



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-PT

Date: 18 December 2008

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 18 December 2008

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON SUBMISSIONS OF THE ACCUSED
CONCERNING LEGALITY OF ARREST**

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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 seized of the “Submission by the Accused Concerning the Prosecution’s Submission of 15 October 2008”, submitted on 22 October 2008 and filed in the English version on 29 October 2008 (“First Submission”), and the “Supplementary Submission by the Accused Concerning the Prosecution’s Submission of 15 October 2008”, submitted on 24 October 2008 and filed in the English version on 29 October 2008 (“Second Submission”) (“Submissions” concurrently), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. The Accused was arrested on 31 May 2007 and transferred to the seat of the Tribunal on 1 June 2007.¹
2. On 14 December 2007, the Trial Chamber rendered a decision on the Accused’s preliminary motions on the Indictment (“14 December 2007 Decision”).² Concerning the issue at hand in this decision, the 14 December 2007 Decision denied the Accused’s challenges to the Tribunal’s jurisdiction based on his alleged illegal arrest.³
3. Since then the Accused has raised the issue of his alleged illegal arrest in a number of submissions.⁴ This issue was also addressed during the Status Conference on 12 March 2008.⁵ At the Status Conference on 30 July 2008, the Pre-Trial Judge instructed the Prosecution to make a renewed request to the Republic of Serbia (“Serbia”) for a report on the circumstances of the Accused’s arrest.⁶ In accordance with this direction, the Prosecution filed a submission on 16 October 2008, attaching a response from the Ministry of Foreign Affairs of Serbia (“Prosecution’s Submission of 16 October” and “Serbia Report” respectively).⁷ The Serbia Report states that the

¹ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order for Detention on Remand, 1 June 2007.

² Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, 14 December 2007.

³ *Ibid.*, paras. 8–26. On 28 July 2008, the Trial Chamber issued a decision dismissing the Accused’s motion to initiate contempt proceedings against the Prosecutor in this case and “other members of the Prosecution” in failing to disclose information and evidence regarding his arrest in Serbia and transfer to the Tribunal. *See* Decision on Submission of the Accused dated 20 June 2008, 28 July 2008.

⁴ *See, e.g.*, Submission of the Accused to Pre-Trial Chamber II to Schedule an Interim Status Conference and Resolve the Problem of the Disclosure of Materials, Failure to Provide Legal Assistance and the Problem of the Communication of the Court, the Prosecutor’s Office and the Registry with the Accused, 13 February 2008 (BCS version) and 19 February 2008 (English version), para. 2.1; Submission of the Accused with a Request to Initiate Proceedings to Establish Contempt of the International Tribunal, filed confidentially and *ex parte*, 20 June 2008 (BCS version), 27 June 2008 (English version). The confidential and *ex parte* status was lifted by the Trial Chamber in its Decision on Submission of the Accused dated 20 June 2008, 28 July 2008.

⁵ *See* T. 146–147 (12 March 2008).

⁶ T. 189 (30 July 2008).

⁷ Submission pursuant to the Direction of the Trial Chamber concerning the Accused’s Arrest, with Appendix, 16 October 2008. The Accused filed a request for certification of a translation of the Serbia Report annexed to the

Serbian Government is not in possession of either records or any documents in relation to the Accused's arrest, and denies any participation in his arrest.⁸ It provides certain additional information concerning "operational intelligence acquired by the Security-Information Agency in respect of the possibility of the Accused's and/or General Ratko Mladić's attempt to cross the border between the Republic of Serbia and Bosnia and Herzegovina on or about 31 May 2007".⁹

4. On 29 October 2008, the Accused filed the First Submission, in which he challenged the authenticity and veracity of the Serbia Report and requested an opportunity to examine the original version of that document.¹⁰ On 29 October 2008, the Accused filed the Second Submission, which presented "new circumstances" concerning his arrest in particular referring to comments by Minister of the Interior of Serbia in a programme of the state television.¹¹ On 31 October 2008, the Accused filed an attachment to the Second Submission, which contained the transcript and a video recording of that TV programme ("Attachment").¹²

5. At the Status Conference held on 31 October 2008, the Prosecution informed the Pre-Trial Judge that for the examination of the original copy of the Serbia Report a meeting with the Accused's legal adviser was scheduled shortly.¹³ The Trial Chamber subsequently received confirmation that the inspection had been carried out. On 6 November 2008, the Prosecution filed a response to the Submissions ("Response").¹⁴ On 16 December 2008, the Accused filed a request for leave to a reply and its reply to the Response ("Reply").¹⁵

Prosecution's Submission of 16 October, 31 October 2008. *See* Request for Certification of a Translation, 20 October 2008 (BCS version), 31 October 2008 (English version). On 18 November 2008, the Conference and Language Services Section ("CLSS") filed an internal memorandum, noting that although "it is not CLSS policy to revise translations done by parties, we can confirm that the portions queried by the Accused are correct." *See* Request for Verification of Translation of Filing D2070-2072 (D2073-2075), dated 20 October 2008, 18 November 2008. On 28 November 2008, the Accused filed a motion concerning this memorandum. The motion is pending. *See* Zdravko Tolimir's Motions Concerning Two Internal Memoranda from the Conference and Language Services Section, 24 November 2008 (BCS version), 28 November 2008 (BCS version).

⁸ Prosecution's Submission of 16 October, p. 1. *See also* Serbia Report, pp. 1-3.

⁹ Prosecution's Submission of 16 October, p. 2. *See also* Serbia Report, pp. 1-3.

¹⁰ Submission by the Accused Concerning the Prosecution's Submission of 15 October 2008, 22 October 2008 (BCS version), 29 October 2008 (English version), paras. 1-12.

¹¹ Supplementary Submission by the Accused Concerning the Prosecution's Submission of 15 October 2008, 24 October 2008 (BCS version), 29 October 2008 (English version), paras. 1-6.

¹² Attachment to Supplementary Submission by the Accused Concerning the Prosecution's Submission of 15 October 2008, 30 October 2008 (BCS version), 31 October 2008 (English version).

¹³ T. 214 (31 October 2008).

¹⁴ Response to Submission, Supplementary Submission and Attachment by the Accused Concerning the Prosecution's Submission of 15 October 2008, 6 November 2008. The BCS translation was filed on 3 December 2008.

¹⁵ Reply to the Prosecution's Response to Submission, Supplementary Submission and Attachment by the Accused Concerning the Prosecution's Submission of 15 October 2008, 4 December 2008 (BCS version), 16 December 2008 (English version).

II. SUBMISSIONS OF THE PARTIES

A. Submissions

6. In the First Submission, the Accused argues with reference to the Serbia Report that there are reasonable grounds to question its “authenticity and truthfulness” because of some defects in the document.¹⁶ He also refers to the former Chief Prosecutor of the Tribunal, Ms. Carla del Ponte’s book, which he claims elaborates on the information about the circumstances of his arrest.¹⁷ The Accused requests the Trial Chamber (i) to disregard the Serbia Report or find it unreliable in considering the circumstances of his arrest; (ii) to order the Prosecution to let the Accused and his legal adviser inspect the original copy of the Serbia Report; (iii) to order the Prosecution to obtain from the Security and Information Agency of Serbia and other organs information and documents regarding his arrest; and (iv) to order the Prosecution to obtain from the former Chief Prosecutor a statement confirming the allegations about intelligence on his arrest and mentioned in her book that Serbia, and in particular “a Serbian special unit”, was involved in the Accused’s arrest.¹⁸

7. In the Second Submission, the Accused puts forward “new circumstances” concerning his arrest: remarks made by the Minister of the Interior of Serbia in a programme of the state television aired on 22 October 2008.¹⁹ He submits that the Minister of the Interior’s statement that the former Serbian government arrested the Accused in Serbia and handed him over to the Tribunal²⁰ “not only confirms [the Accused’s] claims about the location of [his] arrest, but also confirms that [the Serbia Report] is false, and may not even be authentic, since it refers to information received from the Ministry of the Interior that [...] could not have been provided without the knowledge of the current Minister of the Interior.”²¹ Taken together with the former Chief Prosecutor’s alleged remarks in her book, the Accused argues that the Trial Chamber has sufficient information to establish that he was arrested in Serbia without having been given “the opportunity to have the court decide about handing [him] over in accordance with the Law on Cooperation with the [...] Tribunal”.²² For the reasons submitted in the First and Second Submissions, he thus requests the Trial Chamber to find

¹⁶ First Submission, paras. 1–7, 12.

¹⁷ *Ibid.*, paras. 9–10.

¹⁸ *Ibid.*, paras. 8–9, 12.

¹⁹ Second Submission, paras. 1–2.

²⁰ The relevant part of the transcripts compiled by the Accused’s legal adviser, Mr. Gajić, reads: “Tvica Dačić (Minister of the Interior): ‘[...] your Government (addressing former Minister [for Capital Investments in the Government of Republic of Serbia] Velimir Ilić) handed over...[...] Their Government handed Tolimir over, Tolimir. (Addressing Velimir Ilić) Because you arrested him in New Belgrade or, or you arrested him in Republika Srpska.’” *Ibid.*, p. 3; Attachment, p. 2.

²¹ Second Submission, para. 2.

²² *Ibid.*, para. 3.

that he was unlawfully arrested in Serbia and handed over to the Tribunal, and to order the Prosecution to investigate how the Serbia Report was produced as well as to verify its authenticity.²³

B. Response

8. The Prosecution submits that the Requests should be dismissed as the Trial Chamber has already ruled that even if the Accused's allegations concerning the circumstances of his arrest were true, they do not justify declining the exercise of jurisdiction.²⁴ It further asserts that, except for the question of jurisdiction, which was decided by the 14 December 2007 Decision, the legality of the Accused's arrest has no impact upon the proceedings;²⁵ and that in seeking to establish facts confirming the illegality of his arrest, the Submissions fail to raise anything new or of legal consequence.²⁶ The Prosecution argues that neither the information provided to the Prosecution by Serbia nor that provided by the Accused regarding the Minister of Interior's remarks about the Accused's arrest constitute valid grounds for reconsidering the Trial Chamber's prior ruling.²⁷ Further inquiry of Serbia and of the former Chief Prosecutor, the Prosecution argues, is similarly unwarranted.²⁸

C. Reply

9. The Accused first seeks leave to reply to the Response on the grounds that the Prosecution "presents arguments that are not relevant to the [Submissions]."²⁹ In the Reply, the Accused contends that he "did not raise the issue of the Tribunal's jurisdiction nor did he request reconsideration of the ruling of the Trial Chamber on the [14 December 2007 Decision]",³⁰ but that he requests the Trial Chamber to establish that he "was arrested in the Republic of Serbia (and not in the Republika Srpska) and that he was denied the right to have a competent court decide about handing him over to the Tribunal in accordance with the Law on Cooperation with the [...] Tribunal".³¹ The Tribunal has an inherent right, asserts the Accused, to establish the circumstances

²³ *Ibid.*, para. 7. The Accused further requests the Trial Chamber to inform the President of the Tribunal and the Chief Prosecutor of the Tribunal about his illegal arrest and the relevant filings before the Tribunal, "so that in their reports to the Security Council they can draw its attention to the unlawful arrest of those accused before the Tribunal." *Ibid.*

²⁴ Response, paras. 1, 3.

²⁵ *Ibid.*, para. 2.

²⁶ *Ibid.*, para. 3.

²⁷ *Ibid.*, para. 4.

²⁸ *Ibid.*

²⁹ Reply, para. 1.

³⁰ *Ibid.*, para. 2. He claims that he could not request in the Submission reconsideration of the ruling concerning the Tribunal's jurisdiction because the decision has not been translated to a language he understands. *Ibid.*

³¹ *Ibid.*, para. 3.

of his arrest, “regardless of the nature of the legal consequences of the arrest, which is a separate issue”.³² He further submits that “Serbia violated his basic human rights and covered up those who unlawfully arrested him”³³ and that “this can have an impact on the Tribunal’s final judgement and Zdravko Tolimir’s position after and before the final judgement”.³⁴

10. The Accused also argues that “if the Trial Chamber were able to conclude from the evidence presented that the Accused was arrested in the territory of the Republic of Serbia”, it would be unnecessary for the Trial Chamber to issue an order directing further inquiry of the Republic of Serbia and of the former Chief Prosecutor.³⁵

III. APPLICABLE LAW

11. The jurisprudence of the Tribunal dictates that a Chamber has “inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.”³⁶ A party urging reconsideration must satisfy the Trial Chamber of particular circumstances justifying reconsideration in order to avoid injustice.³⁷

IV. DISCUSSION

12. The Accused requests that the Trial Chamber make inquiries and take other measures in order to investigate and establish the circumstances of his arrest. Specifically the Accused asks the Trial Chamber to rule that he was arrested in Serbia and denied his right to call on “a competent court” with regard to his arrest. He requests this without seeking a specific legal remedy as a result and on the basis of the Tribunal’s “inherent right” to do so. This Tribunal does not entertain arguments—factual or legal—in the abstract. While the Accused may have remedies to pursue in national courts in relation to an alleged illegal arrest, it is not for this Trial Chamber to examine the circumstances of the Accused’s arrest for the purpose of providing some form of declaration. The circumstances surrounding the arrest of the Accused are relevant to the Trial Chamber to the extent that they may affect the jurisdiction of the Tribunal over him. For this reason the Trial Chamber

³² *Ibid.*, para. 4.

³³ *Ibid.*, para. 8.

³⁴ *Ibid.*, para. 9.

³⁵ *Ibid.*, para. 5. Finally the Accused contends that should the Trial Chamber fail to find that the arrest of the Accused was unlawful, “the Tribunal will send out an unambiguous signal that the law does not apply to those accused before the Tribunal and that every measure, including unlawful arrest, can be undertaken against them.” *Ibid.*, para. 10.

³⁶ *See, e.g., Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Zdravko Tolimir’s Request for Reconsideration of Appeals Chamber’s Decision of 28 March 2008, 18 June 2008, para. 8.

³⁷ *See, e.g., for example, Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, p. 5.

will consider the arguments of the Accused related to his arrest but only in the context of the impact on the jurisdiction of the Trial Chamber to adjudicate on his case.

13. In the 14 December 2007 Decision, the Trial Chamber examined whether, in light of the jurisprudence of the Tribunal, the circumstances of the Accused's arrest were such so as to require the Tribunal to decline to exercise its jurisdiction on the basis of a violation of State sovereignty or a violation of human rights.³⁸ Despite of the Accused's claim that he is not familiar with the content of the 14 December 2007 Decision, the Pre-Trial mentioned the gist of the decision during the previous status conferences.³⁹ Thus, the Trial Chamber is of the view that despite the submission of the Accused to the contrary, the proper categorisation of the remedy sought is a reconsideration of that decision. With that in mind, the Trial Chamber briefly recounts its prior ruling for the purpose of this decision.

14. First, the Trial Chamber referred to the Appeals Chamber's finding that, in cases involving "universally condemned offences", jurisdiction should not be set aside on the grounds that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice.⁴⁰ On the basis of this, the Trial Chamber concluded that, assuming, without deciding, a violation of State sovereignty occurred in this case, and given the serious crimes involved, such a violation is not sufficient to justify the setting aside of jurisdiction by the Tribunal.⁴¹ Second, the Trial Chamber, noting the jurisprudence of the Tribunal, concluded that, even accepting for the purposes of the decision the version of events advanced by the accused, the circumstances of his arrest did not amount to a human rights violation of such a serious nature so as to require that the exercise of jurisdiction be declined.⁴²

15. When the Trial Chamber reached this conclusion, as noted in the 14 December 2007 Decision, no response to the Prosecution's request had been received from the relevant Serbian authorities regarding the Accused's capture in Belgrade and his transportation within the territory of Serbia until his arrest in the Republika Srpska.⁴³

16. The Trial Chamber now has before it the Serbia Report in which the Government of Serbia has provided an official response regarding the circumstances of the arrest of the Accused. In the First Submission, the Accused sought and subsequently had an opportunity to examine the original

³⁸ 14 December 2007 Decision, paras. 16–17.

³⁹ See T. 146 (12 March 2008), 188 (30 July 2008).

⁴⁰ *Ibid.*, para. 18.

⁴¹ *Ibid.*, para. 19.

⁴² *Ibid.*, para. 25.

⁴³ See *ibid.*, para. 24.

of that document. In these circumstances his request to this effect in the First Submission is now moot. On the evidence before the Trial Chamber, there is no basis to doubt the authenticity of the Serbia report which was submitted through official channels in response to the request of the Prosecution. The description provided of the arrest in that report is, in essence, the same as that set out in the report from the Republika Srpska which had been considered already in the 14 December 2007 Decision. The Serbia Report does not contain any new information that leads the Trial Chamber to reconsider its prior ruling.

17. With regard to the submissions of the accused as to the “new circumstances” regarding his arrest, namely the former Chief Prosecutor’s alleged remarks in her book and the Minister of the Interior’s statements during a TV programme, the Trial Chamber comes to a similar conclusion. Even if, for the purpose of the decision, the Trial Chamber accepts these statements as true, this would not add anything new to the original allegations advanced by the Accused and decided upon by the Trial Chamber in the 14 December 2007 Decision. The comments of the former Chief Prosecutor alleged by the Accused and the remarks of the Minister of the Interior are both submitted in support of the Accused’s original allegation that he was arrested in Serbia and illegally transferred to the Republika Srpska and that Serbian authorities were involved. Given that the Trial Chamber’s original decision assumed these allegations to be true for the purpose of its determination, no new circumstances have been presented so as to justify revisiting that decision. The Trial Chamber is thus not persuaded that a clear error of reasoning in the 14 December 2007 Decision has been demonstrated in the Submissions, or that reconsideration is necessary to prevent an injustice.

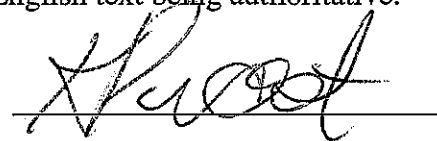
18. Finally, given the findings above, the Trial Chamber is of the view that the Accused’s arguments do not warrant any inquiries of the former Chief Prosecutor nor do they justify a further request to Serbia regarding the report or the circumstances of the arrest of the Accused.

V. DISPOSITION

For these reasons, pursuant to Rule 54 of the Rules, the Trial Chamber hereby

- (1) **GRANTS** the Accused leave to file the Reply; and
- (2) **DENIES** the Submissions.

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



Kimberly Prost
Pre-Trial Judge

Dated this eighteenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]