



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-03-68-A

Date: 7 April 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker
Judge O-Gon Kwon

Acting Registrar: Mr. Hans Holthuis

Decision of: 7 April 2009

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

**DECISION ON ORIĆ'S MOTION REGARDING A BREACH OF *NON-BIS-
IN-IDEM***

Office of the Prosecutor

Mr. Serge Brammertz

Counsel for Naser Orić

Ms. Vasvija Vidović

Mr. John Jones

District Prosecutor's Office in Bijeljina, Republika Srpska

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”);

BEING SEISED OF Naser Orić’s “Motion Regarding a Breach of Non-Bis-In-Idem”, filed on 11 December 2008 (“Motion”), requesting that a Trial Chamber, pursuant to Article 10 of the Statute of the Tribunal (“Statute”) and Rule 13 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), immediately order the Prosecutor’s Office in Bijeljina¹ (“Bijeljina Prosecutor’s Office”) to permanently discontinue its proceedings² against Orić as being in breach of the *non-bis-in-idem* principle;

RECALLING the “Judgement”, issued on 30 June 2006, in which the Trial Chamber found Orić guilty of a count of failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder pursuant to Articles 3 and 7(3) of the Statute and a count of failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment pursuant to Articles 3 and 7(3) of the Statute but acquitted him of all other charges;³

RECALLING the “Appeal Judgement”, issued on 3 July 2008, in which the Appeals Chamber reversed Orić’s convictions;⁴

NOTING that in the Motion Orić submits that:

- a. he was tried and acquitted of all charges stemming from incidents in 1992 and 1993 by the Tribunal following the Appeal Judgement of 3 July 2008;⁵
- b. the Bijeljina Prosecutor’s Office has instituted criminal proceedings⁶ against him for crimes for which he has already been tried and acquitted by the Tribunal, on the basis of superior responsibility for deaths in custody and responsibility for attacks on Serb villages;⁷

¹ The Motion sometimes refers to the Prosecutor’s Office in Bijeljina as the “Municipal Prosecutor’s Office” and sometimes as the “District Prosecutor’s Office”. In the “Submission of the Ministry of Foreign Affairs of Bosnia and Herzegovina” filed on 27 January 2009 (“Submission”), it is referred to as the “District Prosecutor’s Office”. The word consistently used in the BCS versions of Annexes 1 and 2 of the Motion and the Submission is “okružno”, which means “District”. The Trial Chamber, therefore, finds that the District Prosecutor’s Office is referred to throughout.

² Motion, para. 1. Identified as KT-11/01, KT-12/01, KT-70/97 and KT-26/01. *Ibid.*

³ Trial Judgement, para. 782.

⁴ Appeal Judgement, p. 64.

⁵ Motion, para. 2.

⁶ Motion, para. 1. Identified as KT-11/01, KT-12/01, KT-70/97 and KT-26/01. *Ibid.*

⁷ Motion, paras. 3-4.

- c. before Orić's indictment at the Tribunal, the Tribunal Prosecutor received and took into account the case-files that the Bijeljina Prosecutor's Office bases its charges on, constituting further proof that the Bijeljina Prosecutor's Office's charges overlap entirely with the crimes for which he was tried and acquitted on appeal by the Tribunal;⁸
- d. the Bijeljina Prosecutor's Office's investigations breach the "Rules of the Road" agreement;⁹ and,
- e. the prosecution is in breach of the principle of *non-bis-in-idem*, a fundamental principle recognized by the Tribunal.¹⁰

RECALLING the "Order Assigning a Chamber to Consider a Motion Pursuant to Rule 13", issued on 12 December 2008;

RECALLING the "Order Requesting Submissions on a Motion Pursuant to Rule 13", filed on 19 December 2008;

RECALLING the "Corrigendum to Order Requesting Submissions on a Motion Pursuant to Rule 13", filed on 22 December 2008;

NOTING the "Submission of the Ministry of Foreign Affairs of Bosnia and Herzegovina", filed in the English version on 27 January 2009 ("Submission"), in which the Bijeljina Prosecutor's Office explains its position, contending:

- a. the Bijeljina Prosecutor's Office was unable to fully consider the request of the Defence and an English translation of the Submission could not be provided given the short deadline to file its response;¹¹
- b. the Prosecutor of Bosnia and Herzegovina assessed each order to institute proceedings against Orić and returned them to the Bijeljina Prosecutor's Office for further action;¹²
- c. the Bijeljina Prosecutor's Office has obtained uncertified copies of both the Tribunal's Second Amended Indictment dated 1 October 2004 and the Judgement, but was never

⁸ Motion, para. 5.

⁹ Motion, para. 5.

¹⁰ Motion, paras. 6, 12.

¹¹ Submission, p. 4. The Bijeljina Prosecutor's Office received the request on 12 January 2009 and only had four days to respond by 16 January 2009. *Ibid.*

¹² Submission, p. 5. *Cf.* Motion, para. 3 (which states that the Bijeljina Prosecutor's Office has "instituted criminal proceedings...against Orić").

provided originals of the Indictment, the Judgement or the Appeal Judgement, all of which were needed “to obtain an insight into all the charges”;¹³

- d. the Bijeljina Prosecutor’s Office had received criminal reports alleging reasonable suspicion that Orić committed war crimes long before the Tribunal instigated an investigation and issued an indictment against him;¹⁴
- e. it is not evident from the Indictment or Judgement whether Orić was tried specifically for crimes of personally killing civilians and prisoners of war;¹⁵ and
- f. the Bijeljina Prosecutor’s Office’s investigation is *on-going* and once the investigation is complete, the Bijeljina Prosecutor’s Office will issue an indictment only for the offences not covered by the Judgement, thereby ensuring that there is no violation of the *non bis in idem* principle;¹⁶

NOTING the “Response to Submissions by Republika Srpska on a Motion Pursuant to Rule 13”, filed on 30 January 2009 (“Response”), in which Orić countered the Submission, contending:

- a. the Bijeljina Prosecutor’s Office had ample time to provide a full response and should have been prepared to justify the breach of the *non bis in idem* principle;¹⁷
- b. the Bijeljina Prosecutor’s Office was duty-bound to consider the Tribunal’s indictment and Judgement in Orić’s case and these documents are easily obtainable since they are public documents;¹⁸
- c. during an interview of Orić, the Bijeljina Prosecutor’s Office refused an offer by his Counsel to provide copies of the Judgement or the Appeal Judgement in addition to refusing to allow her to lodge an objection based on *non bis in idem*;¹⁹
- d. in four letters²⁰ dated in 2006, the State Prosecutor’s Office of Bosnia and Herzegovina ordered the Bijeljina Prosecutor’s Office to take into account Orić’s Tribunal case, as well as to “adhere to Article 4 of the BIH Criminal Procedure Code, according to which a person

¹³ Submission, p. 6.

¹⁴ Submission, p. 6.

¹⁵ Submission, p. 6.

¹⁶ Submission, p. 6. (emphasis added).

¹⁷ Response, para. 4(1). Orić contends that the Bijeljina Prosecutor’s Office had one month to provide a response. *Ibid.*

¹⁸ Response, para. 4(2).

¹⁹ Response, para. 4(3).

²⁰ Response, para. 4(4). Identified as KTA-RZ-104/2006, KTA-RZ-100/2006, KTA-RZ-106/2006 and KTA-RZ-103/2006. *Ibid.*

cannot be prosecuted for a crime for which he was already prosecuted and convicted in a final judgement”;²¹

- e. whether the Bijeljina Prosecutor’s Office commenced an investigation of Orić prior to the Tribunal’s investigation is irrelevant in considering a breach of *non bis in idem*;²²
- f. the Bijeljina Prosecutor’s Office clearly does not understand that Rule 13 applies “where ‘*criminal proceedings have been instituted*’, and not only from the point at which an indictment is issued”;²³
- g. any distinction between the Bijeljina Prosecutor’s Office’s prosecution of Orić from the Tribunal’s on the basis of the form of liability cannot be maintained in good faith, since the documents submitted by the Bijeljina Prosecutor’s Office “*clearly show that... [Orić] ordered crimes committed by others*”;²⁴ and the claim that Orić was tried for crimes on the basis of superior responsibility at the Tribunal while the Bijeljina Prosecutor’s Office is investigating him as a direct perpetrator is “completely untrue”;²⁵
- h. in the single exception where Orić is suggested to have directly perpetrated crimes against Nenad Rankić, the basis is too speculative and insufficient for distinguishing the Bijeljina Prosecutor’s Office’s proceeding from the Tribunal’s;²⁶ and
- i. the Bijeljina Prosecutor’s Office undermines the spirit and letter of the *non bis in idem* principle by arguing that Orić was a wartime commander in Srebrenica at the time of the alleged war crimes; a premise found untrue by the Tribunal;²⁷

NOTING that Article 10(1) provides that “[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal”;

NOTING that Rule 13 provides: “[W]hen the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following

²¹ Response, para. 4(4).

²² Response, para. 4(5).

²³ Response, para. 4(6).

²⁴ Response, para. 4(7).

²⁵ Response, para. 4(7).

²⁶ Response, para. 4(8). Orić’s defence counsel bases this assertion on a report which states “the direct perpetrator of this crime is also unknown... it might even be the reported Naser Orić.” *Ibid.*

²⁷ Response, para. 4(9). Orić bases this assertion on Judgement paragraphs 497–532 and 696–716. *Ibid.*

mutatis mutandis the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council”;

NOTING that the Motion, the Submission and the Response do not provide evidence that Orić is being tried before a court in Bosnia and Herzegovina for any of the alleged crimes which are the subject of the criminal investigation that is being conducted against him by the Bijeljina Prosecutor’s Office;

CONSIDERING that because Orić is not being tried before a national court for acts constituting serious violations of international humanitarian law under the Statute, for which he has already been tried by the Tribunal, there has been no breach of Article 10(1);

CONSIDERING that because there is no information to show that criminal proceedings have been instituted against Orić before a court in Bosnia and Herzegovina for a crime for which he has already been tried by the Tribunal, Rule 13 is not applicable;

PURSUANT TO Article 10(1) and Rule 13,

HEREBY DISMISSES the Motion.

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



O-Gon Kwon
Judge

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

[Seal of the Tribunal]