

IT-05-08/2-AR73.1 36
A 36- A 27 PK
28 MARCH 2008



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-AR73.1
Date: 28 March 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 28 March 2008

THE PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON INTERLOCUTORY APPEAL AGAINST ORAL DECISION OF THE PRE-
TRIAL JUDGE OF 11 DECEMBER 2007**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Mr. Zdravko Tolimir

SM

1. The Appeals 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 (“International Tribunal”) is seized of an appeal by Zdravko Tolimir (“Appellant”)¹ from an oral decision rendered by the Pre-Trial Judge in this case on 11 December 2007, denying the Appellant’s request to receive documents in “Serbian and the Cyrillic script” (“Impugned Decision”).²

I. BACKGROUND

2. The Impugned Decision disposed of a motion submitted by the Appellant on 16 November 2007, in which the Appellant requested the service of documents in Serbian and in the Cyrillic script.³ On 15 January 2008, the Trial Chamber granted the Appellant certification to appeal the Impugned Decision, on 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” (“Decision on Certification”).⁴

3. The Trial Chamber rendered a further decision on 15 January 2008,⁵ dismissing a motion brought by the Appellant on 7 December 2007,⁶ in which he again asked that all documents be provided to him in Serbian and in the Cyrillic script. In its Decision on Motion of 7 December 2007 the Trial Chamber found, *inter alia*, that the motion reiterated “previous arguments regarding the use of the Serbian language in Cyrillic script” raised by the Appellant in his Motion of 16 November 2007.⁷ The Trial Chamber, however, granted the Appellant certification to appeal the Decision on Motion of 7 December 2007 in conjunction with the Impugned Decision.⁸

¹ Appeal by the Accused to the Presiding Judge of Chamber II against the Verbal Ruling of the Pre-Trial Judge Ordering Communication between the Accused and the International Tribunal and the Obligation to Accept Material Accompanying the Indictment in a Language, Script and Form that the Accused Does Not Understand, submitted on 25 January 2008 (English translation filed on 31 January 2008) (“Appeal”).

² *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, T. 114.

³ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, 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 of the Indictment, submitted on 16 November 2007 (English translation filed on 20 November 2007) (“Motion of 16 November 2007”).

⁴ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 5.

⁵ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, Decision on Accused’s Submission Dated 7 December 2007 and Decision on Certification to Appeal, 15 January 2008 (“Decision on Motion of 7 December 2007”).

⁶ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, Submission of the Accused to the Tribunal Concerning the Need for Communication between the Trial Chamber, Prosecution and Registry with the Accused in his Mother Tongue, Serbian, and Using the Cyrillic Alphabet, which He Can Understand, submitted on 7 December 2007 (English translation filed on 13 December 2007) (“Motion of 7 December 2007”).

⁷ Decision on Motion of 7 December 2007, p. 1.

⁸ *Id.*

4. On 31 January 2008, the Appellant filed his Appeal against the Impugned Decision.⁹ No appeal has been lodged against the Trial Chamber's Decision on Motion of 7 December 2007.

5. The Prosecution filed a response on 11 February 2008.¹⁰ No reply was filed by the Appellant.

II. STANDARD OF REVIEW

6. Decisions relating to trial and pre-trial management are discretionary in nature.¹¹ The Pre-Trial Judge's decision in this case to deny the Appellant's request to receive documents in Serbian and the Cyrillic script is a discretionary decision relating to pre-trial management. Such a decision is to be accorded deference by the Appeals Chamber.

7. Deference implies that the Appeals Chamber will reverse such decisions only when an abuse of such discretion is established. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹²

8. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.¹³ For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.¹⁴

⁹ The Appeal Chamber notes that the Appellant received the translated Decision on Certification on 22 January 2008, and the translated Decision on Motion of 7 December 2007 on 17 January 2008.

¹⁰ Prosecution's Response to Tolimir's Appeal against Oral Decision of the Pre-Trial Judge of 11 December 2007, filed on 11 February 2008 ("Prosecution Response").

¹¹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, ("*Popović* Decision") para. 12; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, ("*Prlić* Decision on Reduction of Time") para. 8. In relation to pre-trial management see *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

¹² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Decision on Admission of Transcript"), para. 8; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006 ("*Milutinović* Decision on Review"), para. 6.

¹³ *Milutinović* Decision on Review, para. 6.

¹⁴ *Popović* Decision, para. 14.

III. DISCUSSION

(A) Scope of the Appeal

9. The Appeals Chamber notes that the Appellant raises a number of issues that go beyond the scope of the certified issue, that is, whether in the particular circumstances of this case the Appellant has a legal right to receive disclosed material and filings in Serbian in the Cyrillic script.¹⁵ Additional issues, not certified, include the Appellant's submissions concerning his health;¹⁶ the holding of a Status Conference without his written consent;¹⁷ the provision of legal assistance;¹⁸ and the fact that he has not received any documents since being taken into custody in The Hague.¹⁹ The Appeals Chamber finds that these issues are not properly before it and accordingly declines to consider these submissions.

10. The Appellant further challenges the lack of consideration given to the Motion of 7 December 2007 by the Pre-Trial Judge in reaching the Impugned Decision.²⁰ The Appeals Chamber notes in this respect that, while not initially considered by the Pre-Trial Judge because a translation was not available prior to the rendering of the Impugned Decision, the Motion of 7 December 2007 was considered and dismissed by the Trial Chamber.²¹ Moreover, the Trial Chamber certified the appeal against its Decision on Motion of 7 December 2007. Despite this, the Appellant does not appeal the dismissal by the Trial Chamber but rather insists on challenging the fact that the Motion of 7 December 2007 was not taken into account by the Pre-Trial Judge. The Appeals Chamber finds that the issue, as framed by the Appellant, is not properly before it and accordingly declines to consider his submissions in this regard.

(B) The Appeal

11. The Appellant submits that the Pre-Trial Judge erred in her application of the law and committed an error of fact occasioning a miscarriage of justice by failing to allow him to communicate with the International Tribunal's organs in Serbian, his mother tongue, written in Cyrillic script.²² The Appellant contends that the Impugned Decision violates his rights, specifically those enshrined in Article 21(4)(a) of the Statute of the International Tribunal ("Statute") and Rule

¹⁵ Decision on Certification, para. 5.

¹⁶ Appeal, p. 4.

¹⁷ *Ibid.*, p. 3.

¹⁸ *Ibid.*, pp. 3-4.

¹⁹ *Ibid.*, p. 4.

²⁰ *Ibid.*, pp. 2-3.

²¹ See Decision on Motion of 7 December 2007.

²² Appeal, p. 2.

66(A) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).²³ First, he alleges that the Impugned Decision allows “the Prosecution to choose the language and script in which to disclose its material” to the Appellant. Secondly, he claims that he is consequently prevented, as a self-represented accused, from “taking part in the organisation and preparation of his defence” and that in this way he is being “permanently denied a fair trial in a language he understands.”²⁴

12. The Appellant further claims that the Impugned Decision violates the guarantees of Article 21(4)(b) of the Statute as it denies him the right to adequate time and facilities for the preparation of his defence²⁵ and, as a consequence, breaches the principle of equality of arms between the Appellant and the Prosecution.²⁶ Citing Article 21(4)(d) of the Statute the Appellant states that the Impugned Decision places him in an unequal position as compared to other accused – both self-represented and those who are represented by legal counsel – who were allowed to “defend themselves in their mother tongue” and to communicate with the International Tribunal’s organs in their native “tongue and scripts”.²⁷ Finally, the Appellant claims that only Serbian accused are denied the right to correspond with the International Tribunal’s organs in their own language and script.²⁸

13. The Prosecution opposes the Appeal. It argues that the Impugned Decision is consistent with the Rules and fully respects the rights of the Appellant as provided in the Statute.²⁹ The Prosecution submits that the Pre-Trial Judge’s finding that the Appellant is able to read and understand the material that is provided to him was reasoned and justified and is entitled to deference by the Appeals Chamber.³⁰ The Prosecution further adds that the Appellant has not provided any legal or factual basis for his claim to be provided with documentation in Cyrillic script.³¹

14. The Appeals Chamber notes at the outset that the Appellant’s right to the use of his mother tongue in his written or oral communications with the International Tribunal’s organs is not in dispute here. Rather, the contentious issue on appeal is limited to the question of whether the

²³ *Ibid.*, p. 3.

²⁴ *Id.*

²⁵ *Ibid.*, p. 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Prosecution Response, para. 2.

³⁰ *Ibid.*, paras 2, 11.

³¹ *Ibid.*, para. 11.

delivery to the Appellant, who is representing himself, of materials in B/C/S³² and in Latin script satisfies the guarantees provided by Article 21(4)(a) of the Statute and Rule 66(A) of the Rules in this case. The Appeals Chamber considers that it does.

(i) Alleged Error of Law

15. The Appeals Chamber finds that the Impugned Decision correctly interprets the governing law in finding that the

right to receive relevant material in this Tribunal in a language [the accused] can understand, [...] 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.³³

This is consistent with the plain language of Article 21(4)(a) of the Statute and Rule 66(A) of the Rules which, as the Pre-Trial Judge aptly points out, hinges on understanding and not preference.³⁴ These provisions, when read with the other minimum guarantees provided in Article 21(4) of the Statute, create an obligation to provide relevant material in a language which the accused understands sufficiently in order to allow for the effective exercise of his right to conduct his defence.³⁵ Article 21 of the Statute provides that the accused has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him and to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal. This language reproduces the relevant provisions of Article 14(3)(a) and (f) of the International Covenant on Civil and Political Rights.³⁶ Whether an accused possesses

³² In coming to terms with disputes on the proper qualification of the languages used in the region of the former Yugoslavia, and in particular in the Republics of Bosnia-Herzegovina, Croatia, and Serbia, the International Tribunal has often adopted the acronym "B/C/S" to identify the Bosnian, Croatian, and Serbian languages (see, among others, *Kordić and Čerkez Appeal Judgement*, List of Abbreviations). In the region of the former Yugoslavia, the terms "hrvatskosrpski" and "srpskohrvatski" were used, with the Cyrillic script prevalent in Serbia, the Latin script in Croatia and both used in Bosnia-Herzegovina. Cf., for example, Article 4 of the Bosnia-Herzegovina Constitution of 1974 with Article 8 of the Constitutions of the Republic of Serbia (1990 and 2001) and Article 12 of that of the Republic of Croatia (1990, with amendments).

³³ Impugned Decision, T. 114.

³⁴ *Id.*

³⁵ See, for example, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996 (filed on 27 September 1996), paras. 6-10; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on the Defence Counsel's Request for Translation of All Documents, 20 November 2002, pp. 2-3.

³⁶ See also the explanations provided by the Human Rights Committee in this respect: "The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based" and "Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence." (General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)).

the sufficient level of understanding is of course a question of fact to be decided on a case-by-case basis.

16. The Appeals Chamber therefore finds that the Appellant has failed to demonstrate that the Impugned Decision is based on an incorrect interpretation of governing law.

(ii) Alleged Error of Fact

17. The Appeals Chamber notes that the Pre-Trial Judge substantiated her finding that the Accused is able to read the Latin script, but refuses to read documents in this script by choice³⁷ on several grounds. First, the Pre-Trial Judge considered that the Accused was “educated in the former Yugoslavia where [...] the Roman script was taught in the school system”.³⁸ Second, the Pre-Trial Judge recalled that, prior to the Accused’s first appearance before the Tribunal, he was provided with a copy of the Indictment in B/C/S language in Latin script, and that the Accused stated, at the initial appearance hearing of 4 June 2007, that he had received a copy of the Indictment in a language he understood, and he “had time to read it and look through it”.³⁹ Third, the Pre-Trial Judge considered that, on the basis of an Indictment in B/C/S and the Latin script, the Accused was able, within the time limits that were set, to prepare and submit preliminary objections to the Indictment, and that the arguments advanced by the Accused “clearly indicate an understanding of the content of that [I]ndictment”.⁴⁰ Fourth, the Pre-Trial Judge noted that the Accused had been inconsistent in his explanation of why he claims that he is unable to read and understand the B/C/S language in Latin script, and the degree to which he can read the Latin script.⁴¹ Fifth, the Pre-Trial Judge recalled that the Prosecution provided examples of documents in Serbian in the Latin script, dating from the period of 1992 to 1995, which were either signed by the Accused, or sent to the Accused in his “official capacity with the army at that time”.⁴²

18. The Appeals Chamber notes that the Appellant seeks to incorporate arguments made in his Motion for Certification⁴³ into his Appeal,⁴⁴ particularly in relation to the alleged factual error. The

³⁷ Impugned Decision, T. 115-116.

³⁸ *Ibid.*, T. 114.

³⁹ *Ibid.*, T. 114-115.

⁴⁰ *Ibid.*, T. 115.

⁴¹ *Ibid.*, T. 115.

⁴² *Ibid.*, T. 115.

⁴³ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, Submission of the Accused to the Presiding Judge of 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 on 17 December 2007 (English translation filed on 19 December 2007) (“Motion for Certification”).

⁴⁴ Appeal, p. 2.

Appeals Chamber is not seized of these arguments and is not bound to consider them. Nonetheless, given the absence of argumentation on the factual question in the Appeal, the Appeals Chamber takes note of the following submissions.

19. The Appellant claims that the only language he understands, speaks and reads is his mother tongue, the Serbian literary language written in Cyrillic script. He argues that,

the Pre-trial Judge dismissed the assertion of the accused that he only understands his mother tongue, the Serbian literary language, and the Cyrillic script, the knowledge of which he refreshed after the strokes suffered and that he was not capable of refreshing his knowledge of or even learning to write the 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.⁴⁵

The Appellant further contends that the Pre-Trial Judge should have taken into account the possibility of determining this by submitting the Appellant's handwriting to a handwriting expert.⁴⁶ The Appeals Chamber understands the Appellant to be alleging that, following his stroke, he relearned to use the Cyrillic script, and not the Latin one – but that he still has problems even in respect to the former. The Appellant, however, provides no support for these assertions, which, in any event, provide no indication that the Appellant is unable to understand B/C/S in Latin script.

20. In relation to the question of whether the Latin script was taught in the school system of Yugoslavia when the Appellant received his education, the Appellant merely argues that an early attempt to create a common literary Serbian and Croatian language in the former Yugoslavia had failed and that citizens of the former Yugoslavia were able to choose the language and script that they would use.⁴⁷ The Appeals Chamber considers these general assertions to be irrelevant. They provide no information as to whether the Appellant was taught and understands the Latin script.

21. Lastly, the Appellant claims that the Pre-Trial Judge's finding that he signed and received documents written in Latin script in his official capacity in the army ignored "the fact that an authorised handwritten or dictated text can be relayed in electronic script via computers, electric typewriters or teletypewriters and that only electronic equipment based on western technology with an electronic Latin alphabet was in use during the wars in the former SFRY".⁴⁸ The Appeals Chamber finds that this submission falls short of demonstrating that the Pre-Trial Judge exceeded her discretion in finding that receiving and signing documents written in Serbian and in Latin script

⁴⁵ Motion for Certification, para. 2.2.

⁴⁶ Motion for Certification, paras 2.2, 2.6, and 2.7.

⁴⁷ *Ibid.*, para. 2.4.

⁴⁸ *Ibid.*, para. 2.3.

in an official military capacity was demonstrative of a sufficient understanding of that language written in a particular script.

22. The Appeals Chamber finds that the Appellant has failed to put forward any argument capable of challenging the Pre-Trial Judge's factual finding that he is in fact able to read and understand B/C/S and the Latin script. The Appellant's submission that he has been asking for "a trial in a language and script that he understands from the moment he first appeared before the International Tribunal up to the moment that the contentious ruling was adopted" is inaccurate.⁴⁹ Indeed, as recalled by the Pre-Trial Judge in the Impugned Decision, the record of the proceedings shows that, at his Initial Appearance before the International Tribunal on 4 June 2007, the Accused declared that he had read and understood the Indictment provided to him in B/C/S in Latin script,⁵⁰ and that he waived his right to have the Indictment read in court "because [he] read it out before [he] appeared in court".⁵¹

23. The Appeals Chamber accordingly finds that the Appellant has failed to demonstrate an abuse of discretion in the Pre-Trial Judge's determination that, in the particular circumstances of this case, the Appellant has no legal right to receive disclosed material and filings in Serbian in the Cyrillic script.

24. In addition to the foregoing, the Appeals Chamber considers it worth noting that, since 3 January 2008 and despite his continued choice to defend himself, the Appellant has been granted two legal assistants (a legal adviser and a case manager) remunerated by the International Tribunal, who will be able to support him in all matters related to case preparation.⁵²

25. The Appeals Chamber lastly dismisses the Appellant's request to "extend the pre-trial period because of the time already wasted for the Defence."⁵³ The Appeals Chamber recalls that there is no fixed period for pre-trial proceedings and that, in any event, this issue was not certified by the Trial Chamber. The request for an extension of time is therefore inapposite and will not be considered by the Appeals Chamber.

26. The Appeals Chamber further notes that it will not entertain frivolous arguments in the future.

⁴⁹ Appeal, p. 3.

⁵⁰ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, T. 9.

⁵¹ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-PT, T. 9-10.

⁵² Registrar's Notification Regarding the Assignment of Legal Assistance to the Accused, 11 January 2008, para. 2.

⁵³ Appeal, p. 6.

V. DISPOSITION

On the basis of the foregoing, this Appeal is hereby **DISMISSED**.

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

Done this 28th day of March 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]