THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 1 July 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION TO DISMISS: LACK OF JURISDICTION OF MECHANISM FOR CRIMINAL TRIBUNALS (MICT)

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. Dr, Radovan Karadzic respectfully moves to dismiss his indictment on the grounds that the United Nations Security Council lacked the power to establish the Mechanism for Criminal Tribunals (MICT). Since the Security Counsel extinguished Dr. Karadzic's right to appeal at the ICTY, there is no legal entity to which Dr. Karadzic can appeal in the event of conviction. As the right to appeal is a fundamental right which cannot be abridged, Dr. Karadzic's indictment must be dismissed.

2. The MICT was created by Security Council Resolution 1966 on 22 December 2010. In the Resolution, the Security Council stated that it was acting pursuant to Chapter VII of the United Nations Charter.

3. Article 39 of Chapter VII provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make such recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

4. Article 41 of Chapter VII provides:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

5. In *Prosecutor v Tadic*, No. IT-94-1-A, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995), the Appeals Chamber held that the United Nations Security Council, had the power pursuant to Article 39 to take measures to "maintain or restore international peace and security," and that the creation of the International Tribunal was one of the measures not involving the use of armed force that may be employed pursuant to Article 41.

6. The *Tadic* decision also held that the exercise of the Chapter VII powers by the Security Council, and the determination by that body that a threat to international peace and security existed, was not unlimited, but was subject to judicial review.[1]

7. Judge Fitzmaurice of the International Court of Justice had made the same point in the case of *Legal Consequences of the Continual Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1971) when he opined that "the Security Council can act in the preservation of peace and security, provided the threat said to be involved is not a mere figment or pretence."[2]

8. The "extraordinary powers" granted under Chapter VII to the Security Council by the countries agreeing to the U.N. Charter were on "condition that it confines itself to short-term measures with preliminary effect while the definitive settlement of a conflict is left to the parties or to the procedures under Chapter VI of the Charter."[3] As one commentator has noted "these distinctions between Chapter VI and VII would become obsolete if the Security Council at any given time were free to declare the provisions of Chapter VII applicable."[4]

9. Therefore, the continued exercise of the Security Council's powers in 2010 over alleged crimes in the former Yugoslavia in 1992-95 is subject to judicial review and determination of whether it is reasonable to conclude that a "threat to peace" existed in 2010 and whether the formation of a new Tribunal with jurisdiction over such crimes was reasonable as a limited and necessary measure to maintain or restore international peace and security.

10. In *Tadic*, the Appeals Chamber said:

> "The determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter."[5]

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[1] Para 29
[2] Page 293
[3] Krisch, Nico and Frowein, J.A (2002) *Article 39, In* The Charter of the United Nations: A commentary (Bruno Simma, ed 2002).at note 5, p 705-06.
[4] De Wet, Erika, *The Chapter VII Powers of the United Nations Security Council* 137 (1st ed 2004)
[5] Para 29. See also Article 24(2) of the Charter, which provides that in discharging its duties, the Security Council "shall act in accordance with the Purposes and Principles of the United Nations."

11. Judge Weeramantry in his dissent in the ICJ Lockerbie case noted that Article 24(1) of the UN Charter provides that the Security Council "'shall act in accordance with the Purposes and Principles of the United Nations.' The duty is imperative and the limits are categorically stated."[6] Judge Lauterpacht in the ICJ Bosnian Genocide case reasoned: "Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accord with the Purposes and Principles of the United Nations."[7]

12. The Bossuyt Report, commissioned by the UN Commission on Human Rights to examine the Security Council's use of economic sanctions, maintained that because Article 24 requires the Council to act in accordance with the principles and purposes contained in Article 1, it follows that "no act of the Security Council is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the United Nations."[8]

13. The Purposes and Principles of the United Nations Charter are found in Articles 1 and 2 of the Charter. They include the rights to self-determination, to encourage respect for human rights, and the principle of sovereign equality. An examination of those purposes and principles reveals that the creation of a new Tribunal is inconsistent with them.

14. Article 1(2) of the Charter states that the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." The International Court of Justice has held that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."[9]

15. The Security Council has usurped the traditional criminal jurisdiction of the former Yugoslavia by the creation of the Tribunal arming it with primary jurisdiction over crimes committed on that territory This deprives the people of the former Yugoslavia of an important aspect of self-determination—the right to judge its fellow citizens. Since judges are appointed by the elected government, they are accountable to

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[6] 1992 I C.J 114, 170 (Weeramantry dissenting)
[7] 1993 ICJ at 440 (separate opinion of Lauterpacht).
[8] Marc Bossuyt, UN Commission on Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, UN Doc E/CN.4/Sub 2/2000/33, P 23 (2000).
[9] *Western Sahara Case* (1975) at para, 55

the citizens of the countries of the former Yugoslavia. By removing the adjudication of crimes to an International Tribunal, the Security Council consequently removed the power of self-determination from the people of the former Yugoslavia.

16. While respect for the former Yugoslavia's right of self-determination may have been outweighed by the lack of a functioning judicial system in that region in 1993 when the Tribunal was created, the issue presented in this motion requires that the Trial Chamber determine whether the creation of a new Tribunal in 2010 was reasonable considering the preference for self-determination expressed in Article 1(2).

17. Dr. Karadzic challenges the exercise of the Chapter VII powers of the Security Council at a time when the conditions precedent to the exercise of those powers—a threat to or breach of the peace—no longer existed.

18. Article 1(3) of the Charter provides that one of the purposes of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This section has been interpreted as requiring "proportionality"—an evaluation of the necessity and proportionality of the Chapter VII measures in relation to the threat to peace which provides the basis for the measures.

19. In his treatise, *The Charter of the United Nations: A Commentary* (2002 ed), Professor Simma notes that "the Charter indicates a desire to minimize the impact of enforcement measures as much as possible.[10] ...Non-military enforcement action under Article 41 is subject to the general limits of Chapter VII action, i.e. to the Purposes and Principles of the Organization, [and] to the principle of proportionality."[11]

20. Angelet contends that "A first limit to the Security Council's discretion under Chapter VII of the Charter flows from the proportionality principle, according to which the Council's action must be appropriate and necessary for the achievement of its stated purposes (typically, the removal of a threat to peace), and may not affect other interests to an extent which is disproportionate to the advantage obtained of pursued. At the very

[10] Page 711
[11] Page 745

least, the Security Council may not take action which is unnecessary for a removal of a threat to the peace.[12]

21. It is contended that the creation of a new Tribunal in 2010 to adjudicate cases of crimes allegedly committed in 1992-95 in the former Yugoslavia was outside of the powers of the Security Council under Chapter VII of the United Nations Charter given that there was no current threat to peace in that region in 2010. Therefore, respect for human rights and fundamental freedoms would not best be accomplished by creating a new Tribunal to continue to adjudicate cases from the former Yugoslavia.

22. The concept of proportionality encompasses the principle that when the threat to international peace and security has ended, the enforcement measures of Chapter VII must end as well. The Secretary General himself recognized that the life span of the Tribunals must end when they are no longer necessary for the restoration and maintenance of peace and security in the relevant territories.[13] That time had come by 2010.

23. Would it be reasonable to bomb Banja Luka in 2010 because of the events that occurred in 1992-95? Would it be reasonable to impose an economic blockade of Republika Srpska at this time as a result of the 1992-95 events? How then can it be reasonable to employ the Security Council's Chapter VII powers to create a new Tribunal to adjudicate crimes from 1992-95?

24. Article 2(1) of the Charter provides that the United Nations is based upon the "principle of the sovereign equality of all its Members." Clearly, the sovereignty of the countries of the former Yugoslavia has been infringed upon like no other member of the United Nations, with the possible exception of Rwanda, by the creation and maintenance of an international tribunal to prosecute crimes committed on its territory.

25. In his book, *Authority of the Security Council* (2001), Schweigman observes that:

> "The correct interpretation of the article would seem to be, however, that the Council's actions may only temporarily affect a state's sovereignty as long as that state's

[12] Angelet, "International Law Limits to the Security Council", *United Nations Sanctions and International Law*, (Gowlland-Debbas V ed. 2001) at pp72-73

[13] Secretary General's Report on the Creation of the International Criminal Tribunal for the former Yugoslavia, doc S/25704 (3 May 1993) at para 28

> actions threaten international peace and security. A measure by the Council that permanently infringes on a State's sovereignty is unwarranted."[14]

26. The Trial Chamber has the power, and the duty, to determine whether the MICT was validly created in 2010 or whether this exercise of the Security Council's Chapter VII powers could no longer be considered reasonable in light of the absence of a threat to peace, the absence of the necessity to maintain or restore international peace and security in the former Yugoslavia, and the purposes and principles of self determination, respect for human rights, and sovereign equality. .

27. It is obvious that in 2010 in the former Yugoslavia there is no breach of the peace, threat to the peace, or acts of aggression that warrant the continued exercise of the Security Council's powers under Chapter VII. It is also obvious that creating a new Tribunal to adjudicate the cases of persons suspected of committing crimes in the former Yugoslavia in 1992-95 was not necessary to maintain or restore international peace and security.

28. One need only look to other resolutions of the Security Council to be convinced of those facts. In Resolution 1503 (2003), the Security Council recognized that the ICTY had contributed to "lasting peace and security" in the former Yugoslavia, and urged the ICTY to transfer some of its cases to the national courts of the countries of the former Yugoslavia. In Resolution 1534 (2004), the Security Council insisted that the Tribunal complete its work expeditiously and reiterated its desire to see cases handled by the national courts. Since 2004, the ICTY has successfully transferred the cases of 13 persons to the courts of the countries of the former Yugoslavia, and national courts in those countries remain fully functional.

29. Because the Security Council lacked the authority in 2010 to create a new Tribunal to adjudicate cases dealing with the 1992-95 events in the former Yugoslavia, it follows that MICT is without jurisdiction to adjudicate Dr. Karadzic's case.

30. Resolution 1966 provides that:

The Mechanism shall have competence to conduct, and complete, all appellate

[14] Page 173

proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the respective branch of the Mechanism [15]

31. The commencement date of The Hague branch of the MICT is today, 1 July 2013. Since Dr. Karadzic's trial has not yet been concluded, if he is convicted his appeal will necessarily be before the MICT. By extinguishing the jurisdiction of the ICTY over his appeal, and placing it in a new Tribunal which it did not have the power to create, the Security Council has deprived Dr. Karadzic of his fundamental right to review of a conviction.[16] Therefore, since any conviction would be effectively unreviewable, the indictment against him should be dismissed.

32. The creation of the MICT cannot be justified by the need to complete the work of the ICTY. While the Security Council had the power to create the ICTY in 1993 and authorize it to complete its work, it created an entirely new Tribunal in 2010 with a new Statute, new Rules of Procedure and Evidence, new Judges, a new Registrar, and new Prosecutor. Significantly for Dr. Karadzic, the new Tribunal has created a new legal aid scheme, which has reduced the amount of funds available for his defence on appeal by over E230,000.[17] It also provides for part-time judges, serving on a temporary basis. These new provisions will adversely affect Dr. Karadzic's right to a fair and expeditious appeal.

33. The Security Council had the option of retaining the ICTY until it could complete all of its cases, including first-instance appeals, or allowing uncompleted cases to be adjudicated in the courts of the countries of the former Yugoslavia. However, because there was no continuing threat to peace and security in the former Yugoslavia in 2010, the Security Council did not have the authority to create a new Tribunal to adjudicate such cases.

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[15] See Annex 2, Article 2(2)

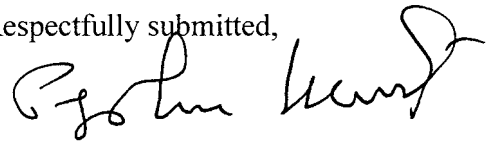
[16] Article 14(5) of the International Covenant on Civil and Political Rights: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." See also Article 8(2)(h) of the 1969 American Convention on Human Rights; Article E(4) of the 1992 Resolution of the African Commission on Human and Peoples' Rights on the Right of a Fair Trial; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),Article 2 of Protocol Seven;

[17] See ICTY Association of Defence Counsel, *General Differences Between the ICTY and MICT Appeals Legal Aid Policies* (2013) attached as Annex "A".

33. For all of the above reasons, the Trial Chamber should find that the MICT lacks jurisdiction over Dr. Karadzic's appeal. It should order the indictment dismissed. Dr. Karadzic would have no objection to the dismissal of the indictment being stayed for 60 days to give the Security Council time to decide whether it wishes to restore his right to appeal before the ICTY or to allow his case to be adjudicated in the courts of the former Yugoslavia.

Word count: 2808

Respectfully submitted,



Radovan Karadzic[18]

[18] The assistance of Legal Interns Joseph Sadon and Igor Petrovich of Georgetown Law Center and Ethan Notarius of the University of Buffalo Law School (USA) is gratefully acknowledged.

ANNEX "A"

General Differences Between the ICTY and MICT Appeals Legal Aid Policies

1. The ICTY policy distinguishes between two phases (a- preparation and filing of the notice of appeal; b- appeal phase) while the MICT distinguishes between three phases (a- notice of appeal; b- appeal briefs, c- appeal hearing).

2. The lump sum of the MICT policy is distributed in monthly stipends. These do not represent a monthly allotment of hours (as in the ICTY policy) or a monthly salary They are advance payments of the lump sum.

3. The lump sum under the ICTY policy is paid in Euros, the lump sum under the MICT policy in US Dollars.

4. The lump sum under the ICTY policy does not include hearing hours, while the MICT policy does.

Financial Overview of the ICTY and MICT Appeals Legal Aid Policies

Only the maximum and minimum amounts are provided, which take into consideration the grading according to the years of experience of Counsel and the level of complexity of the case. The lump sums include the amount provided for Counsel, Co-Counsel and support staff.

ICTY Policy

	Phase 1	Phase 2	Total
	Maximum = 54 650 € Minimum = 53 320 €		
Level 1		Maximum = 209.235 € Minimum = 173.040€	**Maximum = 473.120 €**
Level 2		Maximum = 278.980 € Minimum = 230.720 €	**Minimum = 225.360 €**
Level 3		Maximum = 418 470 € Minimum = 346 080 €	

This does not include the hearing hours

MICT Policy

	Phase 1	Phase 2	Phase 3	Total
	26.950 $ = 20.670,65 €		32.760 $ = 25.126,92 €	
Level 1		110.940 $ = 85.090,98 €		**Maximum = 241.106,45 €**
Level 2		158.840 $ = 121 830,28 €		**Minimum = 130.888,55 €**
Level 3		254 640 $ = 195 308,88 €		

The amount in Euros was calculated with the UN Operational Rate of Exchange of 1 June 2013 0,767

Sentencing Appeal

Phase 1	Phase 2	Phase 3	Total
19 500 $ = 14 956,5 €	53 050 $ = 40.689, 35 €	9 300 $ = 7.133,1 €	**81.850 $ = 62.778,95 €**