



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: 19 February 2009

Original: English

IN TRIAL CHAMBER II

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

Acting Registrar: Mr. John Hocking

Decision of: 19 February 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON TOLIMIR'S REQUEST FOR LEAVE TO FILE AN
INTERLOCUTORY APPEAL**

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”);

BEING SEISED OF the “Request for Leave to File an Interlocutory Appeal”, submitted by the Accused Zdravko Tolimir (“Accused”) on 5 December 2008 and filed in the English version on 17 December 2008 (“Request”);

NOTING that at a further appearance on 3 July 2007 an amended indictment filed by the Prosecution became the then operative indictment in this case (“Indictment”);

RECALLING the “Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules”, issued on 14 December 2007 (“Decision on Preliminary Motions”);

RECALLING the “Decision on Second Preliminary Motion on the Indictment Pursuant to Rule 72 of the Rules”, issued on 1 October 2008 (“Impugned Decision”), in which the Trial Chamber denied the “Preliminary Motion Pursuant to Rule 72(A)(i), (ii) with a Request for [Confirmation of the Understanding] of Certain Allegations in the Indictment”, submitted by the Accused on 28 July 2008 and filed in the English version on 8 August 2008 (“Second Preliminary Motion”),¹ on the grounds, *inter alia*, that:

- (1) the Accused’s preliminary motions, pursuant to Rule 72, had already been submitted and decided upon by the Trial Chamber;²
- (2) the Trial Chamber had not found that a clear error of reasoning had been demonstrated in the Decision on Preliminary Motions or that reconsideration was necessary to prevent an injustice;³ and
- (3) the Accused’s claims relating to the translation of the Indictment were not an issue to be dealt with in motions challenging the jurisdiction or the form of an indictment;⁴

NOTING that in the Request the Accused requests the Trial Chamber to grant him leave to file an Interlocutory Appeal against the part of the Impugned Decision concerning the formal defects of the Indictment⁵ on the following grounds:

¹ Impugned Decision, p. 11.

² Impugned Decision, para. 35.

³ Impugned Decision, para. 36.

⁴ Impugned Decision, para. 38.

- (1) the Accused was not granted leave to file an appeal against the Decision on Preliminary Motions, because it had not been translated into a language that he understood and the translation was not in the Judicial Database;⁶ and the “Prosecution’s Motion Seeking Leave to File a Second Amended Indictment to Correct Mistaken Paragraph References and to Drop Two Crime Incidents”, filed on 16 October 2008 (“Prosecution Motion”), indicates that even the Prosecution noticed formal defects in the Indictment;⁷
- (2) according to the principles of fairness, the Appeals Chamber should decide on the submissions of the Accused regarding the formal defects of the Indictment before a decision is rendered on the Prosecution Motion;⁸
- (3) in light of the content of the Prosecution Motion, a prompt decision by the Appeals Chamber could accelerate the procedure by removing any doubts about the formal defects of the Indictment and determining their legal significance;⁹
- (4) the significance of certain defects of the Indictment is in dispute between the Prosecution and the Accused; and what the Prosecution regards as a minor error the Accused regards as an “error of fundamental significance”;¹⁰
- (5) the removal of doubt about the clarity and adequacy of the Indictment and about the formal defects described in the Second Preliminary Motion, would expedite the proceedings, in particular by resolving issues related to two alleged joint criminal enterprises and the alleged participation of the Accused;¹¹ and
- (6) the formal defects presented in the Second Preliminary Motion concern factual and legal allegations of importance for the efficient preparation of the defence and the expeditious conduct of the proceedings¹² and the Accused, in appealing the Impugned Decision, would present the issue of the grounds for specific allegations regarding these formal defects of the Indictment;¹³

⁵ Request, paras. 1, 10.

⁶ Request, para. 3.

⁷ Request, para. 3.

⁸ Request, para. 4.

⁹ Request, para. 5.

¹⁰ Request, para. 6.

¹¹ Request, para. 7.

¹² Request, para. 8.

¹³ Request, para. 9.

NOTING the “Prosecution’s Response to the Accused’s Request to File an Interlocutory Appeal”, filed on 23 December 2008 (“Response”), in which the Prosecution objects to the Request, arguing that the Accused’s claims do not rise to a level of importance sufficient to merit certification on the following grounds:

- (1) the requirements of Rule 72(B)(ii) have not been met, because the Request addresses the requisite criteria for certification under the Rules in “the most unspecific and general of terms”,¹⁴ which, if accepted, would undermine the purpose of the certifying procedure under Rule 72(B)(ii) by allowing certification to appeal a decision whenever an Accused is unsatisfied with the disposition of his claims;¹⁵
- (2) the Impugned Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, because: (a) the Impugned Decision is limited in its scope;¹⁶ (b) the suggestion that the Prosecution Motion undermines the Impugned Decision is “wholly incongruous”;¹⁷ and (c) the operative Indictment is substantially the same as the indictment against the seven Accused in the *Popović* trial;¹⁸ and
- (3) the decision does not require the immediate attention of the Appeal Chambers, because the “Accused has failed to indicate any issue resulting from the Decision which could conceivably cause any delay at the present stage of proceedings or later”,¹⁹

NOTING that in respect of decisions on preliminary motions pursuant to Rule 72(B)(ii) the Trial Chamber may grant “certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

NOTING that certification is precluded unless the Trial Chamber finds that the conditions for certification are satisfied; that even where they are satisfied, certification remains in the discretion

¹⁴ Response, para. 5. The Prosecution cites paragraphs 5, 6, 7, and 8 of the Request to illustrate its point. Response, para. 5.

¹⁵ Response, para. 5.

¹⁶ Response, para. 6.

¹⁷ Response, para. 7. The Prosecution argues: (a) that the Decision on Preliminary Motions was evaluated as a whole; (b) the Request “fails to establish that the [I]mpugned Decision is in anyway legally or factually deficient”; and (c) the Trial Chamber has ruled that the proposed Second Amended Indictment is now the “operative indictment”. Response, para. 7.

¹⁸ Response, para. 8.

¹⁹ Response, para. 9.

of the Trial Chamber;²⁰ and that a request for certification is not concerned with whether the decision was correctly reasoned or not;²¹

CONSIDERING that the Accused's submissions in paragraphs 3 and 4 of the Request in regard to the Prosecution Motion do not relate to the criteria for certification set forth in Rule 72(B)(ii);

CONSIDERING that the Accused's submissions in paragraphs 5–9 of the Request refer to the arguments in the Second Preliminary Motion and assert that the criteria set forth in Rule 72(B)(ii) have been met, but they do not present reasons for this assertion;

CONSIDERING that the Impugned Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING, therefore, that the criteria for certification set forth in Rule 72(B)(ii) have not been met;

NOTING that, as stated above, in the Impugned Decision the Trial Chamber found that the preliminary motions pursuant to Rule 72 had already been submitted by the Accused and been decided upon by the Trial Chamber²² and that there were no grounds for reconsideration of the Decision on Preliminary Motions;²³

NOTING that Rule 73(B) sets forth the criteria for certification of the Impugned Decision, in so far as it is a determination as to whether a reconsideration of the Decision on Preliminary Motions is justified;

CONSIDERING that since the criteria for certification pursuant to Rules 72(B)(ii) and 73(B) are the same, the criteria for certification set forth in Rule 73(B) have also not been met;

PURSUANT TO Rules 72(B)(ii) and 73(B),

HEREBY DENIES the Request.

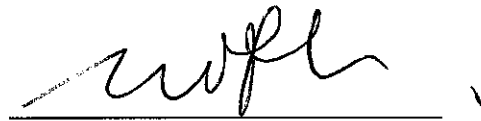
²⁰ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2

²¹ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para. 4.

²² Impugned Decision, para. 35.

²³ Impugned Decision, para. 36.

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



Carmel Agius
Presiding

Dated this nineteenth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]