

25-02-54-R77-5
02171-02166
19 MAY 2009

2171
SF

**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-02-54-R77.5

Date: 19 May 2009

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Mehmet Güney
Judge Liu Daqun

Registrar: Mr. John Hocking

Decision of: 19 May 2009

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

**DECISION ON DEFENCE MOTION FOR
CERTIFICATION TO APPEAL TRIAL CHAMBER'S
DECISION REGARDING THE ISSUANCE OF A
SUBPOENA TO *AMICUS CURIAE* PROSECUTOR**

***Amicus Curiae* Prosecutor**

Mr. Bruce MacFarlane, QC

Counsel for the Accused

Mr. Karim A. A. Khan, Counsel
Mr. Guénaél Mettraux, Co-Counsel

THE SPECIALLY APPOINTED CHAMBER (“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 seized of the “Defence Motion Seeking Certification of Trial Chamber’s ‘Reason for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curiae Prosecutor’ dated 3 February 2009”, filed confidentially on 9 February 2009 and publicly on 12 February 2009 (“Motion”), whereby the Defence seeks certification by the Chamber to appeal pursuant to Rule 73 of the Rules of Procedure and Evidence (“Rules”) the “Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to *Amicus Curiae* Prosecutor” (“Impugned Decision”). The Amicus Curiae Prosecutor (“*Amicus* Prosecutor”) filed its confidential Response on 23 February 2009 (“*Amicus* Response”). The Chamber hereby renders its decision.

I. SUBMISSIONS

1. In its Motion, the Defence raises more than 10 errors in law allegedly committed by the Chamber in the Impugned Decision, each allegedly amounting to an abuse of the Chamber’s discretion. In sum, it is alleged that the Chamber:

- (i) failed to consider the link between the subpoena motion and a clear statement of intent by the Defence to call the investigative officer as a witness during the trial;¹
- (ii) failed to set forth the reasons why the Defence did not demonstrate that there was a chance that the investigating officer would be able to provide information that could assist the Defence case;²
- (iii) failed to take into proper consideration the peculiarities of Mr. MacFarlane’s position which should have given reasons to conclude that he is able to provide information that would assist the Defence in its case;³
- (iv) erred in discussing the applicability of testimonial privileges in this case;⁴
- (v) failed to complete a “balancing exercise” or to evaluate the necessity of compelling the *Amicus* Prosecutor to an examination;⁵
- (vi) erred in dismissing the Defence submission that the *Amicus* Prosecutor is in the identical position as that of an investigator;⁶

¹ Motion, para.6 (i).

² Motion, para. 6 (ii).

³ Motion, para. 6 (iii).

⁴ Motion, para. 6 (iv);

⁵ Motion, para. 6 (v).

⁶ Motion, para. 6 (iv).

- (vii) erred in finding that the “most extraordinary circumstances” are required to issue a subpoena against a prosecutor;⁷
- (viii) erred in taking into account the consequences of having the prosecuting counsel becoming a witness, as it could have been avoided by due diligence of the *Amicus* Prosecutor;⁸
- (ix) erred in factoring the financial cost for assessing the merits of the subpoena motion;⁹
- (x) erred when finding that the granting of a subpoena in this case would potentially open the floodgates and could be used as a litigation tactic;¹⁰
- (xi) failed to properly consider that the *Amicus* Prosecutor is the only witness who can testify as to the conduct and manner of the investigation of this case;¹¹
- (xii) erred by affording the potential witness a protection that is not afforded by any state practice;¹²
- (xiii) erred by denying the Defence the opportunity to make an assessment of the credibility of the *Amicus* Prosecutor.¹³

2. The Defence also argues that the inability to interview the investigating officer will cause the Defence “severe prejudice” that would be difficult to remedy later.¹⁴ The Defence further explains that it would be precluded from “effectively pierc[ing] the reality” and that as a consequence, it would affect the fair and expeditious conduct of the proceedings. It concludes that an immediate resolution by the Appeals Chamber would allow the Defence to effectively and rapidly prepare its case and thus materially advance the proceedings.¹⁵ Finally, the Defence submits that the issue as to whether a witness “can hide behind his subsequent appointment” as counsel was never considered by the Tribunal and its importance warrants the immediate resolution by the Appeals Chamber.¹⁶

3. In his Response, the *Amicus* Prosecutor submits that the current motion is not the proper forum to advance arguments related to the correctness of the Impugned Decision.¹⁷ He contends that the Defence failed to demonstrate that granting the certification would significantly affect the

⁷ Motion, para. 6 (vii).

⁸ Motion, para. 6 (viii)

⁹ Motion, para. 6 (ix)

¹⁰ Motion, para. 6 (ix)

¹¹ Motion, para. 7.

¹² Motion, para. 8 a), b) and d).

¹³ Motion, para. 8 c).

¹⁴ Motion, paras 9 and 10.

¹⁵ Motion, para. 9.

¹⁶ Motion, para. 10.

outcome of the trial as the information sought by questioning the *Amicus* Prosecutor does not relate to the charges against Ms. Hartmann.¹⁸ He further argues that the Defence also failed to demonstrate the necessity to interview the *Amicus* Prosecutor in order to challenge the legality of the investigation.¹⁹ He stresses that the Defence is already in possession of sufficient material that would allow the preparation of its case, and that the proposed investigation by the Defence would be nothing more than a “fishing expedition”.²⁰ Finally, the *Amicus* Prosecutor avers that the Defence failed to show that an immediate resolution by the Appeals Chamber would materially advance the proceedings. He specifically submits that raising an important point in law is not a condition for certification under Rule 73 (B).²¹

II. APPLICABLE LAW

4. Rule 73(B) of the Rules requires that the following two cumulative criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (i) 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 (ii) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.

5. 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.”²² Furthermore, certification remains in the discretion of the Trial Chamber, even in cases where both requirements of the Rule are satisfied.²³

III. DISCUSSION

6. The Chamber recalls that the certification of a motion for interlocutory appeal does not rest on the correctness of a decision but on whether the criteria set out in Rule 73(B) are met.²⁴ The issues before the Chamber in the circumstances of the present case are thus whether (a) the refusal to issue a subpoena at this stage of the proceedings to interview the *Amicus* Prosecutor would

¹⁷ *Amicus* Response, para. 6.

¹⁸ *Amicus* Response, para. 6.

¹⁹ *Amicus* Response, para. 7.

²⁰ *Amicus* Response, paras 8-10.

²¹ *Amicus* Response, para. 12.

²² *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeals, 19 January 2009 (*Karadžić* Decision); *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.

²³ *Karadžić* Decision, para. 11; *Prosecutor v. Tolimir*, Case No. 11-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

²⁴ *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.

significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the Appeals Chamber may materially advance the proceedings.

7. The Chamber observes that the Defence Motion sets forth broad arguments challenging the substance of the Impugned Decision. Although the Defence submits a detailed list of alleged errors, the Chamber finds that those issues are not suitable for an interlocutory appeal and can be dealt with at trial.

8. As concerns the material advancement of the proceedings through the immediate resolution of the dispute by the Appeals Chamber, the Chamber is of the opinion that the Defence may avail itself of the opportunity to challenge the legitimacy of the investigation process at trial where any other issues in relation thereto can be properly addressed.²⁵ Contrary to the Defence's submissions, the Chamber finds that the Defence has not demonstrated how the immediate resolution of the issue by the Appeals Chamber would affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, instead of advancing the expeditious conduct of the proceedings, the Chamber is of the opinion that referring the matter to the Appeals Chamber would result in undue delay.

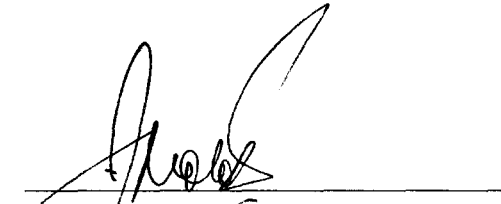
9. As both prongs of Rule 73(B) of the Rules have to be satisfied cumulatively, the Motion must fail.

IV. DISPOSITION

10. For the foregoing reasons and pursuant to the Rule 73(B) of the Rules, the Chamber **DENIES** the Motion.

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

²⁵ For example, the Defence could submit proposed questions for counsel to the Chamber which could pose such questions to the Prosecutor. Also, the Defence will have the opportunity to cross-examine the witnesses who provided information to the investigator in the framework of the investigative report.



Judge Bakone Justice Moloto
Presiding

Dated this nineteenth day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]