

**UNITED
NATIONS**



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: 8 December 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kimberly Prost, Presiding
Judge Christoph Flügge
Judge Antoine Kesia-Mbe Mindua

Acting Registrar: Mr. John Hocking

Decision of: 8 December 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON THE ACCUSED'S REQUEST FOR LEAVE TO APPEAL
THE ORAL RULING OF THE CHAMBER OF 22 OCTOBER 2009**

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 Appeal the Oral Ruling of the Chamber of 22 October 2009”, submitted on 29 October 2009 and filed publicly on 3 November 2009 (“Request for Leave”);

RECALLING that during the Status Conference on 22 October 2009, the Pre-Trial Judge issued an oral decision (“Impugned Decision”)¹ on the “Notice by Zdravko Tolimir on the Use of Physical Force Against Him for Identification of a Pre-Trial Accused Before the Tribunal” submitted on 28 July 2009 and filed publicly on 30 July 2009 (“Notice”), in which the Accused informed the Chamber that physical force had been employed against him for the purposes of obtaining his photograph and fingerprints at the United Nations Detention Unit (“UNDU”) and requested that the Chamber investigate the reasons why and at whose direction these actions were taken;²

NOTING the “Registrar’s Submission on Notice by Zdravko Tolimir” filed publicly with confidential Annexes A and B on 5 August 2009 (“Registrar’s Submissions”);

NOTING the “Response to the Registrar’s Submission of 5 August 2009”, submitted on 20 August 2009 and filed confidentially and *ex parte* with a request to remove confidential status on 25 August 2009 (“Accused’s Response”);

RECALLING that in the Impugned Decision, the Pre-Trial Judge referred to the holding of the Appeals Chamber in the case of *Prosecutor v. Šešelj* (“Šešelj case”), in which it held that “in a case of review of an administrative decision, a Trial Chamber may only step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted”;³

RECALLING further that in the Impugned Decision, the Pre-Trial Judge specified that “the Rules are very clear as to the procedure to be followed in the case of complaints about treatment, and ... those complaints must be directed initially to the commanding officer and, from there, through the Registry, to the President”, and stated that she informed the Accused that he could pursue the other remedies available to him;⁴

¹ T. 295-296 (22 October 2009).

² Notice, para. 6.

³ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, 9 April 2009, para. 20.

⁴ T. 295 (22 October 2009).

NOTING that in the Request for Leave, the Accused requests, pursuant to Rules 73 (B) and (C) of the Rules of Procedure and Evidence (“Rules”), certification from the Trial Chamber to file an interlocutory appeal against the Impugned Decision on the grounds that

- (1) the Chamber “misinterpreted the views of both the Registrar and the [A]ccused regarding the application of the ruling of the Appeals Chamber made in the *Šešelj* case, and failed to note that addressing the Commanding Officer of the Detention Unit and the Registrar would be an obviously inefficient legal remedy”;⁵
- (2) because it concerns the conditions of the Accused’s detention, “the ruling [inherently] relates to issues that would have a significant effect on the fairness and expeditiousness of the trial”, and therefore, “a prompt ruling by the Appeals Chamber would significantly expedite the trial”;⁶
- (3) “this is an important legal issue which concerns both the status of the [A]ccused and the manner in which his rights . . . should be ensured”;⁷

NOTING the further arguments of the Accused that:

- (1) the Chamber “erred in its presentation of the arguments of both the Registrar and the [A]ccused” because “the procedure suggested by the Registry could [only] have been implemented in the manner envisaged by the Rules of Detention, had physical coercion not been used before the accused was given the opportunity to send a written complaint to the Registry within a reasonable time frame”⁸ and because “the subject of the [Notice of 20 July] related to the manner of implementing the [Commanding Officer’s] administrative decision”;⁹
- (2) the Chamber’s instruction to the Accused to pursue his complaint with the Commanding Officer of the UNDU was erroneous because “[i]t was exactly the Commanding Officer of the Detention Unit who applied physical force unlawfully and justified her action in [the Registry’s Submission]”;¹⁰

⁵ Request for Leave, para. 4.

⁶ Request for Leave, para. 5.

⁷ Request for Leave, para. 6.

⁸ Request for Leave, para. 10.

⁹ Request for Leave, para. 12.

¹⁰ Request for Leave, para. 13. *See also* Request for Leave, para. 17.

- (3) pursuing his complaint with the Registry would be ineffective because the Registrar has already made submissions on the matter;¹¹
- (4) “[s]ince the means at disposal according to the Rules of Detention are obviously inefficient in terms of the specific act of the use of physical force, since this is an act that violates the rights of the [A]ccused as described in the [Accused’s Response], and since the treatment of an accused in the Detention Unit largely affects the fairness of the proceedings, all the conditions were met for the Trial Chamber consider the requests presented in [the Notice] and [the Accused’s Response]”;¹²
- (5) the present situation is distinguishable from that addressed by the Appeals Chamber in the *Šešelj* case because “in this specific instance there is no overlap between the jurisdiction of the Trial Chamber on the one hand, and the Commanding Officer of the Detention Unit or the Registry and the President of the Tribunal on the other”;¹³
- (6) “[i]t is an indisputable rule of international law that obviously inefficient legal means need not be used when addressing an international legal institution”;¹⁴

NOTING that Rule 73 (B) of the Rules provides that a Chamber “may grant such certification [of interlocutory appeals] 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 Chamber finds that the conditions for certification are satisfied; that even where they are satisfied, certification remains in the discretion of the Chamber;¹⁵ and that a request for certification is not concerned with whether the decision was correctly reasoned;¹⁶

¹¹ Request for Leave, para. 17.

¹² Request for Leave, para. 19.

¹³ Request for Leave, para. 20.

¹⁴ Request for Leave, para. 21.

¹⁵ Decision on Tolimir’s Motion for Leave to File an Appeal Against Decision Regarding Second Amended Indictment, 22 April 2009, p. 3, referring to *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

¹⁶ Decision on Tolimir’s Motion for Leave to File an Appeal Against Decision Regarding Second Amended Indictment, 22 April 2009, p. 3, referring to *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.

CONSIDERING that the Accused provides neither specification of nor support for his assertion that the Impugned Decision relates to an issue or issues which would satisfy the criteria for certification set forth in Rule 73 (B);

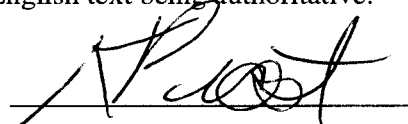
CONSIDERING that the further arguments presented by the Accused largely relate to the merits of the underlying Impugned Decision and do not explain how an issue presented by the Impugned Decision relates to the criteria for certification set forth in Rule 73 (B);

CONSIDERING that the criteria for certification set forth in Rule 73 (B) have not been met;

PURSUANT TO Rule 73 (B);

HEREBY DENIES the Motion.

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



Kimberly Prost
Presiding Judge

Dated this 8th day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]