



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-95-5/18-PT

Date: 19 January 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 19 January 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON INSPECTION AND DISCLOSURE**

Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon

The Accused:

Mr. Radovan Karadžić

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 Accused’s “Application for Certification to Appeal Decision on Holbrooke Agreement Disclosure”, filed on 9 January 2008 (“Application”), and the “Prosecution’s Response to Karadžić’s Application for Certification to Appeal the Decision on Accused’s Second Motion for Inspection and Disclosure”, filed on 16 January 2009 (“Response”), and hereby renders its decision thereon.

I. Procedural background

1. After having submitted a request for inspection and disclosure of certain documents to the Prosecution,¹ which was refused, the Accused filed a “Motion for Inspection and Disclosure: Holbrooke Agreement” on 6 November 2008 (“Motion”), in which he requested the Trial Chamber, pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), to order the Prosecution to allow inspection and disclosure of numerous documents categorised into groups.² The Accused submitted that the documents were material to the preparation of the defence, because “[i]t is part of his defence that (a) he was promised on 18–19 July by Richard Holbrooke that he would not have to face prosecution in The Hague if he agreed to withdraw completely from public life, and (b) this promise is attributable to the ICTY”.³ The Accused also argued that the documents were exculpatory because “[t]he existence of an agreement that the accused will not have to face prosecution at the ICTY, and facts tending to show that the agreement is attributable to the ICTY, if established, might suggest the legal innocence of the accused or mitigate his punishment if convicted”.⁴

2. On 17 December 2008, the Trial Chamber issued a “Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue” (“Decision”), in which it held that, for the purposes of Rule 66(B) and Rule 68 of the Rules, only a limited number of the documents requested by the Accused met the relevant legal standards for their disclosure. Accordingly, the

¹ Notice of Request for Inspection and Disclosure: Holbrooke Agreement, 16 October 2008. Previously, on 6 October 2008, the Accused filed a “Motion for Inspection and Disclosure: Immunity Issue”, requesting the Trial Chamber to order the Prosecution to provide inspection and disclosure of certain material pursuant to Rule 66(B) and Rule 68 of the Rules respectively. In its “Decision on Accused Motion for Inspection and Disclosure”, filed on 9 October 2008, the Trial Chamber found that it would be premature to assume jurisdiction in respect of Rule 66(B) of the Rules, and that the Motion did not meet the required criteria outlined for the issuance of an order under Rule 68 of the Rules, and therefore denied the motion, informing the Accused that he should submit his request directly to the Prosecution.

² See Motion, para. 1.

³ Motion, para. 3.

⁴ Motion, para. 10.

Trial Chamber granted the Accused's motion in part, ordering the Prosecution to disclose to the Accused:

- (a) any written agreement made at the alleged meeting in Belgrade on 18–19 July 1996, and
- (b) any notes taken or recordings made on 18–19 July 1996 of proceedings at the alleged meeting in Belgrade on those days,

which were in the custody or control of the Prosecution.⁵ The Trial Chamber denied the Motion in all other respects.⁶

3. As regards the remaining documents requested, the Trial Chamber considered that the Accused had not described those documents with sufficient specificity, and that the categories of documents were “overly broad in scope”, and “framed in language too vague for the Prosecution to be able to determine in every case whether a particular document falls into a particular category”.⁷

4. Further, the Trial Chamber held that the remaining documents did not satisfy the test for materiality to the preparation of the defence. The Trial Chamber was of the view that, in order to be of relevance to the preparation of the defence case, the requested documents should relate to a “colourable argument”; that is, an argument that has some prospect of success.⁸ The Trial Chamber considered that an alleged agreement between the Accused and Richard Holbrooke for the Accused's immunity from prosecution at the Tribunal would have no effect on the Trial Chamber's jurisdiction,⁹ and that therefore the legal standards for inspection and disclosure of the documents requested had not been met.¹⁰

5. In a letter dated 2 January 2009, the Prosecution informed the Accused that the Prosecution had conducted a specific search to determine whether it was in possession of the documents ordered to be disclosed in the Decision. The Accused was advised that, apart from documents already disclosed, no such items were identified.¹¹

⁵ Decision, para. 29.

⁶ Decision, para. 29.

⁷ Decision, para. 20.

⁸ Decision, para. 23.

⁹ Decision, para. 25.

¹⁰ Decision, paras 21–26.

¹¹ Letter from Senior Trial Attorney to Radovan Karadžić dated 2 January 2009, filed 15 January 2009.

II. Submissions

6. In the Application, the Accused, pursuant to Rule 73(B) of the Rules, requests certification of an interlocutory appeal of the Decision.¹² The Accused submits that the Decision significantly affects the fairness of the proceedings and the outcome of the trial in that it “prevents him from obtaining the documents he needs to factually support a motion to dismiss the indictment” based upon the alleged Holbrooke agreement, a motion which, according to the Accused, could result in his release without a trial if successful, and in that the Decision “foreshadows a decision on the merits of such a motion”.¹³

7. The Accused submits that an interlocutory decision on these issues by the Appeals Chamber would materially advance the proceedings, since “should [the Accused] obtain the disclosure he needs and prevail on the merits of his motion to dismiss [the Indictment] ... a trial would be unnecessary”.¹⁴

8. In the Response, the Prosecution opposes the Application. The Prosecution first asserts that the Application was filed 16 days after the deadline for its submission with no justification, and that it should be dismissed on this basis.¹⁵ The Prosecution further avers that “[t]he Application amounts to an improper attempt to appeal matters raised in the Underlying Submission [regarding an alleged immunity agreement] that have yet to be decided”.¹⁶ According to the Prosecution, the Accused “mistakenly argues that he has satisfied the two-pronged test under Rule 73(B) because an appeal could result in his release without a trial”, but “[t]he decision is exclusively about disclosure” and “[a] successful appeal ... would not result in Karadžić’s release without a trial.”¹⁷ The Prosecution is of the opinion that “[t]he suggestion in the Application that a successful appeal of the Decision could assist [the Accused] in obtaining material regarding the alleged immunity agreement that would in turn assist him in prevailing on [a motion on this matter] is not only tenuous, it is also erroneous”, since “[t]he Chamber held that such material would not assist [the Accused]”.¹⁸

9. The Prosecution further submits that “[t]he fact that the decision may ‘foreshadow’ a decision on the underlying submission does not deprive Karadžić of the opportunity to appeal any such ... decision if and when it is rendered”, and that if the Appeals Chamber were to find

¹² Application, paras 2, 7.

¹³ Application, para. 7.

¹⁴ Application, para. 8.

¹⁵ Response, paras 1–2.

¹⁶ Response, para. 3.

¹⁷ Response, para. 4.

¹⁸ Response, para. 5.

that the alleged undertaking was relevant, both Accused and Prosecution could at that point revisit the matter of disclosure.¹⁹ Finally, it is submitted that a decision granting the Application “would result in procedural confusion and inefficiency” which would impede rather than advance the proceedings,²⁰ and that on those bases the Application should be denied.²¹

III. Applicable law

10. Rule 73(B) of the Rules requires that two cumulative criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²²

11. The Trial Chamber recalls that “even when an important point of law is raised, ... the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied.”²³ Even where both requirements of the Rule are satisfied, certification remains in the discretion of the Trial Chamber.²⁴

IV. Discussion

12. In respect of the Prosecution’s argument that the Application is untimely, the Trial Chamber notes that the Decision was intimated to the Accused in B/C/S on 7 January 2009,²⁵ and that therefore the Accused’s Application was filed within the time allowed under Rule 73(C).

¹⁹ Response, para. 5.

²⁰ Response, para. 8.

²¹ Response, para. 9.

²² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008 (“Lukić Decision”), para. 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *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 (“Milošević Decision”), para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005 (“Halilović Decision”), p. 1.

²³ *Halilović* Decision, p. 1.

²⁴ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4; *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.

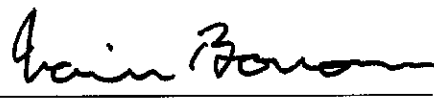
13. Notwithstanding its opinion on the effect of any alleged immunity agreement on the outcome of the trial, and with regard to the fact that the Appeals Chamber might have a different opinion on the issue, the Trial Chamber considers that disclosure related to the making of submissions on an allegation of immunity may significantly affect the fair and expeditious conduct of proceedings. For this reason, the Trial Chamber considers that the first criterion of Rule 73(B) is met.

14. As regards the second requirement of Rule 73(B), the Trial Chamber is also satisfied that an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings. The Trial Chamber disagrees with the Prosecution that an interlocutory appeal would result in procedural confusion and thinks that this issue would be best settled at this early stage.

V. Disposition

15. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **GRANTS** the Application.

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



Judge Iain Bonomy
Presiding

Dated this nineteenth day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ See Procès-Verbal of Reception of Document(s) of the ICTY, Case No. IT-95-5/18-PT, 7 January 2009, in which the Registry provides notification of the Accused's reception of the B/C/S translation of the Decision.