

**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-05-88/2-AR72.2
Date: 12 March 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision: 12 March 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON ZDRAVKO TOLIMIR'S APPEAL AGAINST
THE DECISION ON SUBMISSIONS OF THE ACCUSED
CONCERNING LEGALITY OF ARREST**

The Office of the Prosecutor:

Mr. Peter McCloskey

The Accused:

Mr. Zdravko Tolimir, *pro se*

JM

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of an appeal filed by Zdravko Tolimir (“Appellant”) on 23 January 2009¹ against the “Decision on Submissions of the Accused Concerning Legality of Arrest” rendered by Trial Chamber II (“Trial Chamber”) on 18 December 2008.² The Office of the Prosecutor (“Prosecution”) responded on 10 February 2009.³ The Appellant did not file a reply.

I. BACKGROUND

2. The original indictment against the Appellant was made public on 25 February 2005.⁴ He was arrested on 31 May 2007 and transferred to the seat of the Tribunal on 1 June 2007.⁵ The case was assigned to the Trial Chamber on the same day⁶ and the first initial appearance took place on 4 June 2007.⁷ The operative indictment charges him with genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war, including extermination, murder, persecution, forcible transfer and deportation under Articles 3, 4(3)(a), 4(3)(b), 5(b), 5(d), 5(h), 5(i) and 7(1) of the Tribunal’s Statute.⁸

3. On 14 December 2007, the Trial Chamber rendered its “Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules”, in which it considered, *inter alia*, the Appellant’s allegations in relation to the circumstances of his arrest and concluded that, even assuming, *arguendo*, all those allegations were true, they could “not justify declining the exercise of jurisdiction by this Tribunal.”⁹

4. Following the receipt of additional filings relevant to the conditions of his arrest and pending the B/C/S translation of the 14 December 2007 Decision, the Appellant filed the

¹ Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, the B/C/S original filed on 23 January 2009, the English translation filed on 29 January 2009 (“Appeal”).

² *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Submissions of the Accused Concerning Legality of Arrest, 18 December 2008 (the B/C/S translation was filed on 9 January 2009) (“Impugned Decision”).

³ Prosecution’s Motion for Extension of Time to File a Response and Response to Tolimir’s “Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest”, 10 February 2009 (the B/C/S translation was filed on 20 February 2009) (“Response”).

⁴ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-I, Indictment, 8 February 2005 and Decision on Motion of the Prosecution to Further Vacate the Order for Non-Disclosure, 25 February 2005.

⁵ Impugned Decision, para. 1.

⁶ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-I, Order Assigning a Case to a Trial Chamber, 1 June 2007.

⁷ A counsel to represent the Appellant “at his initial appearance, and in such other matters as may be necessary until a permanent counsel is assigned” was assigned by the decision of the Deputy Registrar on 4 June 2007.

⁸ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Second Amended Indictment, 16 October 2008 (“Indictment”).

⁹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Preliminary Motions on the Indictments Pursuant to Rule 72 of the Rules, 14 December 2007 (the B/C/S translation was filed on 31 December 2008) (“14 December 2007 Decision”), paras 16-26.

submissions addressed by the Impugned Decision.¹⁰ The Trial Chamber treated the Submissions as a request for reconsideration of the relevant parts of its 14 December 2007 Decision and, specifying that “it [was] not for this Trial Chamber to examine the circumstances of the Accused’s arrest for the purpose of providing some form of declaration”, limited its analysis to whether the new facts justified the reconsideration of its refusal to decline the exercise of its jurisdiction *ratione personae* as a remedy for the alleged violations.¹¹

5. The Appellant did not seek certification to appeal the Impugned Decision, considering it to be an appeal as of right pursuant to Rules 72(B)(i) and (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).

II. DISCUSSION

A. Appellant’s Submissions

6. The Appellant argues that the Trial Chamber erred in stating that the Tribunal had no “inherent jurisdiction to establish the circumstances of an accused’s arrest” and thus limiting its analysis only to the possible impact of these circumstances on the Tribunal’s *ratione personae* jurisdiction.¹² He argues that the Tribunal has jurisdiction to determine the legality of his arrest claiming that (i) the fact that he may have recourse to remedies before national courts cannot be an obstacle for the Tribunal to be seized of the matter; (ii) the legality of the arrest is of particular significance for the protection of an accused’s rights and thus of crucial importance to the Tribunal’s integrity; (iii) an unlawful arrest may render “worthless the documents which follow after such an arrest”; and (iv) the Tribunal’s jurisdiction in this regard is a natural result of the fact that the indictment and the warrant for arrest are issued by the Tribunal and that the transfer of the arrested accused is ensured by the Registrar of the Tribunal under Rule 57 of the Rules.¹³

7. The Appellant further suggests that the Trial Chamber erred in refusing to declare the circumstances of his arrest violated his rights as an accused.¹⁴ He claims that such a declaration could be in itself an adequate legal remedy.¹⁵ Therefore, he insists that the Trial Chamber should have concluded on the merits of his claims related to the circumstances of his arrest and that a

¹⁰ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Submission by the Accused Concerning the Prosecution’s Submission of 15 October 2008, the B/C/S original filed on 22 October 2008, the English translation filed on 29 October 2008; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Supplementary Submission by the Accused Concerning the Prosecution’s Submission of 15 October 2008, the B/C/S original filed on 24 October 2008, the English translation filed on 29 October 2009 (jointly, “Submissions”).

¹¹ Impugned Decision, paras 12-13.

¹² Appeal, paras 5-6.

¹³ Appeal, paras 7-14.

¹⁴ Appeal, para. 15.

¹⁵ Appeal, paras 16, 34-35.

subsequent conclusion as to whether those circumstances warrant “the dispensation of the jurisdiction [would be] a matter [of its] discretionary opinion”.¹⁶

8. The Appellant reiterates his Submissions in relation to the factual allegations relevant to his arrest insisting on the distinction to be made between his case and that of Dragan Nikolić which concerned the issues of state sovereignty,¹⁷ and requests the Appeals Chamber to establish that “considering the circumstances under which [the Appellant] was arrested and those which followed upon his arrest, it is not within the Tribunal’s jurisdiction to continue proceedings against [him]”.¹⁸

B. The Response

9. The Appeals Chamber notes that the Response was filed out of time. The Prosecution submits that it “miscalculated the due date” and requests the Appeals Chamber to accept its Response as validly filed despite this mistake.¹⁹ The Appeals Chamber recalls that procedural time-limits are to be respected and underlines that

they are indispensable to the proper functioning of the Tribunal and the fulfilment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.²⁰

10. The Appeals Chamber finds that no good cause has been shown to allow the Appeals Chamber to exercise its discretion in recognizing the filing of the Response as validly done. Therefore, the Appeals Chamber declines to consider the arguments contained therein.

C. Scope of Appeal

11. The Appeals Chamber recalls that interlocutory appeals on jurisdiction lie as of right under Rule 72(B)(i) of the Rules only where they challenge an indictment on the ground that it does not relate to the Tribunal’s personal, territorial, temporal or subject-matter jurisdiction.²¹ The Appellant

¹⁶ Appeal, paras 17, 31-33.

¹⁷ Appeal, paras 18-30 citing *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003.

¹⁸ Appeal, para. 36.

¹⁹ Response, para. 1.

²⁰ *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against the Trial Judgement, 4 September 2008, para. 16 citing *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 46 (footnotes omitted); see also fn. 54 of that Judgement, which refers to Rule 127 of the Rules and states that “[t]he fact that an act performed after the expiration of a prescribed time may be recognized as validly done illustrates the following principle: timely filing is the rule, and filing after the expiration of a time-limit constitutes late filing, which is normally not permitted. However, if good cause is shown, the Rule establishes that despite the expiration of time and tardy filing, an act may be recognized as validly done, as a permitted derogation from the usual rule. Thus the Rule reinforces the principle that procedural time-limits are to be respected.”

²¹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR72.1, Decision on Tolimir’s “Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal”, 25 February 2009, para. 4.

challenges the Tribunal's jurisdiction over him because of the alleged illegality of his arrest.²² However, he does not challenge the Indictment on any of the above-listed grounds. Consequently, Rule 72(D) of the Rules "cannot provide a basis for appeal of the Impugned Decision".²³

12. The alternative relief sought by the Appellant concerns the establishment of the circumstances of his arrest and a declaration as to its unlawful nature.²⁴ These submissions equally go outside the scope of a jurisdictional challenge and therefore are not properly before the Appeals Chamber.

13. In light of the above, the Appeals Chamber considers that the Appellant should have requested the Trial Chamber's authorization to lodge an appeal against the Impugned Decision under Rule 73(B).²⁵ Absent certification to appeal under Rule 73(B) of the Rules, the Appeals Chamber has no jurisdiction to address the merits of the Appeal.

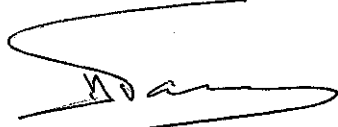
III. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber **DENIES** the Appeal.

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

Done this 12th day of March 2009,

At The Hague, The Netherlands.



Judge Andrézia Vaz, Presiding

[Seal of the Tribunal]

²² Appeal, para. 36.

²³ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003 ("Nikolić Decision of 9 January 2003"), p. 3. The Appeals Chamber notes that a number of its decisions rendered in the ICTR prior to 27 May 2003, have adopted a different approach allowing comparable appeals to be filed as of right under Rule 72(D) (e.g. *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, paras 11 and 72 citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-72, Decision and Scheduling Order, 5 February 1999, p. 3; see also the Dissenting Opinion of Judge Shahabuddeen attached to the *Nikolić* Decision of 9 January 2003 (paras 13 *et seq.*)). However, given that the Rules of Procedure and Evidence of the ICTR were amended on 27 May 2003 to include the provisions on certification of appeal referred to in the *Nikolić* Decision of 9 January 2003, the Appeals Chamber considers that these two approaches are not in contradiction.

²⁴ Appeal, para. 37.

²⁵ *Nikolić* Decision of 9 January 2003, p. 3.