



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: 28 August 2013

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: 28 August 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO DISMISS THE INDICTMENT

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 seized of the Accused’s “Motion to Dismiss: Lack of Jurisdiction of Mechanism for Criminal Tribunals (MICT)”, filed publicly on 1 July 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests that the Chamber dismiss the Third Amended Indictment (“Indictment”) on the grounds that the United Nations Security Council (“UN” and “Security Council”, respectively) did not have the lawful authority to establish the Mechanism for International Criminal Tribunals (“MICT”), that accordingly there is no legal entity to which he can appeal in the event that he is convicted, and that therefore his fundamental right to appeal has been abridged.¹ By passing Security Council Resolution 1966 (“Resolution 1966”) establishing the MICT, the Accused observes, the Security Council extinguished the jurisdiction of the Tribunal’s Appeals Chamber over any appeal arising from his case, and he submits that because the MICT lacks jurisdiction, “any conviction would be effectively unreviewable”.²

2. More specifically, the Accused asserts that the Security Council’s determination of the existence of a threat to peace and security, as well as any concomitant exercise of authority under Chapter VII of the UN Charter, is subject to judicial review,³ and that this Chamber “has the power, and the duty to determine whether the MICT was validly created”.⁴ In the Accused’s view, since no continuing threat to peace and security existed in the former Yugoslavia in 2010,⁵ the creation of the MICT was a disproportionate and unreasonable exercise of power which exceeded the scope of the Security Council’s Chapter VII authority.⁶ The Accused also asserts that the 2010 establishment of a court with primary jurisdiction over crimes committed on the territory of the former Yugoslavia “deprive[d] the people of the former Yugoslavia of an important aspect of self-

¹ Motion, paras. 1, 33 *bis*. The Chamber notes that the Motion contains two paragraphs numbered “33” and shall refer to the second of these as “para. 33 *bis*”.

² Motion, paras. 30–31 (citing Security Council Resolution 1966 dated 22 December 2010, U.N. Doc. S/RES/1966 (2010) (“Resolution 1966”), Annex 2, Art. 2(2)).

³ Motion, paras. 5–6, 10, *citing Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Decision”), para. 29. *See also* Motion, paras. 7–8, 11–14 (citing various authorities on the circumscription of the Security Council’s Chapter VII authority).

⁴ Motion, para. 26. *See also* Motion, para. 16.

⁵ Motion, paras. 27–28, 33.

⁶ Motion, paras. 17, 21–22, 27, 29, 33 (citations omitted). *See also* Motion, paras. 18–20 (citing authorities on the principle of proportionality as a limitation on Security Council Chapter VII actions).

determination”,⁷ and constituted a violation of the sovereignty of the countries of the former Yugoslavia.⁸

3. The Accused further contends that the MICT only “provides for part-time judges, serving on a temporary basis” and that the application of the MICT’s legal aid scheme would result in a significant reduction in the funds available to him on appeal.⁹

4. In the “Prosecution Response to Karadžić’s Motion to Dismiss: Lack of Jurisdiction of Mechanism for Criminal Tribunals (MICT)” filed publicly on 5 July 2013 (“Response”), the Office of the Prosecutor (“Prosecution”) opposes the Motion. The Prosecution submits that the Motion is speculative and premature given that the Accused has not been convicted, and that he does not presently have a right to the review of any potential conviction that might eventually be entered against him.¹⁰ Moreover, the Prosecution contends that this Chamber lacks jurisdiction to determine whether the MICT was lawfully established.¹¹ However, the Prosecution suggests that the legality of the MICT need not be determined at this stage, since, in the event that the MICT later determines that Resolution 1966 is invalid, the Accused’s right to appeal before the Appeals Chamber of the Tribunal would automatically be revived.¹²

5. On 25 July 2013, the Registrar filed the “Registrar’s Submission Regarding the Accused’s ‘Motion to Dismiss: Lack of Jurisdiction of Mechanism for Criminal Tribunals (MICT)’” (“Registrar’s Submission”) pursuant to Rule 33(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”). The Registrar first observes that the remuneration schemes referred to by the Accused in the Motion pertain solely to accused persons represented by counsel who have been assigned by the Registrar (“Tribunal Legal Aid Policy”), and that the remuneration of the legal team assisting the Accused is governed by the “Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused”.¹³ The Registrar also contests the accuracy of the Accused’s submission that the Tribunal Legal Aid Policy is more favourable than that of the MICT, noting that the “Remuneration Policy for Persons Representing Indigent Accused in Appeals Proceedings before the Mechanism for International Criminal Tribunals” (“MICT Legal Aid Policy”) was drafted after having considered the principles, policies, and procedures governing the remuneration

⁷ Motion, para. 15.

⁸ Motion, para. 24. *See also* Motion, para. 25 (citing authority suggesting that the propriety of Security Council action under Chapter VII is limited temporally by the extent of the threat to international peace and security).

⁹ Motion, para. 32 (alleging a discrepancy of “over €230,000” between the remuneration schemes applicable at the Tribunal and the MICT). *See also* Annex “A” to the Motion.

¹⁰ Response, paras. 1–2.

¹¹ Response, paras. 4–7, *citing, inter alia, Tadić* Decision, para. 20.

¹² Response, para. 3.

¹³ Registrar’s Submission, paras. 3–4.

schemes at both this Tribunal as well as the International Criminal Tribunal for Rwanda (“ICTR”).¹⁴ The Registrar points out that the lump sum amounts set out in the MICT Legal Aid Policy are “derived from the maximum allotments of hours” applied by the Tribunal and the ICTR in order to ensure equivalent funding at the MICT.¹⁵

II. Discussion

6. The Chamber notes at the outset that the Accused in the Motion requests the dismissal of the Indictment yet does not refer to any applicable provision in the Tribunal’s Statute (“Statute”) or in its Rules which would provide for such a remedy at this stage of the proceedings. The Chamber understands the Motion to allege a present violation of the Accused’s right to a fair trial based on the alleged uncertainty regarding his right to appeal to a legally-constituted tribunal in the future, as well as how various aspects of his right to a fair trial will be preserved before the MICT in the event of an appeal. Accordingly, the Chamber interprets the Motion to essentially constitute a request for the Chamber to set aside its jurisdiction in light of these alleged violations of the Accused’s right to a fair trial.

7. The Appeals Chamber has held that in “exceptional cases” involving an egregious violation of an accused’s human rights, the Tribunal may indeed be required to decline to exercise its jurisdiction in order to maintain a proper balance between the rights of the accused and the interest of the international community in the prosecution of persons charged with serious violations of international humanitarian law.¹⁶ However, the Chamber recalls that, in the words of the Appeals Chamber, apart from “exceptional cases”, such a remedy will “usually be disproportionate”.¹⁷

8. The Chamber recalls that Article 20(1) of the Statute provides that the Chamber must ensure the fairness and expeditiousness of the trial with full respect for the rights of the Accused. Article 21(2) of the Statute provides that an accused is entitled to a fair hearing, while Article 21(4) of the Statute provides certain minimum guarantees, including the right to have adequate time and facilities for the preparation of his defence.¹⁸ The Accused is entitled to these rights throughout all stages of the proceedings. Although the right to appeal is not one of the minimum guarantees

¹⁴ Registrar’s Submission, para. 6.

¹⁵ Registrar’s Submission, para. 6.

¹⁶ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 (“*Nikolić Appeal Decision*”), paras. 28–30.

¹⁷ *Nikolić Appeal Decision*, para. 30.

¹⁸ Statute, Art. 21(4)(b).

enumerated in Article 21(4), Article 25(1) of the Statute provides that “the Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor”.¹⁹

9. However, Article 2(1) of Annex 2 to Resolution 1966 has supplemented Article 25(1) of the Statute by providing that the MICT shall have competence to conduct all appellate proceedings for which the notice of appeal against judgement is filed on or after the commencement date of the respective branch of the MICT, which for the Tribunal was 1 July 2013.²⁰ Any appeal of the judgement to be issued by this Chamber will thus be heard by the Appeals Chamber of the MICT, which shall also ensure the protection of the Accused’s rights during any proceedings before it.²¹

10. In this regard, the Chamber notes that the text of Article 21 of the Statute is repeated *verbatim* in Article 19 of the MICT Statute, and that Article 23 of the MICT Statute almost completely mirrors Article 25 of the Statute.²² Furthermore, the MICT Appeals Chamber has already held that the parallels between the procedural frameworks of the Tribunal and the MICT “are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness”, and that it is bound to interpret the MICT Statute in a manner consistent with the jurisprudence of the Tribunal and the ICTR.²³

11. Turning to the Accused’s submissions regarding the differences between the legal aid policies applicable at the MICT and at the Tribunal, the Chamber recalls the Registrar’s submission that the legal aid policies which the MICT has issued to date would not be applicable to the remuneration of a team assisting a self-represented accused, but that the future development of such a policy will be guided by the consideration of ensuring funding at the MICT that is equivalent to that provided by the Tribunal.²⁴ As for the Accused’s claim that the MICT Statute provides for “part time judges, serving on a temporary basis”,²⁵ the Chamber notes that the MICT Statute vests the MICT President, who is also the Presiding Judge of the MICT Appeals Chamber, with the authority to decide on the necessity of the presence of the MICT judges at the seat of either

¹⁹ Article 25(1) of the Statute reflects Article 14(5) of the International Covenant on Civil and Political Rights, which establishes that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.

²⁰ Resolution 1966, para. 1.

²¹ Statute of the International Residual Mechanism for Criminal Tribunals, Annex 1 to Security Council Resolution 1966 (“MICT Statute”), Arts. 19, 23.

²² See paras. 7–8, *supra*. The only difference between Article 25 of the Statute and Article 23 of the MICT Statute lies in the latter’s explicit provision for the possibility of appeals from the decisions of a Single Judge.

²³ *Phénéas Munyarugarama v. Prosecutor*, MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama’s Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, paras. 5–6.

²⁴ Registrar’s Submission, paras. 3–4, fn. 9.

²⁵ Motion, para. 32.

branch.²⁶ The Chamber further observes that the symmetry between Article 19 of the MICT Statute and Article 21 of the Statute would provide the Accused with the same basis for challenging either (1) the application of any remuneration policy that might eventually be applied to his case before the MICT or (2) any circumstance that he contends abridges his right to a fair trial on appeal pursuant to the channels established either in the MICT Statute or in any applicable administrative policy.²⁷ The Chamber thus concludes that any differences between the respective procedural frameworks applicable at the MICT and the Tribunal do not constitute a present violation of his right to a fair trial.

12. With regard to the Accused's challenge to the MICT's jurisdiction, the Chamber notes that the Appeals Chamber has already determined that the Tribunal's authority to determine its own competence is limited to precisely that question, and has held that the Tribunal is specifically *not* "a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council".²⁸ The Chamber therefore considers that it lacks jurisdiction to determine the legality of the MICT's establishment, as this question must be addressed by the MICT itself.

13. However, the Chamber observes that even if the MICT were to find merit in the Accused's submission that the passage of Resolution 1966 exceeded the bounds of the Security Council's Chapter VII authority and accordingly found that Resolution 1966 ceased to have effect, the appellate jurisdiction established by Article 25 of the Statute would remain intact. The Chamber is thus satisfied that the Accused will have the right to appeal the judgement to be rendered by this Chamber to a legally constituted tribunal and does not consider that there is any uncertainty in this regard. Therefore, as long as the frameworks protecting the rights of the accused at each institution are primarily equivalent, as the Chamber has determined that they are,²⁹ the Chamber need not determine with certainty which institution would ultimately adjudicate an appeal from its eventual judgement in order to conclude that the Accused's right to a fair trial has not been presently infringed.

²⁶ MICT Statute, Arts. 8(3), 12(3).

²⁷ Article 32 ("Settlement of Disputes over Payment") of the MICT Directive on the Assignment of Counsel largely mirrors Article 31 ("Settlement of Disputes over Payment") of the Tribunal Directive on the Assignment of Counsel. *Compare* Directive on the Assignment of Counsel, MICT/5, 14 November 2012, Art. 32 *with* Directive on Assignment of Defence Counsel, IT/73/REV.11, 11 July 2006 ("Tribunal Directive"), Art. 31. *See also* Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 1 April 2010, para. 26 (stating that any disputes regarding remuneration or reimbursement of expenses shall be settled in accordance with Article 31 of the Tribunal Directive).

²⁸ *Tadić* Decision, para. 20. *See also Tadić* Decision, paras. 18–19.

²⁹ *See* paras. 10–11, *supra*.

14. In light of the absence of any present infringement of the Accused's right to a fair trial, the Chamber need not determine whether declining to exercise jurisdiction by dismissing the Indictment would be a proportionate remedy.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Rule 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 twenty-eighth day of August 2013
At The Hague
The Netherlands

[Seal of the Tribunal]