council (“UNSC”) did not have a legal basis for establishing the Tribunal.² The Accused further argues that since the UNSC lacks any power to “hold trials and pronounce judgement[s],” it cannot establish a subsidiary organ such as the Tribunal and vest it with the power to “hold trials and pronounce judgement[s]”.³ Under the Accused’s analysis, an international tribunal is properly established through the conclusion of a treaty, as was the case with the International Criminal Court, since treaties are the source of international judicial authority.⁴

2. The Accused also characterises the UNSC as “the political executive organ of the [United Nations],” incapable of setting up an independent and impartial tribunal that is “established by law” as required by the International Covenant for Civil and Political Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Given that the Tribunal was created neither through an international treaty nor through domestic legislation, it cannot be said to have been “established by law”.⁵

3. The Accused further argues that the UNSC does not possess “any legislative power or authority to adopt general legal enactments that have the same role in international law as domestic legislation has in national law.”⁶ Thus, the UNSC could not have delegated these non-existent legislative powers to the Tribunal’s Judges through the enactment of Article 15 of the Statute of the Tribunal (“Statute”), which allows the Judges to adopt the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁷ Further, the Accused contends that the Tribunal’s Judges then delegated their purported legislative power to the Office of the Prosecutor (“Prosecution”)

¹ The Accused filed this Motion, in BCS, on 20 November 2009; the English translation was filed on 26 November.

² Motion, paras. 3–5

³ Motion, para. 8.

⁴ Motion, para. 3.

⁵ Motion, para. 13.

⁶ Motion, paras. 11, 13.

⁷ Motion, para. 15.

by enacting Rule 37(A) which obliges the Prosecution to perform “all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statutes and the Rules, as may be framed by the Prosecutor.”⁸

4. Finally, the Accused argues that the UNSC suspended the implementation of the Geneva Conventions of 12 August 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 by vesting the Tribunal, rather than the national jurisdictions, with primary jurisdiction over violations of international humanitarian law in the former Yugoslavia.⁹

5. The “Prosecution Response to Motion Challenging the Legal Validity and Legitimacy of the International Criminal Tribunal for the Former Yugoslavia” was filed on 1 December 2009 (“Response”). The Prosecution argues that the Appeals Chamber has already determined the validity of the Tribunal’s creation in its previous decisions and that, as a result, the Accused’s Motion should be dismissed.¹⁰

II. Challenges to Jurisdiction

6. The Chamber notes that the Motion fails to refer to any applicable provision in the Rules. Having already filed an extremely large number of different motions, there is no doubt that the Accused understands the proper procedure, outlined in Rules 72 and 73 of the Rules, for bringing motions before the Trial Chamber. In addition, he has previously submitted a number of motions challenging aspects of the Tribunal’s jurisdiction within the proper confines of Rule 72.¹¹ This Chamber has also addressed the differences between Rule 72 and Rule 73 motions in its decision on yet another jurisdictional challenge filed by the Accused based on his alleged immunity agreement with the United States of America Ambassador, Richard Holbrooke.¹² Moreover, other than stating that it is his “moral duty in the light of history and before the general public” to challenge the validity of the Tribunal, the Accused has failed to specify the relief he seeks.¹³

⁸ Motion, para. 18.

⁹ Motion, para. 12.

¹⁰ Response, para. 2.

¹¹ See “Preliminary Motion to Dismiss Paragraph 60(k) for Lack of Jurisdiction”, 10 March 2009; “Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability”, 16 March 2009; “Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction”, 18 March 2009; “Preliminary Motion on Lack of Jurisdiction concerning Omission Liability”, 25 March 2009; “Preliminary Motion to Dismiss JCE III – Special Intent Crimes”, filed on 27 March 2009; and “Preliminary Motion on Lack of Jurisdiction: Superior Responsibility”, 30 March 2009.

¹² Decision on the Accused’s Holbrooke Agreement Motion, 8 July 2009 (“Holbrooke Decision”).

¹³ Motion, para. 21.

7. The Trial Chamber must, therefore, first decide which provision of the Rules governs the Accused's Motion. There is no doubt that the Motion, being a challenge to the very establishment and the existence of the Tribunal, is a challenge going to its jurisdiction.¹⁴ Rule 72 of the Rules, entitled "Preliminary Motions" refers explicitly to challenges to jurisdiction and provides as follows:

Rule 72
Preliminary Motions

(A) Preliminary motions, being motions which

(i) challenge jurisdiction;

...

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. ...

...

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
- (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
- (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
- (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

8. Although clearly a jurisdictional challenge, the Accused's Motion is not a "preliminary motion", as defined by Rule 72, since it does not concern any of the issues listed in Rule 72(D).¹⁵ Indeed, this Tribunal and the International Criminal Tribunal for Rwanda have faced jurisdictional challenges disputing the validity of the respective Tribunals and have consistently held that motions of that nature fall outwith the exhaustive list under Rule 72(D).¹⁶ Moreover, even if the Motion were a jurisdictional challenge falling under Rule 72, it would be out of time as the Accused's trial has already commenced.

9. Rule 73 refers to "other motions" and provides as follows:

¹⁴ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("Tadić Decision"), paras. 10–12.

¹⁵ *Prosecutor v. Radovan Karadžić*, Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, paras. 41–43 ("Holbrooke Decision") citing *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003.

¹⁶ See *Prosecutor v. Milan Milutinović et al*, Case No. IT-05-87-T, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, 21 February 2008 ("*Milutinović Decision*"); *Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004, paras. 7–10; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67/PT,

Rule 73
Other Motions

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

Unlike preliminary motions challenging jurisdiction, motions falling under Rule 73 are without interlocutory appeal, save with certification by the Trial Chamber.¹⁷ The question then is whether the Accused's Motion, even though a jurisdictional challenge, should be governed by Rule 73, making this decision subject to the certification procedure outlined in Rule 73(B).

10. As noted above, having faced a jurisdictional challenge from the Accused in relation to the alleged immunity agreement with Holbrooke, the former pre-trial Chamber in this case already dealt with the distinction between Rule 72 and Rule 73, eventually deciding that the challenge there was governed by the latter.¹⁸ Furthermore, jurisprudence exists that indicates that a motion challenging the validity of the Tribunal is one that should be filed under Rule 73.¹⁹ Accordingly, the Chamber is of the view that the Accused's Motion falls into the category of "other motions" as that is defined in Rule 73 of the Rules.

III. Legal Validity of the Tribunal

11. Whether the UNSC legally established the Tribunal is an issue that was unambiguously settled in 1995 in the *Tadić* case, when the Appeals Chamber held that the establishment of the Tribunal fell squarely within the powers of the UNSC under Article 41 of the Charter of the United Nations.²⁰ On the basis of the reasoning set out in that decision, the Trial Chamber finds that the Accused's argument that the Tribunal was not legally constituted because it was not established through an international treaty is without merit. Indeed, the establishment of an international tribunal through an international treaty, as in the case of the International Criminal Court, is but one of the methods by which to set up such a tribunal.²¹

12. In *Tadić*, the Appeals Chamber also found untenable the argument that the UNSC, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such

Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004, paras. 10–12.

¹⁷ Rule 73(B)

¹⁸ Holbrooke Decision, paras. 41–43.

¹⁹ *Milutinović* Decision, paras. 1–15.

²⁰ *Tadić* Decision, paras. 26–36.

²¹ See *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, paras. 398–399 (affirming a Trial Chamber decision that denied the

powers.²² Rather, it held that the UNSC established the Tribunal in furtherance of its principal function to maintain international peace and security.²³

13. In addressing the question of whether the Tribunal is a tribunal “established by law”, the Appeals Chamber in *Tadić* explained that the separation of powers element of the principle that a tribunal be “established by law” is inapplicable in an international setting as it is impossible to classify the organs of the United Nations into the divisions that exist between the executive, legislative, and judicial branches in the domestic sphere.²⁴ According to the Appeals Chamber, an international criminal court is “established by law” when it is “rooted in the rule of law and offer[s] all guarantees embodied in the relevant international instruments.”²⁵ Having examined various provisions of the Statute and the Rules, the Appeals Chamber held that the Tribunal was established in accordance with the rule of law.²⁶

14. The Appeals Chamber in *Tadić* has also already addressed the Accused’s argument regarding the primacy of the domestic jurisdictions over crimes such as those encompassed by the Geneva Conventions of 12 August 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. It held that a tribunal such as this one must be endowed with primacy over national courts as otherwise there would be a perennial danger of international crimes being characterised as “ordinary crimes,” or proceedings being designed to shield persons accused of serious crimes.²⁷ Furthermore, it cannot be said that the UNSC suspended the implementation of those conventions on the territory of the former Yugoslavia as the national courts are still able to, and do, exercise jurisdiction over the relevant international crimes. Indeed, Article 9 of the Statute provides that national courts have concurrent jurisdiction with the Tribunal until the latter requests the former to defer to its competence.²⁸

15. As for the Accused’s argument that the UNSC delegated its non-existent legislative powers to the Tribunal’s Judges, it should be noted that the Appeals Chamber previously held that the UNSC does have decision-making powers and that it has acted as a legislator when it

accused’s motion which argued that the Charter of the United Nations did not empower the UNSC to establish a criminal court such as the Tribunal).

²² *Tadić* Decision, paras. 37–38. See *Prosecutor v. Krajišnik*, Case No. IT-00-39-AR73.2, Decision on Krajišnik’s Appeal Against the Trial Chamber’s Decision Dismissing the Defense Motion for a Ruling That Judge Canivell is Unable to Continue Sitting in the Case, 15 September 2006 (“*Krajišnik* Decision”), para. 15.

²³ *Tadić* Decision, para. 38.

²⁴ *Tadić* Decision, paras. 42-43.

²⁵ *Tadić* Decision, para. 42.

²⁶ *Tadić* Decision, paras. 45-46.

²⁷ *Tadić* Decision, paras. 55-60.

²⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 29.

established the Tribunal and enacted its Statute using its Chapter VII powers.²⁹ Article 15 of the Statute then authorised the Tribunal's Judges to adopt the Tribunal's Rules of Procedure and Evidence. The Judges were, in turn, authorised to enact Rule 37(A), a Rule that the Accused mistakenly argues was a delegation of purported legislative powers to the Prosecution. Indeed, Rule 37(A) simply instructs the Office of the Prosecutor to (i) perform all its functions in accordance with the Rules and (ii) ensure that its internal regulations, if any, are consistent with the Statute and the Rules. Accordingly, this argument too is without merit.

16. Thus, for all the reasons outlined above, the Chamber is of the view that the Accused's Motion should be denied. This should not come as a surprise to the Accused given the available jurisprudence and his remark in the Motion that it was his moral duty to file it "regardless of what the decision of the Trial Chamber may be in response."³⁰ The Trial Chamber wishes to emphasise to the Accused, yet again, that his efforts and resources are best directed towards preparing for the resumption of his trial rather than to filing challenges out of "moral duty", which he knows are not going to bear fruit.

IV. Disposition

17. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73 of the Rules, hereby **DENIES** the Motion.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this seventh day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁹ *Krajišnik* Decision, para. 15. See also *Tadić* Decision, para. 37.

³⁰ Motion, para. 21.