



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-AR72.1

Date: 25 February 2009

Original: English

IN THE APPEALS CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 25 February 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**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"**

The Office of the Prosecutor

Mr. Peter McCloskey

Accused

Mr. Zdravko Tolimir

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 by Zdravko Tolimir (“Tolimir”)¹ against the Decision on Second Preliminary Motion on the Indictment Pursuant to Rule 72 of the Rules issued by Trial Chamber II (“Trial Chamber”) on 1 October 2008 (“Impugned Decision”), in which the Trial Chamber denied Tolimir’s motion² alleging that the Tribunal lacked jurisdiction over certain aspects of the Second Amended Indictment (“Indictment”)³ and that the form of the Indictment was flawed.⁴

I. PROCEDURAL BACKGROUND

2. On 30 October 2007, Tolimir submitted certain preliminary motions regarding issues of jurisdiction, alleged defects in the form of the Indictment, and severance of counts.⁵ These were denied by the Trial Chamber on 14 December 2007.⁶ On 28 July 2008, Tolimir filed another preliminary motion contending that the Tribunal lacked jurisdiction over Counts 1 (Genocide) and 2 (Conspiracy to Commit Genocide) of the Indictment and that the form of the Indictment was flawed.⁷

3. On 1 October 2008, the Trial Chamber issued the Impugned Decision in which it denied Tolimir’s Second Preliminary Motion, which it treated as a motion for reconsideration.⁸ The Trial Chamber denied certification to appeal.⁹ In the Appeal, Tolimir requests the Appeals Chamber to find that the Impugned Decision was not reasoned and “to declare [that the Trial Chamber] has no jurisdiction over Counts 1 and 2 of the Indictment,” or alternatively to have the Trial Chamber order the Prosecution to amend the Indictment in various ways and/or to “confirm that [Tolimir] was charged with conspiracy to commit genocide on the basis of his alleged participation in a joint

¹ Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal, 15 December 2008 (BCS version), 5 January 2009 (corrected English version) (“Appeal”).

² *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Preliminary Motion Pursuant to Rule 72(A)(i), (ii) with a Request for Clarification of the Meaning of Certain Allegations in the Indictment, with Annexes I and II, 28 July 2008 (BCS version), 8 August 2008 (English version) (“Second Preliminary Motion”).

³ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, Second Amended Indictment, 16 October 2008.

⁴ The Impugned Decision was translated into BCS on 2 December 2008.

⁵ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Preliminary Motions on the Indictment in Accordance with Rule 72 of the Rules, 30 October 2007 (BCS version), 7 November 2007 (English version).

⁶ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, 14 December 2007.

⁷ Second Preliminary Motion, pp. 4, 8.

⁸ Impugned Decision, para. 36.

⁹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Tolimir’s Request for Leave to File an Interlocutory Appeal, 19 February 2009.

criminal enterprise.”¹⁰ The Office of the Prosecutor (“Prosecution”) responded on 15 January 2009, requesting the dismissal of the Appeal on jurisdictional grounds.¹¹ Tolimir did not file a reply.

II. PRELIMINARY ISSUE

4. The Appeals Chamber recalls that decisions on preliminary motions are without interlocutory appeal, except when jurisdiction is challenged.¹² Specifically, Rule 72(B)(i) of the Rules states that a motion challenging jurisdiction lies as of right when the accused 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 (“personal jurisdiction”);

(ii) the territories indicated in Articles 1, 8 and 9 of the Statute (“territorial jurisdiction”);

(iii) the period indicated in Articles 1, 8 and 9 of the Statute (“temporal jurisdiction”); or

(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute (“subject-matter jurisdiction”).¹³

III. DISCUSSION

A. Arguments of the Parties

5. Tolimir first submits that his Appeal “refers solely to the part of the [Impugned] Decision relating to the challenges to the jurisdiction of the Tribunal.”¹⁴ Tolimir specifically addresses paragraph 37 of the Impugned Decision,¹⁵ which states that:

Insofar as [Tolimir’s] motion alleges challenges to the jurisdiction, the Trial Chamber has considered those arguments and notes that while couched as such, they do not relate to the jurisdiction of the Tribunal. Rather the points raised constitute issues of law and evidence which can be properly advanced and argued during the course of trial.¹⁶

6. Tolimir contends that the Impugned Decision “lacks reasoning” because the Trial Chamber “did not state the reasons for its conclusion”¹⁷ that his Second Preliminary Motion did not challenge jurisdiction. He maintains that the Trial Chamber should have stated the reasons why his arguments “relate to issues of evidence . . . [and] to issues of law that do not relate to the jurisdiction of the

¹⁰ Appeal, paras 54-55 (emphasis omitted).

¹¹ Prosecution’s Response to 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,” 15 January 2009 (“Response”), para. 11.

¹² See Rules 72(B) of the Rules of Procedure and Evidence (“Rules”).

¹³ See Rule 72(D) of the Rules; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 9.

¹⁴ Appeal, para. 3.

¹⁵ *Id.*, para. 4.

¹⁶ Impugned Decision, para. 37.

¹⁷ Appeal, paras 4-6 (emphasis omitted).

Tribunal.”¹⁸ Tolimir further contends that the Trial Chamber erred in concluding that his Second Preliminary Motion raised evidentiary issues as “the factual allegations of the Indictment . . . [were] not . . . the subject of [the Second Preliminary Motion].”¹⁹

7. Tolimir alleges that several of the points in his Second Preliminary Motion present issues concerning the jurisdiction of the Tribunal.²⁰ He identifies these points as:

- i. The argument that certain acts, such as reburial and forcible transfer of women and children, do not constitute the *actus reus* of genocide;²¹
- ii. The argument that certain acts, because they are not presented by the Indictment as stemming from “genocidal intentions” but rather as natural and foreseeable consequences of Joint Criminal Enterprises (“JCEs”), cannot be considered acts of genocide;²²
- iii. The issue of “the applicability of the theory of joint criminal enterprise . . . to establishing responsibility for genocide and conspiracy to commit genocide;”²³ and
- iv. The argument that the Indictment did not adequately define the *mens rea* of the crime of genocide.²⁴

Tolimir contends that these points “are issues of law covered by Rule 72(D) [of the Rules] and it is imperative that they be resolved before the beginning of the trial.”²⁵

8. The Prosecution responds that the Impugned Decision “is not a decision on a motion challenging jurisdiction”²⁶ and thus should be dismissed as it was not certified by the Trial Chamber.²⁷ It contends that Tolimir “failed to show that the Trial Chamber erred when it concluded that none of the arguments raised in the Second Preliminary Motion related to the jurisdiction of the Tribunal.”²⁸ The Prosecution further contends that “[t]he Trial Chamber carefully indicated factors and arguments taken into account before coming to its decision” and that “[o]ne paragraph [of the

¹⁸ *Id.*, para. 6.

¹⁹ *Id.*, para. 7.

²⁰ *Id.*, para. 8.

²¹ *Id.*; *see also id.*, paras 14-15, 19, 36-39, 43, 45-48.

²² *Id.*, para. 8; *see also id.*, paras 35, 40-44,

²³ *Id.*, para. 8; *see also id.*, paras 20-34, 49-52.

²⁴ *Id.*, para. 8; *see also id.*, para. 53.

²⁵ *Id.*, para. 12.

²⁶ Response, para. 3.

²⁷ *Id.*, paras 3-5.

²⁸ *Id.*, para. 6.

Impugned Decision] was sufficient to explain that [Tolimir] misapprehended the nature of a jurisdictional challenge.”²⁹

9. The Prosecution maintains that “the Appeal contains no jurisdictional argument, but only arguments relating to the interpretation of the applicable law of the Tribunal and questions of evidence.”³⁰ While not engaging Tolimir’s points exhaustively, it notes by way of example that certain acts mentioned in the Indictment, such as reburial, which Tolimir maintains are incorrectly treated in the Indictment as evidence of the *actus reus* of genocide, merely “show the *mens rea* of the JCE members and demonstrate how they viewed the killings as something to be hidden” providing “a description of the context and the manner in which the crimes took place.”³¹ Finally, the Prosecution notes that the charges contained in Tolimir’s Indictment are identical to those leveled against the joint accused in *Prosecutor v. Vujadin Popović et al.*,³² the proceedings in this latter case are ongoing before the Trial Chamber.³³

B. Analysis

10. The Appeals Chamber finds that Tolimir fails to raise a proper jurisdictional challenge; none of Tolimir’s contentions challenge the relevant categories referred to in Rule 72(D)(iv) of the Rules.³⁴ Tolimir does not appear to contend that the Indictment errs in its treatment of personal, temporal or territorial jurisdiction. His objections centre on the framing and support for Counts 1 and 2 of the Indictment. Though at first glance somewhat related to subject-matter jurisdiction, Tolimir’s assertions do not allege that he is charged with a crime outside the Tribunal’s subject-matter jurisdiction. Genocide and Conspiracy to Commit Genocide, which are within the Tribunal’s subject matter jurisdiction,³⁵ are still charged, whatever the relationship between these crimes and JCEs, and whether or not the Prosecution has provided sufficient or correct details regarding the *actus reus* and *mens rea*. As the Trial Chamber correctly noted, Tolimir’s challenges relate to “issues of law and evidence which can be properly advanced and argued during the course of trial.”³⁶

11. The Appeals Chamber thus concludes that it need not consider the merits of the Appeal.

²⁹ *Id.*, para. 8.

³⁰ *Id.*, para. 9.

³¹ *Id.*

³² Case No. IT-05-88-T.

³³ *Id.*, para. 10.

³⁴ *See supra*, para. 4.

³⁵ *Id.*; *see also* Article 4, Statute of the Tribunal.

³⁶ Impugned Decision, para. 37.

IV. DISPOSITION

12. On the basis of the foregoing, the Appeal is **DENIED**.

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

Done this 25th day of February 2009,
At The Hague,
The Netherlands.



Judge Theodor Meron

Presiding

[Seal of the International Tribunal]