



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: 22 April 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: 22 April 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON TOLIMIR'S MOTION FOR LEAVE TO FILE AN APPEAL
AGAINST DECISION REGARDING SECOND AMENDED INDICTMENT**

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 “Motion for Trial Chamber II to Grant Leave to File an Appeal against the Decision on Prosecution’s Motion Seeking Leave to File a Second Amended Indictment”, submitted by the Accused Zdravko Tolimir (“Accused”) on 27 January 2009 and filed in the English version on 29 January 2009 (“Motion”);

RECALLING 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 for Amendment”), in which the Prosecution requested leave to amend the Amended Indictment of 11 June 2007¹ and file the proposed Second Amended Indictment;²

RECALLING the “Decision on Prosecution’s Motion Seeking Leave to File a Second Amended Indictment”, issued on 22 December 2008 (“Impugned Decision”), in which the Trial Chamber granted the Prosecution Motion for Amendment and decided that the proposed Second Amended Indictment be the operative indictment in the case;

NOTING that in the Motion the Accused requests leave to file an appeal against the Impugned Decision on the following grounds:

- (1) The amendments proposed in the Prosecution Motion for Amendment to which the Accused objected are of a material nature and Rules 50(B) and 50(C) should be applied;³
- (2) The Impugned Decision is internally contradictory in that it states in paragraph 20 that the contentious paragraphs of the Amended Indictment “evidently [...] can cause confusion for the reader and, even more importantly for the Accused” and yet in paragraph 21 it distinguishes “issues that are fundamental to the clarification of the content of an Indictment and those points of an Indictment that *only require a more refined clarification*”;⁴
- (3) The proposed amendments are tantamount to an expansion of the charges or an amendment to the nature of some of the charges and therefore the intervention of the

¹ Prosecution’s Submission of Amended Indictment with Attached Annexes A, B and C, 12 June 2007.

² Prosecution Motion for Amendment, para. 10.

³ Motion, para. 3.

⁴ *Ibid.*, para. 4.

Appeals Chamber is essential so that issues of great importance for the conduct of further proceedings can be promptly resolved and so as to contribute to a fair and expeditious trial;⁵ and

- (4) The amendment of the *mens rea* requirements for forcible transfer and deportation is material and, because the preparation of the Defence of the Accused and the conduct and outcome of the trial depend on this issue, the intervention of the Appeals Chamber is essential;⁶

NOTING the “Prosecution’s Response to the Accused’s Motion for Certification of 22 December 2008 Decision on Prosecution’s Motion to File a Second Amended Indictment”, filed on 11 February 2009 (“Response”), in which the Prosecution requests that the Motion be dismissed in its entirety;⁷

NOTING that the Prosecution submits in the Response that:

- (1) the Accused does not provide any evidence to colour his assertions that the amendments should have been held to be “material” and are tantamount to an expansion of the charges or an amendment to the nature of some charges;⁸
- (2) the Accused faces the same case as he did under the Amended Indictment;⁹
- (3) there is no credible basis for the claim that proceedings cannot be conducted fairly and expeditiously on the basis of the Second Amended Indictment or that there is any resultant impact on the outcome of the trial;¹⁰
- (4) the Accused has failed to identify any issue resulting from the Impugned Decision which could conceivably require intervention by the Appeals Chamber;¹¹ and
- (5) matters of pre-trial management may be appropriately addressed by the Trial Chamber in the ordinary course of proceedings and there is nothing in the Impugned Decision that interferes with this;¹²

⁵ *Ibid.*, para. 4.

⁶ *Ibid.*, para. 5.

⁷ Response, para. 2.

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*, para. 8.

¹⁰ *Ibid.*, para. 9.

¹¹ *Ibid.*, para. 10.

NOTING that Rule 73(B) provides that “[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”;

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 of the Trial Chamber;¹³ and that a request for certification is not concerned with whether the decision was correctly reasoned or not;¹⁴

CONSIDERING that the Accused does not provide justification for the assertion that the amendments are of a material nature¹⁵ or for the assertion that they are tantamount to an expansion of the charges or an amendment to the nature of some of the charges,¹⁶ such that the issue in the Impugned Decision can be considered as one that would significantly affect the fair and expeditious conduct of the proceedings;

CONSIDERING that the Accused does not explain how the alleged internal contradiction in the Impugned Decision¹⁷ relates to the criteria for certification set forth in Rule 73(B);

CONSIDERING that the Impugned Decision does not involve any 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;

PURSUANT TO Rule 73(B),

HEREBY DENIES the Motion.

¹² *Ibid.*, para. 11.

¹³ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2

¹⁴ *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.

¹⁵ Motion, paras. 3, 5.

¹⁶ *Ibid.*, para. 4.

¹⁷ *Ibid.*, para. 4.

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



Carmel Agius
Presiding

Dated this 22nd day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]