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CASE/AFFAIRE NO. IT-05-88/2-PT		DATE 15 January 2008
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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: 15 January 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:

15 January 2008

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON MOTION FOR CERTIFICATION TO APPEAL THE 11
DECEMBER ORAL DECISION**

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 seised of the “Submission of the Accused to the Presiding Judge or Pre-Trial Chamber II for Leave to File an Appeal Against the Oral Ruling of the Pre-Trial Judge Ordering Communication Between the Accused and the International Tribunal and Disclosure of Material Supporting the Indictment in a Language, Script and Form that the Accused does not Understand”, submitted by the Accused on 17 December 2007 (“Motion”).¹ The Trial Chamber hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. During the Status Conference on 11 December 2007, the Pre-Trial Judge issued a decision on the Accused’s “Motion to the Pre-Trial Chamber and the Registry Concerning Assistance in Appointing a Legal Advisor, Disclosure of Material in a Language the Accused Understands and Notification of Special Defence on the Charges in the Indictment” submitted on 16 November 2007 (“Impugned Decision”).² The Pre-Trial Judge denied the request of the Accused to receive documents in “Serbian and the Cyrillic script” rather than in the Latin script.³ The Impugned Decision further held that “there is a right to receive relevant material in this Tribunal in a language you can understand, but this does not translate into a right for an accused, regardless of his or her background, education, experience, to come before this Tribunal and demand the production of documents in any language or script that he or she chooses”.⁴

II. SUBMISSIONS OF THE PARTIES

2. In the Motion, the Accused reargues factual matters and raises a number of arguments most of which deal with the correctness of the Impugned Decision instead of being directed at the standard for certification.⁵ The Accused alleges that he only understands “his mother tongue, the

¹ Submission of the Accused to the Presiding Judge or Pre-Trial Chamber II for leave to file an appeal against the oral ruling of the Pre-Trial Judge ordering communication between the Accused and the International Tribunal and disclosure of material supporting the Indictment in a language, script and form that the Accused does not understand,” submitted by the Accused on 17 December 2007 (English version filed on 19 December 2007).

² Motion to the Pre-Trial Chamber and the Registry Concerning Assistance in Appointing a Legal Advisor, Disclosure of Material in a Language the Accused Understands and Notification of Special Defence on the Charges in the Indictment” submitted on 16 November 2007 (English translation filed on 20 November). The “Prosecution Response to the Accused’s 16 November 2007 Motion” was filed on 4 December 2007. The “Registrar’s Submission on the Accused’s Motion dated 16 November 2007” was filed on 7 December 2007.

³ T. 114 (11 December 2007)

⁴ T. 114 (11 December 2007)

⁵ The Accused claims that while sustaining the allegations of the Prosecution that he signed documents written in the Latin alphabet the Pre-Trial Judge ignored the fact that during the war in the Former Yugoslavia only electronic equipment with Latin alphabet were in use and that there were “authorised handwritten or dictated text” which were relayed in electronic script via those computers. *See* Motion, para. 2.3. The Accused also submits that the decision

Serbian literary language and the Cyrillic script”, the knowledge of which he refreshed after the strokes suffered.⁶⁷ He claims that he is unable to peruse documents written in these languages and conduct an active defence in his trial.⁸ The Accused argues that the Impugned Decision orders him “to accept disclosure of material accompanying the indictment in a language and script which the accused cannot understand and which is not his mother tongue”⁹ and that his “basic right has been violated”.¹⁰

3. On 28 December 2007, the Prosecution filed its response to the Motion (“Response”).¹¹ The Prosecution argues that an application for certification under Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) must be predicated upon the existence of a genuine issue of law or fact.¹² The Prosecution submits that the Accused failed to establish evidentiary support of his factual claim or controvert the significant evidence to the contrary.¹³ It also submits that he failed to establish legal support for the requested relief.¹⁴ For the reasons above, the Prosecution submits that none of the requirements set out in Rule 73(B) have been met and therefore requests that the Motion be denied in all respects.¹⁵

III. DISCUSSION

4. Pursuant to Rule 73(B), “[d]ecisions 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”. Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied; even where both

considered that he studied in the Latin script of the Serbian language, but ignored the fact that Serbian and Croatian were separate languages and that from 1950 citizens in the Former Yugoslavia were able to choose the language and the script which they would use. Motion, para. 2.4.

⁶ In particular, the Accused claims that he was “not capable to refresh his knowledge of or even learning to write in Cyrillic because of impeded coordination and difficulties in writing in a script with complex graphological features and that this could be determined by expert analysis of the handwriting of the accused, which was not taken into account”. Motion, para. 2.2.

⁷ Motion, para. 2.4.

⁸ Motion, para. 2.7.

⁹ Motion, para. 3.1.

¹⁰ Motion, para. 3.2.

¹¹ Prosecution’s Response to the Accused’s Request for Certification of the Pre-Trial Judge’s Oral Decision of 11 December 2007, 28 December 2007 (“Response”).

¹² Response, para. 6.

¹³ Response, paras. 8–12.

¹⁴ Response, paras. 13–20. The Prosecution argued that even if the Accused had substantiated his claim of being incapable of reading the Serbian language as written in the Latin script, the relief he has requested is neither compelled nor justified by the Statute, the Rules or the International Covenant on Civil and Political Rights. *Ibid.*, para. 13.

requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber.¹⁶

5. Even though not articulated in the Motion, the Trial Chamber considers that the issue of whether in the particular circumstances, this Accused has a legal right to receive disclosed material and filings in Serbian in the Cyrillic script is one that may significantly affect the fair and expeditious conduct of the proceedings. The question impacts on a fundamental procedural matter which affects the pre-trial and trial phases of the proceedings and thus the first criterion set out in Rule 73(B) is met.

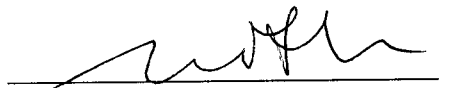
6. Concerning the second requirement indicated in Rule 73(B), the Trial Chamber is of the view that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings since an early determination will ensure that the proceedings are conducted from the initial phase in a manner consistent with the language rights accorded to the accused in terms of Statute and Rules of this Tribunal. Therefore the second criterion set out in Rule 73 (B) is also satisfied.

IV. DISPOSITION

For these reasons, pursuant to Rules 73(B) of the Rules, the Trial Chamber hereby

GRANTS certification of the oral decision of the Pre-Trial Judge of 11 December 2007.

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



Carmel Agius
Presiding

Dated this fifteenth day of January 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Response, paras. 20–21.

¹⁶ See e.g., *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, p. 1.