IT-95-5/18-PT
D24100 - D24095
31 AUGUST 2009

24100
PK

UNITED
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-95-5/18-PT

Date: 31 August 2009

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **31 August 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR REMEDY FOR VIOLATION OF RIGHTS IN CONNECTION WITH ARREST

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 for Remedy for Violation of Rights in Connection with Arrest", filed on 4 August 2009 ("Motion"), and hereby renders its decision thereon.

1. In the Motion, the Accused "moves for a finding that his rights were violated in connection with his arrest on 18 July 2008" and for an "appropriate remedy at the conclusion of these proceedings", consisting of either financial compensation in the event of an acquittal or reduction in sentence in the event of a conviction. He also calls for an evidentiary hearing, if necessary.[1]

2. The Accused claims that the Serbian authorities falsely announced that he had been arrested on 21 July 2008 when in fact he was arrested on 18 July. He was then taken to a domestic judge on 22 July. Accordingly, he was held "incommunicado" for four days, without seeing a judicial officer, which was in violation of his right to liberty and security.[2] In support of his argument, the Accused refers to the Serbian Criminal Procedure Code and claims that his arrest did not conform to the procedure outlined therein.[3] The Accused further argues that failure to inform him of the reasons for his arrest, in circumstances where the indictment issued against him by the Tribunal has been available to the Serbian authorities since 1995, was not only in violation of Serbian procedure but also a violation of international human rights law as outlined in International Covenant on Civil and Political Rights and European Convention on Human Rights. In addition, the arrest was conducted in violation of the Tribunal's legal framework, as provided for in Rule 55(E) and (F) of the Rules of Evidence and Procedure ("Rules").[4] In relation to the claim that he was brought before a judge on the fifth day of his arrest, the Accused argues that this too was in violation of relevant international human rights law.[5] As far as his claim for remedy is concerned, the Accused refers to a number of decisions issued by the International Criminal Tribunal for Rwanda ("ICTR"), for the proposition that such a remedy is available to him on the basis that the violations of his rights took place in the course of the execution of an arrest warrant issued by the Tribunal, and irrespective of whether they can be attributed to the organs of the Tribunal.[6]

[1] Motion, paras. 1, 45.
[2] Motion, paras. 4–6.
[3] Motion, paras. 7–11.
[4] Motion, paras. 13–21.
[5] Motion, paras. 22–25.
[6] Motions, paras. 26–44.

3. In the "Prosecution Response to Karadžić's 'Motion for Remedy for Violation of Rights in Connection with Arrest'", filed on 18 August 2009 ("Response"), the Office of the Prosecutor ("Prosecution") argues that the Motion should be denied because (i) the Tribunal is under no obligation to provide the Accused with a remedy unless the alleged violations of his rights can be attributed to it; (ii) the issue of attribution is not addressed by the Accused in the Motion; and (iii) the Accused does not provide any factual support for his allegations of illegal arrest. The Prosecution also argues that there is no justification for an evidentiary hearing at this stage since the requested relief is dependent on the outcome of the proceedings against the Accused, and that the admission of evidence related to the circumstances of the Accused's arrest may be addressed during trial.[7] As for the (i) above, the Prosecution notes that the Accused misstates the law since none of the cases he refers to in the Motion support his position and, in fact, show that the violations must be attributed to the Tribunal if the Tribunal is to provide a remedy, even if that remedy is simply declaratory.[8] The Prosecution further notes that the Tribunal had issued a number of arrest warrants against the Accused prior to his arrest, which complied with the provisions of Rule 55 of the Rules, such as requiring any state arresting the Accused to advise him of his rights and of the indictment against him.[9] Accordingly, the requirement that violations be attributed to the Tribunal does not deprive the Accused of his right to an effective remedy since he may seek relief for those alleged violations in Serbia.[10]

4. On 24 August 2009, having been given leave to do so,[11] the Accused filed his "Reply Brief: Motion for Remedy for Violation of Rights in Connection With Arrest" ("Reply"). In the Reply, the Accused takes issue with the Prosecution's contention that the Trial Chamber cannot provide a remedy to an accused whose rights were not violated by the Tribunal itself. He also refers to this Chamber's earlier decision relating to the alleged Holbrooke Agreement ("Holbrooke Decision") in which, he argues, the Chamber recognised that a remedy, other than stay of proceedings, may be given even in cases where the organs of the Tribunal were not involved in the violations of the accused's rights.[12]

5. Rather than embarking on the detailed analysis of the parties' submissions above, the Chamber recalls that the remedy sought by the Accused is dependent on the outcome of the trial and is to take effect following the issuance of the judgement in this case. The Chamber is,

---

[7] Response, paras. 1, 10–11.
[8] Response, paras. 2–6, 8.
[9] Response, para. 7.
[10] Response para. 9.
[11] Status Conference, T. 413 (20 August 2009).
[12] Reply, paras. 3–10. *See also* Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, para. 85.

therefore, of the view that it would be premature for it to award compensation to the Accused at this point in time, as it would have to make this decision on the assumption that he will be acquitted. The same consideration applies with respect to his request that, in case of conviction, his eventual sentence be reduced. Furthermore, as far as the reduction of sentence is concerned, as always, it will be open to the Accused to make arguments relevant to sentencing towards the end of his trial. Accordingly, the Chamber considers that the Motion is premature and that the arguments made therein should be dealt with during the trial, or rather towards the end of the trial.[13] This also means that it is unnecessary to conduct an evidentiary hearing on this issue at this stage of the proceedings.

6. While of the view that the Motion can be dismissed on the basis of the previous paragraph alone, the Chamber also notes its view that there is substance in the Prosecution's submission that, before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal. The Tribunal does not have an enforcement agency, such as its own police force, which could effectuate arrest of persons against whom an indictment has been issued and confirmed by the Tribunal's organs. Accordingly, it must rely on the international community for the arrest and transfer of such persons.[14] Rule 55, entitled "Execution of Arrest Warrants", outlines the obligations on behalf of the Tribunal and its organs in issuing and executing arrest warrants for those persons accused of serious violations of international humanitarian law.[15] However, the majority of the ICTR authorities relied upon by the Accused, while concerned with violations of rights similar to those alleged in the Motion, were decided in the context of Rules 40 and 40 *bis*, which deal with the provisional arrest of suspects, and their transfer to and provisional detention by the Tribunal/ICTR. These authorities are not directly applicable to cases where an arrest warrant has been issued and executed pursuant to Rule 55 as they concerned facts where suspects were detained by various states pursuant to requests from the Prosecution under Rule 40, and then were left to languish in those states for months, while the Prosecution was preparing to issue an indictment against them. This situation arose partly

[13] Similar approach was followed in the ICTR case of *Rwamakuba* where the issue of violations of Rwamakuba's rights while in detention of the ICTR were considered following his acquittal. *See Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-A, Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention), 11 June 2001; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Decision"), para. 17.

[14] *Barayagwiza v. Prosecutor*, Case No. ICTR–97–19–AR72, Decision, 3 November 1999, para. 42. *See also Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, Declaration of Judge Vohrah, paras. 5–6.

[15] Article 20(2) and Rule 57 are the only provisions that appear to encompass the period of time after an arrest of an accused person by a state but before his or her transfer to the seat of the Tribunal. Neither, however, places any specific obligation, additional to those provided in Rule 55, on any of the Tribunal's organs during that period. Indeed, pursuant to Article 29 of the Statute and Rules 56 and 57 of the Rules, the obligation is on the state which conducts the arrest to ensure prompt compliance with the arrest warrant.

because Rule 40 is, unlike Rule 55, silent on the obligations of the Prosecution before and during the arrest by a state, a gap that was eventually filled by the Appeals Chamber in the *Kajelijeli* case, when it simply aligned the obligations of the Prosecution under Rule 40 with the obligations outlined in Rule 55.[16] Finally, it should be noted that, in all the cases relied upon by the Accused in support of his position that no attribution of responsibility to the Tribunal is necessary before a remedy can be given, the major discussions and findings ultimately revolved around the Prosecution's responsibility for violations, rather than the responsibility of the state authorities.[17] There is no suggestion by the Accused that the violations he alleges can be attributed to the Prosecution through its failure to comply with the requirements of Rule 55, or in any other way. Indeed, the Accused's allegations seem to relate to the manner in which Serbia complied with the arrest warrant. If the Accused were to have material proving that the arrest took place on 18 July 2008 and that the actions of the Serbian authorities could be attributed to the Prosecution or any other Tribunal's organ, he should present such material at trial.

7. Finally, the Chamber considers it appropriate to make clear its rejection of the interpretation placed by the Accused upon the Holbrooke Decision. In that Decision the Chamber expressed a view, in the context of the abuse of process claim, that, even in cases of torture or other very serious mistreatment of an accused by a third party unconnected to the Tribunal, the setting aside of jurisdiction would only take place in "exceptional circumstances", and that other measures *that ensure a fair trial* for the person affected by such serious mistreatment may be sufficient.[18] The Accused's argument that this pronouncement by the Chamber supports his position is misleading. When making the above finding, the Chamber was concerned with the issue of serious mistreatment, such as torture for example, of an accused by third parties, and the serious impact that torture could potentially have on the accused's right to a fair trial before the Tribunal. The present situation is not comparable to that scenario since no issue of the Accused's right to a fair trial before this Tribunal arises on these facts.

---

[16] *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), paras. 220–223.

[17] *See e.g. Barayagwiza v. Prosecutor*, Case No. ICTR–97–19–AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Review"), para. 74, where the Chamber explicitly referred to violations suffered by Barayagwiza in the context of the Prosecution's omissions. *See also Rwamakuba* Decision, para. 28, which was not a Rule 40 case and where the Appeals Chamber, after lengthy discussion, considered "the violations of Mr. Rwamakuba's rights attributable to the Tribunal" and, therefore, found financial compensation to be an effective remedy.

[18] *See* Holbrooke Decision, para. 85.

8. For the above reason, namely that the Motion is premature, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

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

Judge Iain Bonomy, Presiding

Dated this thirty-first day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]