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NATIONS

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-05-87-T

Date: 21 February 2008

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **21 February 2008**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

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

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Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 a "Pavković Motion for Dismissal," filed 28 November 2007 ("Motion"), and hereby renders its decision thereon. In the Motion, Pavković argues that the Tribunal "in its inception and formation as an *ad hoc* tribunal lacks jurisdiction as it was illegally constituted in that it is the result of selective and arbitrary enforcement of international criminal justice thereby violating the principal of equality under the law."[1] Pavković therefore requests that the Indictment against him be dismissed.[2]

I. Competency of Motion

A. Tadić *Jurisdiction Decision and adoption of Rule 72(D)*

1. Pavković moves the Chamber under Rule 73 of the Rules of Procedure and Evidence ("Rules"). The Prosecution argues that the Motion should, in fact, be treated as a preliminary motion under Rule 72 and thus dismissed as untimely because such motions need be brought not later than thirty days after disclosure by the Prosecution to the Defence of all material and statements referred to in Rule 66(A)(i).[3]

2. Article 1 of the Statute provides as follows:

> **Article 1**
> **Competence of the International Tribunal**
>
> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

3. Rules 72 and 73 provide, in relevant part, as follow:

> **Rule 72**
> **Preliminary Motions**
>
> (A) Preliminary motions, being motions which
> (i) challenge jurisdiction;
> (ii) allege defects in the form of the indictment;
> (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or

[1] Motion, para. 1.

[2] Motion, paras. 23–27.

[3] Prosecution Response to Pavković Motion for Dismissal, 12 December 2007 ("Response"), paras. 3–7.

(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

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.

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.

4. The threshold issue before the Chamber is therefore whether Pavković's Motion, which challenges the validity of the establishment of the Tribunal ("validity challenge"), has been properly brought under Rule 73.

5. In 1995, prior to the adoption of paragraph (D) of Rule 72, the Appeals Chamber, in *Prosecutor v. Duško Tadić*, faced issues similar to those presented in the Motion.[4] The Appeals Chamber first turned to its competence to decide its own jurisdiction—*la compétence de la compétence*—and stated the following regarding the accused's challenge to the validity of the United Nations Security Council's establishment of the Tribunal:

> 10. ... But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically—as is visible from the Latin origin of the word itself, *jurisdictio*—a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.
>
> This is the meaning which it carries in all legal systems. Thus, historically, in common law, the Termes de la ley provide the following definition:
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> > "'jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

[4] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

> 11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character". . . . Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

> 12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. *The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.*[5]

The Chamber considers this seminal decision of the Appeals Chamber to be strong support for the position that a motion challenging the very legality of the Tribunal is jurisdictional in nature and therefore one that must be brought as a preliminary motion well before the commencement of the trial. However, the Chamber also notes that, five years after the *Tadić* Jurisdiction Decision, the Tribunal adopted paragraph (D) of Rule 72 in December 2000, thereby providing an exhaustive list of the grounds that could constitute a challenge under Rule 72. The Chamber thus considers the possibility that the adoption of this amendment to the Rules may have had some kind of effect upon the susceptibility of a validity challenge to the auspices of Rule 72. The Chamber will look to subsequent jurisprudence of the Tribunal to test this hypothesis.

6. In *Prosecutor v. Dragan Nikolić*, the Appeals Chamber held that a challenge to the jurisdiction of the Tribunal due to alleged illegality of arrest was within the province of Rule 73, not Rule 72. The Appeals Chamber considered that "the Impugned Decision was taken on a motion which challenged the exercise of the Tribunal's jurisdiction over the Appellant because of the alleged illegality of his arrest, but did not challenge the indictment on any of the ... grounds" listed in Rule 72(D). The Appeals Chamber continued that "the Appellant should have filed his

[5] *Ibid.* at paras. 10–12 (emphasis added); *see also Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997 (treating challenge to legality of ICTR as jurisdictional preliminary motion).

original motion before the Trial Chamber under Rule 73 of the Rules."[6] Judge Mohamed Shahabuddeen dissented, taking a more expansive approach to Rule 72, which, in his view, was able to encompass the accused's challenge as one properly going to the jurisdiction of the Tribunal.[7]

7. The Chamber finds that the Appeals Chamber's decision in *Nikolić* controls in the instant case. The Appeals Chamber was dealing with a challenge to the jurisdiction of the Tribunal on the basis of an alleged illegal arrest of the accused, and found that such a challenge did not fall within the compass of paragraph D of Rule 72. Similarly, Pavković's Motion challenges the jurisdiction of the Tribunal on a basis that is not expressly within the exclusive definition of a jurisdictional motion under Rule 72(A) and (D) and therefore falls outwith the Rule and must be brought under Rule 73, as has been done. The merits of the Motion are discussed in sections II and III of this decision.

B. *Other cases dealing with challenges to jurisdiction*

8. The Chamber, in examining this issue, has surveyed the jurisprudence of both of the *ad hoc* Tribunals, and finds it appropriate to discuss some of the relevant jurisprudence below.

9. In *Prosecutor v. Milan Milutinović et al.*, Ojdanić challenged the jurisdiction of the Tribunal to try him for crimes allegedly committed in the territory of Kosovo because the Security Council did not have the power to vest a tribunal with jurisdiction over the territory of a state (here, the Federal Republic of Yugoslavia), which, at the time, was not a member of the United Nations.[8] The Appeals Chamber expressed some doubt as to whether the motion challenging jurisdiction was within the meaning of Rule 72(D)(ii), but resolved this doubt in favour of Ojdanić and allowed the appeal to proceed to a full panel for a decision.[9] The Chamber considers that this decision, which was taken under the former procedure of a three-Judge panel, does not have binding effect upon the instant issue due to the panel's own expressed doubt, which it happened to resolve in favour of the accused. However, this interlocutory decision of the Appeals Chamber serves to illustrate the difficulty that has been created by the adoption of Rule 72(D).

10. Trial Chamber II, in the case of *Prosecutor v. Vojislav Šešelj*, held that a challenge to the legitimacy of the Tribunal did not come within the ambit of Rule 72(D) and therefore dismissed the

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[6] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, 9 January 2003, p. 3.

[7] *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, 9 January 2003, Dissenting Opinion of Judge Shahabuddeen, paras. 7–18.

[8] *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72.2, Decision, 27 February 2004, p. 3.

[9] *Ibid.*

accused's motion in that respect.[10] This trial-level decision therefore adopted the restrictive approach of the *Nikolić* Appeals Chamber.

11. In *Prosecutor v. Joseph Nzirorera*, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") had before it an appeal lodged pursuant to Rule 72[11] on the basis that the continued exercise of the ICTR Statute was unlawful in the situation where new charges had been added to the indictment in 2004 relating to events in Rwanda in 1994; the accused argued that in 2004 there was no longer a threat to peace and security in Rwanda and therefore no grounds to exercise Chapter VII of the United Nations Charter.[12] In dismissing this appeal, the Appeals Chamber held that Rule 72 did not authorise an interlocutory appeal of every "jurisdictional" argument and that Rule 72 was narrow in scope and permitted interlocutory appeal as of right only in a very limited set of challenges to an indictment.[13] Therefore, "[w]hether the Statute itself is subject to external restrictions, such as Chapter VII of the Charter of the United Nations, does not fall within this limitation on interlocutory appellate jurisdiction."[14] As with *Nikolić* and *Šešelj*, the Appeals Chamber in this case adopted a restrictive approach to Rule 72(D).

12. In *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, the accused argued that the Trial Chamber had erred in denying their pre-trial motion, which included a challenge that the United Nations Charter does not empower the Security Council to establish a criminal court such as the ICTR.[15] Although not discussing the issue directly, the Appeals Chamber found that the Trial Chamber's reasoning was sound and in line with established jurisprudence and dismissed the appeal.[16] Although it can be said that the Appeals Chamber *implicitly* decided that this "validity challenge" was properly brought under Rule 72, the Chamber does not place undue reliance upon this decision because the instant issue was not squarely before the Appeals Chamber in that case.

13. Finally, in the *Bulatović* contempt proceedings arising out of *Prosecutor v. Slobodan Milošević*, an accused, who was tried and convicted for contempt before the Trial Chamber,

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[10] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004), paras. 10–12.

[11] In respect of Rule 72(D), ICTR's Rules of Procedure and Evidence are, in substance, substantially the same as those of the Tribunal.

[12] *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. 1, 4, 7–9.

[13] *Ibid.* at para. 8.

[14] *Ibid.* at para. 10.

[15] *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A, ICTR-96-17-A, Judgement, 13 December 2004, para. 398.

[16] *Ibid.*, para. 399.

advanced a ground of appeal that the Chamber erred in law in dismissing, as outside Rule 72(D), his preliminary motion challenging jurisdiction on the basis that the order on contempt was *ultra vires*.[17] The Appeals Chamber held that "Rule 72(D) is clear and unambiguous in its terms and is inapplicable to proceedings for contempt" because a Chamber's jurisdiction over contempt "arises from its inherent authority to ensure the integrity of its own proceedings and the conduct of those proceedings ... [under] Rule 77."[18] The Chamber considers that this case therefore is not directly applicable to the instant issue, because Pavković is not on trial for contempt. However, it is notable that the Appeals Chamber, yet again, interpreted Rule 72 in a restrictive manner and held that the entire regime of Rule 72 did not pertain to contempt proceedings, thereby further narrowing the purlieus of the Rule.

C. *Note on statutory interpretation*

14. As discussed above, the Chamber has decided that the *Nikolić* case controls the outcome of this decision. As such, resort did not have to be made to a statutory interpretation of Rule 72(A) and (D), and the Chamber did not have to determine whether there was any ambiguity in the language of the Rule.[19] However, the Chamber takes this opportunity to observe that it appears as though the Judges in Plenary, in adopting Rule 72(D), and the Appeals Chamber, in deciding *Nikolić*, have effectively overturned the previous, seminal *Tadić* Jurisdiction Decision on whether a validity challenge is a preliminary motion challenging jurisdiction that must be brought not later than thirty days after disclosure under Rule 66(A)(i).

15. Perhaps this was done to reduce validity challenges in the wake of the *Tadić* Jurisdiction Decision, but it is not possible to determine this because no commentary or explanation accompany

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[17] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, paras. 25–34.

[18] *Ibid.* at para. 35.

[19] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, 2 September 2004 (dated 31 August 2004), para. 12 (interpreting object and purpose of Article 1); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 161 (holding that "where the meaning of the words in a statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly") (footnote omitted); *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 169 (holding that "[a]ny interpretation of the object and purpose of the Statute should of course start with an examination of the language of the Statute" and that "[t]he cornerstone of the theory and practice of statutory interpretation is to ensure the accurate interpretation of the words used in the statute as the intention of the legislation in question") (quoting *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 160); *see also* H.L.A. Hart, *Concept of Law*, Oxford University Press, 1997, pp. 204–205 (postulating that "[l]aws require interpretation if they are to be applied to concrete cases .... Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles" and that a judicial decision interpreting a statute "may be made acceptable as the reasoned product of informed impartial choice ... [as] the '"weighing"' and '"balancing"' characteristic of the effort to do justice between competing interests").

the amendments of the Rules.[20] Nevertheless, the Chamber considers that the purpose served by the amendment would seem to be of limited value; and, the Chamber, in the absence of the amendment, would have entertained the motion as one under Rule 72(A) and dismissed it as untimeous. A challenge such as the one brought now by Pavković is jurisdictional in nature and, but for Rule 72(D), is one that should be brought as a preliminary motion prior to commencement of the trial in order not to render moot the monumental undertaking of an international criminal trial.[21]

II. Selective enforcement and arbitrary application of law

16. Pavković takes issue with the competency of the United Nations Security Council to establish an *ad hoc* tribunal dealing with a specific armed conflict under its Article VII powers, especially at a time when that armed conflict was only one of several being waged.[22] Pavković does not take issue with selective enforcement *per se*, but rather with *arbitrary* selective enforcement, which occurs when there is an absence of objective criteria or when irrelevant criteria are taken into account. Because the Security Council chose to create a tribunal dealing with the armed conflict in the former Yugoslavia, but not all the other armed conflicts at the time, or because it did not do so according to what he terms objective and/or reasonable criteria, the Tribunal, according to Pavković, is the product of arbitrary selective enforcement. He therefore is not being treated equally as compared to other participants in other simultaneous armed conflicts, and this constitutes a violation of his rights under Article 21 of the Statute and Articles 14 and 26 of the International Covenant on Civil and Political Rights.[23]

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[20] Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal, 24 January 2002, para. 8.

[21] *Tadić* Jurisdiction Decision, at paras. 10–12 ("The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.").

[22] Motion, paras. 3–6, 18–21.

[23] Motion, paras. 7–11. In paragraphs 24 and 25 of the Motion, under a section entitled "Remedy Sought," Pavković argues "on a general level" that he "faces significant prejudice as a result of being tried in this Tribunal" and submits that "[t]he significance of universally accepted human rights is diminished substantially if there is no means of enforcing [certain] rights," namely the following: (1) the "right" to be tried in proximity to his family and friends and in a culture with which he is familiar, in order to decrease the overall stress and anxiety of the trial; (2) the "right" to be tried by a court of his home state, so that different notions of criminal liability are not applied to his case; (3) the "right" to be tried by a tribunal that works in his native tongue, in order to reduce the time of the proceedings; and (4) the "right" to be tried in a court of his home state, so that he is not exposed to different possible sentences if convicted. Motion, paras. 24–25. The Chamber construes these submissions as being subsumed within the general thrust of Pavković's challenges—*i.e.*, that the Tribunal was illegally established by the Security Council—and as being further elucidation of the specific manner in which this purported illegal institution violates Pavković's human rights, as guaranteed under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. As such, it is not necessary to embark upon individual discussion of these four issues in this decision.

17. The Prosecution opposes the Motion and requests that it be dismissed, arguing as follows:

> Pavković claims that he should be accorded total impunity for serious crimes of deportation, forcible transfer, persecutions and murder because impunity exists for the perpetrators of crimes in some other conflicts throughout the world. To say, as Pavković does, that total impunity must prevail unless the Security Council completely and simultaneously eradicates impunity is untenable. No precedent or legal principle that Pavković advances supports such an outcome. At most, the Motion presents a case for more enforcement action by the Security Council in other conflicts. It does not establish that the enforcement action already taken is invalid.[24]

The Prosecution further submits that, even if Pavković's claims are correct, dismissal of the Indictment against him is not the appropriate remedy.[25]

18. The Appeals Chamber already has squarely decided the issue that is now before the Chamber. In *Prosecutor v. Duško Tadić*, the Appeals Chamber was faced with the issue of whether "the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred".[26] In analysing this challenge, the Appeals Chamber noted that Security Council Resolution 827 did not specify an article of the United Nations Charter as the legal authority for the establishment of the Tribunal; however, the Appeals Chamber went on to hold that the establishment of the Tribunal "falls squarely within the powers of the Security Council under Article 41."[27] The Appeals Chamber cast the question in terms of whether the Tribunal had been created in a way that was compliant with various human rights instruments requiring that the determination of any criminal charge against a person must be the subject of a fair and public hearing by a competent, independent, and impartial tribunal "established by law."[28] "Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law'."[29] After examining the various definitions of what the requirement "established by law" meant, it concluded that the Tribunal had been established in accordance with the appropriate procedures under the United Nations Charter

[24] Response, paras. 2, 8–12, 19.
[25] Response, paras. 16–18.
[26] *Tadić* Jurisdiction Decision, para. 27 (citing Trial Chamber's summary of appellant's arguments).
[27] *Ibid.* at paras. 32–40
[28] *Ibid.* at para. 41.
[29] *Ibid.* at para. 42.

and provided all the necessary safeguards of a fair trial. It was thus "established by law," and the appeal was dismissed in respect of this challenge.[30]

19. This decision was echoed by Trial Chamber III in the case of *Prosecutor v. Slobodan Milošević*, wherein the Chamber, citing the *Tadić* Jurisdiction Decision, dismissed a jurisdictional challenge based upon the claims that the Tribunal was illegal because it selectively targeted a single nation or group of people.[31]

20. As referred to above in a different context, the Appeals Chamber rejected, in the *Ntakirutimana* case, an accused's challenge that the United Nations Charter does not empower the Security Council to establish a criminal court such as the ICTR.[32]

21. Trial Chamber II, in the case of *Prosecutor v. Vojislav Šešelj*, after having rejected the accused's challenge to the legality of the Tribunal on procedural grounds (see above), dismissed the motion in that respect based upon the Appeals Chamber's holding in the *Tadić* Jurisdiction Decision.[33]

22. Pavković seeks to distinguish the *Tadić* and *Milošević* decisions by claiming that they mischaracterised the actual issue at stake in those challenges. He claims that an accusation of selective prosecution "is not only about the law, it also relates to the extent to which the law is general and enforced in accordance with its terms, matters which relate to the legitimacy of the enforcement regime."[34] Pavković seems to be positing that selective prosecution is not an issue that can be resolved by resort to the legitimacy of the establishment of the Tribunal, but then proceeds to argue that which he has just sought to disavow—framing the issue in terms of "the legitimacy of the enforcement regime". Pavković does not succeed in convincing the Chamber to alter the manner in which this issue has been approached in the past, and his argument even lacks internal cohesion.

23. Pavković has simply failed to distinguish completely on-point Appeals Chamber jurisprudence, which answered this question more than a decade ago. The Appeals Chamber has considered and decided this issue, holding that the Security Council established the Tribunal in

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[30] *Ibid.* at paras. 43–48; *see also Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997 (citing *Tadić* Jurisdiction Decision extensively as persuasive authority).

[31] *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, paras. 5–11.

[32] *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A, ICTR-96-17-A, Judgement, 13 December 2004, paras. 398–399.

[33] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004), paras. 10–12.

[34] Motion, para. 14.

accordance with proper legal procedures. The fact that the Security Council created an *ad hoc* tribunal to deal with one armed conflict, but not all armed conflicts that may have been occurring at the same time, does not invalidate the lawfulness of the Tribunal or substantiate a selective prosecution allegation.

24. It should also be noted that the Prosecution argues that the *Delalić* test for selective prosecution may be applied to the actions of the Security Council in creating the Tribunal, such that the test to be applied to the motion could be (a) whether the Security Council was motivated by a factor inconsistent with the principle of equality before the law and (b) whether other similarly situated persons were not prosecuted. The Prosecution argues that Pavković has failed to demonstrate these two criteria and thus the motion should be dismissed.[35]

25. The Chamber disagrees with the Prosecution's application of the *Delalić* test[36] to the action of the Security Council. The test to be applied is the one set forth in the *Tadić* Jurisdiction Decision, and it is on this basis that the Chamber denies the Motion. In any case, Pavković is clear that his selective prosecution challenge is not *vis-à-vis* him as an individual, but rather that the very establishment of the Tribunal was a discriminatory act on the part of the Security Council. It is therefore not necessary for the Chamber to delve into a legal analysis of selective prosecution with respect to Pavković as an individual.[37] Even if the Chamber had had to conduct such an analysis, it would have agreed with the Trial Chamber in *Prosecutor v. Zejnil Delalić et al.*, when it stated that "it is preposterous to suggest that unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial."[38]

III. Purported conflict of interest

26. Pavković argues that, because three of the five permanent members of the Security Council are member states of the North Atlantic Treaty Organisation ("NATO"), and because NATO was

[35] Response, paras. 14–15.

[36] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 610 *et seq.*; *see also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004), paras. 19–21 (applying *Delalić* standard and dismissing challenge of selective prosecution against Serbs); *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-964-A, Judgement, 1 June 2001, paras. 94–97 (applying *Delalić* standard and dismissing challenge of selective prosecution against Hutus).

[37] Motion, paras. 15–17.

[38] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 180.

involved in the events that are the subject of the Indictment, there is a "conflict of interest" that further undermines the legitimacy of the Tribunal.[39]

27. First, the Chamber considers that the concept of "conflict of interest"—which is applicable to situations such as a counsel's representation of more than one client or a Judge's potential involvement in the events alleged in a case to which he or she is assigned—is not applicable to the process by which the United Nations Security Council decided to create the Tribunal. Second, the Appeals Chamber in the *Tadić* Jurisdiction Decision rejected a similar challenge to the validity of the Tribunal, namely "that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal."[40] The Appeals Chamber also held in that decision that the establishment of the Tribunal fell squarely within the powers of the Security Council under Article 41 of the United Nations Charter and that the Tribunal provided all the necessary safeguards of a fair trial, and thus was "established by law."[41] Third, the Chamber notes that all five permanent members of the Security Council—and not just the three permanent members which were also members of NATO—voted in favour of establishing the Tribunal.[42] Moreover, all the non-permanent members of the Security Council voted in favour of the establishment of the Tribunal, nine out of ten of which were non-NATO members. The vote was unanimous, with no abstentions.[43]

28. Finally, although the Tribunal was created by the Security Council, its Judges are elected by the member states of the United Nations in the General Assembly[44] and must be persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.[45] These features of the Tribunal further gainsay Pavković's claim that there is any type of conflict of interest, or any other kind of unfairness, at work in his criminal trial.

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[39] Motion, paras. 21–22.

[40] *Tadić* Jurisdiction Decision, para. 27.

[41] *Ibid.* at paras. 32–40, 43–48; *see also Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997 (citing *Tadić* Jurisdiction Decision extensively as persuasive authority).

[42] S/RES/827 (1993), 25 May 1993.

[43] *See* United Nations Bibliographic Information System at: <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1D02123S62D41.61459&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VM&term=s%2Fres%2F827%281993%29&matchopt=0%7C0&oper=and&aspect=power&index=.VW&term=&matchopt=0%7C0&oper=and&index=.AD&term=&matchopt=0%7C0&oper=and&index=BIB&term=&matchopt=0%7C0&ultype=&uloper=%3D&ullimit=&ultype=&uloper=%3D&ullimit=&sort=&x=10&y=9#focus>>.

[44] ICTY Statute, Articles 13 *bis* and 13 *ter*.

[45] ICTY Statute, Article 13; *see also Tadić* Jurisdiction Decision, para. 46 (citing Article 13 as example of fair trial guarantee in ICTY Statute).

IV. Disposition

29. Pursuant to Rules 54 and 73 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby DENIES the Motion.

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

Judge Iain Bonomy
Presiding

Dated this twenty-first day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]