



**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: IT-94-2-PT  
Date: 6 July 2001  
Original: English**

**IN TRIAL CHAMBER II**

**Before: Judge David Hunt, Pre-Trial Judge**

**Registrar: Mr Hans Holthuis**

**Decision of: 6 July 2001**

**PROSECUTOR**

**v**

**Dragan NIKOLIĆ**

**DIRECTION**

**The Office of the Prosecutor:**

**Mr Dirk Ryneveld  
Mr Dermot Groome**

**Counsel for Accused:**

**Mr Howard Morrison QC**

1. Prior to the filing of the application which Dragan Nikolić ("Nikolić") has now made for an order which "stays, dismisses or otherwise negates" the indictment against him,<sup>1</sup> there was some discussion of the proposed motion during the Status Conference held on 30 March last.

2. The application is in many respects similar to that made by Stevan Todorović, in that the relief sought by it is based upon alleged abuses of the Tribunal's legal process. Because that application, before it was withdrawn, faced immense delays by reason of appeals brought by the NATO countries against the order for disclosure made against the Stabilisation Force ("SFOR"),<sup>2</sup> it was suggested to counsel for Nikolić, and apparently accepted by him, that the more efficient course in the present case would be to resolve first, as a preliminary issue, whether, in order to obtain the relief to be sought, an accused person has to establish, *inter alia*, that his arrest was tainted by illegal conduct by the Office of the Prosecutor ("OTP") or by persons or organisations for whose conduct the OTP is responsible. As it appears to be accepted that Nikolić has no basis for asserting that the OTP was itself involved in any illegal conduct, the preliminary issue of importance to be determined in the present case is whether the OTP bears any responsibility for any such involvement in illegal conduct by SFOR (if it can be proved).

3. There are obviously many other basic issues which may have to be determined eventually – such as whether the accused person has also to establish that *either* (1) some prejudice arises from the illegal conduct which makes a fair trial impossible, *or* (2) the public interest in safeguarding the rights of an accused and the integrity of the international criminal justice system outweighs the public interest in bringing to trial those persons charged with serious international crimes. There is no suggestion in the Motion that the illegality alleged would make a fair trial impossible. The suggested benefit of having the preliminary issue determined in advance is that, if Nikolić does not succeed in relation to it, the relief sought in the Motion must necessarily be refused without consideration of the other issues (including the factual issues). The preliminary issue is one which has been the subject of much debate, and is one suitable for judicial determination in the abstract, if necessary on appeal.

4. The Motion as filed does not, however, pose this issue at all clearly. Nikolić describes the agreement reached at the Status Conference as the preliminary determination of:<sup>3</sup>

<sup>1</sup> Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72, 17 May 2001 ("Motion").

<sup>2</sup> *Prosecutor v Simić*, Case IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 Oct 2000.

<sup>3</sup> Motion, par 2.

[...] jurisdictional issues going to the legality of arrest and correlated issues of potential abuse of process and the effect of those and any other relevant issue on the question of jurisdiction and relief [...].

I would certainly not have characterised the agreed preliminary issue in that way, but such characterisation would be a matter to be resolved in the final disposition of the Motion. There is no point, however, in dealing with a preliminary issue arising out of the Motion unless the issue as I have identified it once more is still agreed.

5. That this issue may not still be agreed is suggested by the statement in the Motion that, in order to give practical effect to the procedure suggested at the Status Conference (said to be “now adopted”), it is necessary to proceed upon the assumption that, if his application for relief is permitted to continue, Nikolić will establish:<sup>4</sup>

that at the time of his initial apprehension, he was living in the Federal Republic of Yugoslavia (Serbia and Montenegro) (“FRY”); that he was kidnapped, falsely imprisoned and assaulted in the FRY, and taken from the FRY by force and without his consent to Bosnia, where he was subjected to further unlawful imprisonment; that he was handed over to representatives or agents of SFOR in Bosnia and then to representatives or agents of the OTP; finally, that he was transported to The Hague and he has since been imprisoned in the UN Detention Centre here.

These assumed facts contain a number of ambiguities, chief of them being whether Nikolić is asserting that SFOR was involved in the kidnapping in the FRY – for which, the parties are agreed, some individuals (apparently unassociated with the OTP) have been convicted by a domestic court there – or in the alleged unlawful imprisonment in Bosnia before he was handed over to SFOR.

6. The prosecution, on the other hand, has responded by putting forward as the facts to be assumed for the purpose of determining the preliminary issue:<sup>5</sup>

that Nikolić was, at the time of his apprehension, residing in the FRY where he could reasonably be certain that he would be safe from arrest and beyond the reach of the Tribunal; that he was taken forcibly and against his will from the FRY and transported to Bosnia by individuals having no connection with the Tribunal; finally, that he was thereupon delivered into the custody of SFOR, at which point the Tribunal was alerted

<sup>4</sup> *Ibid*, par 3.

<sup>5</sup> Prosecutor’s Response to “Defence Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-Related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72” Filed 17 May 2001, 31 May 2001 (“Response”), par 13.

to the presence of the accused, and whereupon ordinary procedures enabling his formal arrest by the Tribunal and transfer to The Hague were put into effect.

The relevance to the issue I have identified of Nikolić's motive for living in the FRY is not immediately apparent, and these assumed facts appear to leave little, if any, possibility that SFOR was involved in any illegal conduct.

7. Whilst I can understand that each of the parties seeks to retain a factual case to argue in the event that it or he is unsuccessful in the preliminary ruling which is sought, neither party has put forward a version which provides a firm basis upon which that ruling can be made. After consultation with my colleagues in the Trial Chamber, I direct the parties to indicate their express agreement to a preliminary determination by the Trial Chamber, before resolving whether the relief sought in the Motion should be granted, of the following issues,<sup>6</sup> which depend upon no specific assumed facts:

- (1) whether, in order to obtain the relief sought in the Motion, Nikolić must establish, *inter alia*, that his arrest was tainted by illegal conduct at any stage by the OTP or by persons or organisations for whose conduct the OTP is responsible; and
- (2) whether, assuming that it can be proved that SFOR was involved in any illegal conduct connected with Nikolić's arrest at any stage, the OTP bears any responsibility for such involvement.

The Trial Chamber is prepared to consider proceeding upon some other agreed basis, but that agreement will have to be reached by the parties themselves and presented to the Trial Chamber for its approval. The parties must respond to this direction within fourteen days. If agreement cannot be reached, the further progress of the Motion will have to be discussed at a special Status Conference.

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

Dated this 6<sup>th</sup> day of July 2001,  
At The Hague,  
The Netherlands.



Judge David Hunt  
Pre-Trial Judge

[Seal of the Tribunal]

<sup>6</sup> For the sake of clarity, I hope, I have separated the issue into two issues, and further defined them. The effect, however, is consistent with what was proposed at the Status Conference.