



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-PT
Date: 12 May 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 12 May 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION TO DISMISS FOR ABUSE OF PROCESS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 to Dismiss for Abuse of Process”, filed on 14 April 2009 (“Motion”), and hereby renders its decision thereon.

Background and submissions

1. According to the Motion, on 2 December 2008, at approximately 3:00 a.m., the residence of the Accused’s wife in Pale, Bosnia and Herzegovina, was “raided” by NATO troops claiming to be acting on behalf of the Tribunal. One media source reported that the NATO soldiers were seen carrying out boxes and suitcases from the house. The NATO spokesman reportedly said that the purpose of this operation was to search for evidence of the connection between the Accused and the remaining Tribunal fugitives.¹ A search, this time at the house belonging to the Accused’s sister-in-law, also in Pale, took place on 27 March 2009. It was conducted pursuant to a search and seizure order of a Bosnian court in Sarajevo.² The order was issued by a “pre-trial judge providing legal aid to the [Tribunal]” in order to “locate vital evidence for criminal proceedings before the [Tribunal] for the crimes of genocide, crimes against humanity and war crimes.”³ The order also named two employees of the Office of the Prosecutor (“Prosecution”) as providing support to the international prosecutor at the Bosnian Prosecutor’s Office who was to co-ordinate the implementation of the order.⁴

2. Following the December operation, one of the Accused’s legal associates wrote to the Office of the High Representative in Bosnia and Herzegovina seeking information about it. He was told that the Office was not involved and to contact other relevant authorities, without specification as to who these authorities were.⁵ The Accused first raised the matter with the Chamber at the status conference held on 19 January 2009, at which time the pre-trial Judge suggested that he file a written motion if he believed there was a link between the operation and the Tribunal.⁶ Following the search in March, the Accused wrote to the Prosecution asking for information about the two

¹ Motion, paras. 2–3; *see also* Bosnia News, “NATO Troops Raid Home of Serbian War Criminal Radovan Karadžić’s Wife” (2 December 2008), <<http://bosnianews.blogspot.com/2008/12/nato-troops-raid-home-of-serbian-war.html>>.

² Motion, para. 6.

³ Motion, Annex I, p. 1.

⁴ Motion, Annex I, p. 4.

⁵ Motion, paras. 4–5.

⁶ Motion para. 6; *see also* Status Conference, T. 95–100 (19 January 2009).

searches, and received no response.⁷ On 2 April 2009, the Accused raised the matter with the Chamber again, and was advised to file a written motion if he had evidence of illegal action on the part of the Tribunal.⁸ One of the Accused's legal associates then wrote to the Registry, requesting further information about both searches, and asking that his letters with similar requests to the NATO commander in Sarajevo and to the Office of the High Representative be served on them by the Registry. The Registry denied having any information on or involvement in these searches and declined to serve the letters stating that the Accused could do so himself.⁹

3. The Accused argues that the only purpose of these searches, involving among others the Prosecution, is to make it impossible for him to mount his defence and to have a fair trial. He also claims that they were designed to "intimidate and discourage his potential witnesses in Bosnia."¹⁰ He requests that the Chamber conduct an "evidentiary hearing at which the justification, if any, and the responsibility for these searches can be definitively determined, and, at the conclusion of such a hearing, or in lieu of such a hearing, dismiss the indictment or stay the proceedings, as a result of the abuse of process in this case."¹¹

4. In the "Prosecution's Response to Motion to Dismiss for Abuse of Process", filed on 27 April 2009 ("Response"), the Prosecution submits that the Accused's Motion fails to establish any abuse of process or violation of his rights. It notes that the first search did not involve the Prosecution, while the second was "conducted by Bosnian authorities, acting pursuant to a search warrant, with the participation of the [Prosecution]". According to the Prosecution, neither search involved a violation of the Accused's rights let alone an egregious violation, as required by the jurisprudence of the Tribunal before an indictment can be dismissed or a stay of proceedings granted.¹² The Prosecution also disputes the Accused's claim that the searches, only one of which involved the Prosecution, amount to conduct designed to intimidate and discourage the Accused's potential witnesses. In support, it points to the search warrant, which provides that the search was designed to gather evidence relevant to the proceedings at the Tribunal.¹³

5. The Prosecution notes in the Response that on 21 April 2009 its field office in Sarajevo received copies of documents seized during the second search. It submits that, once these are

⁷ Motion, Annex D.

⁸ Motion, para. 8; *see also* Status Conference, T. 181–185 (2 April 2009).

⁹ Motion, para. 9, Annexes E, F, and G.

¹⁰ Motion, paras. 1, 10–13.

¹¹ Motion, para. 18.

¹² Response, paras. 1–5, 7.

¹³ Response, para. 6.

received by the Prosecution in The Hague, it will discharge its disclosure obligations to the Accused.¹⁴

6. On 4 May 2009, the Accused filed a “Motion for Further Disclosure and Extension of Time to Reply: Motion to Dismiss for Abuse of Process” (“Motion for Disclosure and Extension of Time”) in which he requested that the Chamber order the Prosecution to disclose, pursuant to Rules 66(B) and 68, (i) any documents in its possession concerning the 2 December 2008 search, and (ii) any documents showing justification for the search of 27 March 2009.¹⁵ In addition, he requested that the Trial Chamber issue an order to NATO, pursuant to Rule 54 *bis*, for information in its possession showing the justification for the 2 December 2008 search, and any contact it had with the Prosecution concerning this search. He also sought an extension of time in which to seek leave to reply to the Response. On 5 May 2009, the Chamber denied this Motion, without prejudice, on the basis that it was premature since the allegations of abuse of process were to be discussed at the status conference scheduled for the next day.¹⁶

7. The issues in the Motion were discussed further at the status conference of 6 May 2009, when the pre-trial Judge inquired whether the Prosecution had in its possession the documents seized in the second search. The Prosecution explained that these documents were not yet in The Hague, but stated that their receipt was imminent. The Prosecution further noted that the “discharge of [its] disclosure obligations [with respect to the seized documents] will be pursuant to the applicable jurisprudence.” The Accused made submissions largely similar to those raised in the Motion and then noted that the members of his family who were present during the second search were able to see what was taken away.¹⁷

Applicable law

8. In the *Barayagwiza* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) defined the abuse of process doctrine as follows:

[T]he abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court’s jurisdiction in cases where to

¹⁴ Response, para. 4.

¹⁵ Motion, paras. 1–10.

¹⁶ Decision on Motion for Further Disclosure and Extension of Time to Reply With Respect to the Motion to Dismiss for Abuse of Process, 5 May 2009.

¹⁷ Status Conference, T. 212–213 (6 May 2009).

exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.¹⁸

The Chamber continued:

[T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.¹⁹

9. The abuse of process doctrine was also raised in the *Nikolić* case, where the accused argued that his "kidnapping" from the then Federal Republic of Yugoslavia ("FRY") and hand-over to SFOR in Bosnia and Herzegovina, resulting thus in his extradition to the Tribunal, necessitated a dismissal of the indictment against him. The Chamber, referring to the *Barayagwiza* Decision, repeated that, before the abuse of process doctrine can be invoked, it has to be clear that the rights of the accused have been egregiously violated.²⁰ The Trial Chamber found that Nikolić was allegedly illegally arrested and abducted from the territory of FRY by unknown individuals and transferred by them to the territory of Bosnia and Herzegovina, and that neither SFOR nor the Prosecution were involved in these acts. It then found that, despite the abduction and the level of violence allegedly used against Nikolić during his transfer to Bosnia and Herzegovina, there was no egregious violation of Nikolić's rights or the fundamental principle of due process of law.²¹

10. On appeal, the Appeals Chamber considered that the issue was one of jurisdiction *ratione personae* which depends on whether there are any circumstances which would warrant setting aside jurisdiction and releasing the accused. As part of this analysis, the Appeals Chamber looked at whether a violation of an accused's human rights requires the setting aside of jurisdiction by the Tribunal.²² The Appeals Chamber then held as follows:

Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must, therefore be maintained between the fundamental rights of the accused and the

¹⁸ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("Barayagwiza Decision"), para. 74.

¹⁹ *Barayagwiza* Decision, para. 77.

²⁰ *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 ("Nikolić Trial Decision"), para. 111.

²¹ *Nikolić* Trial Decision, paras. 114, 116.

²² *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("Nikolić Appeal Decision"), paras. 18-19.

essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.²³

11. The Appeals Chamber went on to find that Nikolić had failed to show that his rights had been egregiously violated in the process of his arrest.²⁴ The Trial Chamber notes that, in contrast to the Accused's argument that the decision in *Nikolić* rested largely on the fact that the Prosecution was not involved in the arrest,²⁵ the Appeals Chamber held that jurisdiction would not have been set aside even if the conduct of Nikolić's captors had been attributed to SFOR and, by extension, to the Prosecution.²⁶

Discussion

12. In light of the fact that this matter was discussed at the status conference of 6 May 2009, and having regard to all the material and the submissions presented by the Accused, the Trial Chamber is of the view that an evidentiary hearing would not advance its understanding of the circumstances. The Chamber also refers to the Accused's Motion for Disclosure and Extension of Time, which was dismissed without prejudice, and his submissions at the status conference. The request for extension of time to file a leave for reply is rendered moot by the hearing at the status conference and by this decision. Furthermore, the Accused's request for a disclosure order remains premature, as the Prosecution has committed itself to meeting its disclosure obligations under Rules 66 and 68 with regard to the material seized, as soon as it is in possession of that material. In addition, the Accused's request for a binding order on NATO pursuant to Rule 54 *bis* will be dismissed, since the material sought by the Accused has not been shown to be relevant to a matter in issue before the Chamber and necessary for a fair determination of that matter, as required under Rule 54 *bis* (A)(ii).

13. The Accused has brought no evidence before the Chamber to show that the Prosecution, or anybody else in this Tribunal or under its jurisdiction, was involved in the operation at his family's property on 2 December 2008. In addition, the Accused has made no specific allegations of serious misconduct by the authorities performing that search. The only evidence of the purpose of that operation is that it related to the search for fugitives and not to the case against the Accused. There is, therefore, no question of egregious violation of the Accused's rights such that the abuse of process doctrine could be invoked to dismiss the Indictment with regard to that operation.

²³ *Nikolić* Appeal Decision, para. 30 (footnote omitted).

²⁴ *Nikolić* Appeal Decision, paras. 32–33.

²⁵ Motion, para. 16.

²⁶ *Nikolić* Appeal Decision, paras. 18, 33.

14. As for the search conducted in March, the Chamber notes that it was conducted pursuant to a search warrant issued by a Bosnian judge, in accordance with the laws and rules of that state. Other than stating that this search had the effect of intimidating his witnesses, the Accused has made no allegations of impropriety or serious misconduct on the part of the authorities conducting it. To the contrary, he stated that during the search his family members were able to see what was taken away.²⁷ In addition, they were provided with a copy of the search warrant and with a list of items seized.²⁸ The Prosecution has also undertaken to provide the Accused with copies of seized documents, in accordance with the Prosecution's disclosure obligations under the Rules of Procedure and Evidence of the Tribunal ("Rules"). Accordingly, there is no material before the Trial Chamber to support the allegation that the Accused's rights were violated in the course of the searches.

15. The Chamber has considered the Accused's claim that the search was designed to intimidate his witnesses and therefore undermine his defence case. However, the search order contained a large list of documents to be seized, thereby indicating that the purpose of the search was to obtain documentation relevant to the Accused's case.²⁹ In addition, in the event that the Accused is making an argument that any search of his family's properties, no matter how conducted, would be an egregious violation of his rights,³⁰ the Chamber finds no legal grounds for assertion. Even if the search in question was deemed to be unreasonable or in breach of the Accused's rights, the remedy would not be to dismiss the proceedings, but a more proportionate measure, such as excluding the evidence obtained. This is in line with the Appeals Chamber's finding in *Nikolić* to the effect that only serious human rights violations would result in the setting aside of the Tribunal's jurisdiction and the dismissal of the indictment. However, the Accused here has shown no real prejudice to his fair trial rights.

16. Accordingly, since the Accused has failed to show any reason why the second search amounted to an egregious violation of his rights, such that the Indictment should be dismissed, the Chamber will reject his claim.

²⁷ Status Conference, T. 212–213 (6 May 2009).

²⁸ Response, para. 4.

²⁹ Response, Annex A, pp. 2–3.

³⁰ Motion, para. 12.

Disposition

17. For the reasons outlined above, pursuant to Rule 54 of the Rules, the Trial Chamber hereby:
- a. **DENIES** the Motion;
 - b. **DISMISSES** the Accused's request for disclosure by the Prosecution as well as his request for a binding order to NATO;
 - c. **ORDERS** the Prosecution to file a notice immediately upon the fulfilment of its disclosure obligations under Rules 66 and 68 of the Rules with regard to the materials seized in the March search, specifying the documents that were so disclosed.

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

Iain Bonomy
Judge Iain Bonomy, Presiding

Dated this twelfth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]