



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-T

Date: 18 January 2012

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Dissenting Opinion of: 18 January 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DISSENTING OPINION OF JUDGE PRISCA MATIMBA NYAMBE TO
DECISION ON DEFENCE REQUEST FOR CERTIFICATION TO APPEAL**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

A handwritten signature in black ink, appearing to be 'R. M. Nyambe', located at the bottom right of the page.

1. I am appending a Dissenting Opinion with reasons from the “Decision on Defence Request for Certification to Appeal” issued by majority on 13 January 2012 (“Majority Decision”).

2. Rule 73(B) of the Rules and Procedure of Evidence (“Rules”) states as follows:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such 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.

3. The redacted portions that are considered in paragraphs 15 and 16 of the Majority Decision include the following: “[Tolimir] negotiated with Avdo Palo (sic). He asked Avdo Palo (sic), Tolimir did, to order his soldiers to hand over their weapons, and that they would be transported safely to Tuzla by helicopter. Helicopters were supposed to arrive. Avdo didn’t agree to this.”¹

4. I shall first consider the requirement of Rule 73(B) that “...the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial...”

5. In its “Request for Leave to Appeal the Decision on the Prosecution’s Request for Reconsideration of Admission of Written Evidence of Witness No. 39 Pursuant to Rule 92 *bis*”, filed in English on 24 November 2011 (“Request”), the Defence strongly objects to the redaction of parts of the transcript or evidence referring to the acts and conduct of Zdravko Tolimir for the reason that it may influence the outcome of the trial.² These redactions concern “[i]nformation about the contacts and context of these contacts between Zdravko Tolimir and Avdo Palić (Commander of the Žepa Brigade) [...] Zdravko Tolimir’s negotiations during the evacuation of the civilians from Žepa with the Commander of the Žepa Brigade, offering helicopter evacuation if the BIH Army hand over the weapons in the enclave”.³ The Defence continues:

Since Zdravko Tolimir took part in the negotiations in Žepa, that he saw to the evacuation proceeding without any problem and provided full security to the people being evacuated [...] it is not appropriate to redact that part of the testimony of Witness No. 39 from the transcript. The Defence believes that if a witness is available, it is inappropriate to redact parts of the transcript about the most important matter in criminal proceedings (the acts and conduct of the Accused) since the Trial Chamber would be deprived of relevant information which might affect the outcome of the proceedings, and a decision of the Appeal Chamber for admission of evidence of Witness No. 39 pursuant to Rule 92 *bis* would significantly advance the proceedings.⁴

6. The Accused is charged *inter alia* with Forcible Transfer and Deportation. The Defence position is that what happened in Žepa was an evacuation of the inhabitants of Žepa, in other words

¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 7018 (7 February 2007).

² Request, para. 5.

³ *Ibid.*

a normal evacuation. On the one hand, the Prosecution is alleging that the evacuation was a forcible transfer.

7. It seems to me that redacting the relevant portions of the transcript would deprive the Chamber of portions of evidence which might affect the outcome of the trial, within the meaning of Rule 73(B), and an immediate resolution by the Appeals Chamber will not only materially advance the proceedings, but is in the interest of a fair and expeditious trial. As the redacted portions relate to evacuation of the civilian population of Žepa, which is in contention, the exclusion of the same means that the Chamber will be deprived of evidence necessary to decide whether or not the Accused is guilty of Forcible Transfer/Deportation in its final determination. This may affect the outcome of the trial, and is prejudicial to the rights of the Accused to fully present his defence.

8. With regard to the disposition of the Majority Decision that “[t]he Accused does not identify how the Impugned Decision, in this respect, would satisfy the cumulative criteria of Rule 73(B)”, in the instant case, the Accused has indicated that the exclusion of the redacted portions of the evidence would significantly affect the fair conduct of the proceedings as the Chamber would be deprived of this evidence in its final determination; and this may affect the outcome of the trial. In effect the Accused is challenging the Trial Chamber’s misapplication of the Rule 92*bis* criteria, in the Impugned Decision. In my opinion an immediate resolution by the Appeals Chamber may materially advance the proceedings and avoid an injustice to the Accused as it curtails his right to due process. In my opinion the criteria set out in Rule 73(B) have been met for the Chamber to grant certification and not to do so would be patently unfair and unjust.

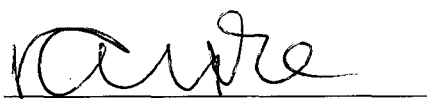
9. Paragraph 16 of the Majority Decision states that “...the Chamber notes that redacting portions of evidence concerning acts and conduct of an accused when admitting evidence pursuant to Rule 92 *bis* is done with the sole purpose of protecting the rights of an accused, given that such admission means he does not have the availability to confront his accuser.” I agree with this reasoning, especially in the case of a self-represented accused like in this case. Protecting his rights must also mean respecting the choices that he makes. The Chamber can guide. But ultimately the Accused must be allowed to pursue his defence as he sees fit. In this case, the Accused has waived his right to have the redacted portions excluded from the transcript that is admitted in evidence, and the Chamber should not go out of its way to force him to his rights when clearly he has chosen to waive his rights. Moreover, the Accused is already disadvantaged by the very fact that he does not have the possibility to cross-examine the witness.

⁴ *Ibid.*

10. With regard to the disposition in paragraph 16 of the Majority Decision that "...the Accused has [...] every opportunity to present evidence on any of the matters that are the subject of redacted portions of Witness No. 39's evidence, if he considers them helpful to the Defence case", in fact the Accused has approached the Chamber with the Request at the current stage of the proceedings. To suggest that the Accused has every opportunity to present the same evidence later is not in the interest of an expeditious trial, because he may as a consequence need to present additional oral testimony as part of his case. For all the above reasons I am of the view that the Accused has met the criteria in Rule 73(B) for certification to be granted.

11. Moreover, the request has been made pursuant to Rule 73(B) which gives the Trial Chamber discretionary power to grant or not to grant the request. The right to appeal is a universal legal principle embraced by the major legal systems of the world. Granting this request would *not* be an improper exercise of the Trial Chamber's powers under Rule 73(B). I would not consider it a misapplication or improper exercise of its discretion herein. The need to protect the interests of an Accused, especially a self-represented Accused, would be better achieved, if the Chamber were to grant this request. If the request were granted, there would be no prejudice to the Prosecution. As for the Chamber, the more information it has, the better disposed it would be to further its truth seeking mandate given to it by the UN. For these reasons the Trial Chamber would be on firm grounds to exercise its discretionary powers under Rule 73(B) in favour of the Accused and grant the request for certification.

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



Judge Prisca Matimba Nyambe

Dated this eighteenth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]