



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: 17 July 2009

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 17 July 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON HOLBROOKE AGREEMENT MOTION**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

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 Motion”, filed on 15 July 2009 (“Application”), and hereby renders its decision thereon.

1. On 8 July 2009, the Trial Chamber issued its “Decision on the Accused’s Holbrooke Agreement Motion” (“Decision”) in which it found that an alleged agreement, according to which the Accused was promised by U.S. Ambassador Richard Holbrooke that he would not be prosecuted by the Tribunal if he stepped down from office, would not be binding on the Tribunal. In addition, the Chamber held that the alleged agreement could not be used as basis for a successful abuse of process claim, and also denied the Accused’s request for an evidentiary hearing relating to the existence of the alleged agreement.¹ The Chamber further held that the Accused’s motion relating to the alleged agreement was not a preliminary motion challenging jurisdiction under Rule 72 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), but was a motion challenging the jurisdiction of the Tribunal under Rule 73. This meant that the parties would be required to seek certification from this Chamber before they could appeal the Decision. However, the Chamber also stated that this was of minor significance since the motion “clearly raises a fundamental challenge to the jurisdiction of the Chamber and it is difficult to conceive of circumstances in which the Chamber would not grant an application for certification to appeal its decision thereon, should one be made by either party.”²

2. In the Application, the Accused, pursuant to Rule 73(B) of the Rules, requests certification for interlocutory appeal of the Decision. He contends that the Trial Chamber has already made pronouncements to the effect that this issue is one that meets the two criteria under Rule 73(B),³ as did other Trial Chambers that were faced with similar challenges to jurisdiction.⁴

3. In the “Prosecution Response to Karadžić’s ‘Application for Certification to Appeal Decision on Holbrooke Agreement Motion’”, filed on 16 July 2009 (“Response”), the Office of the Prosecutor (“Prosecution”) does not oppose the Application.⁵

4. According to the Rules, decisions on motions other than preliminary motions are without interlocutory appeal save with certification by the Trial Chamber.⁶ Rule 73 governs the exercise

¹ Decision, paras. 46, 49–79, 84–88.

² Decision, paras. 43–44.

³ Application, para. 4.

⁴ Application, para. 5.

⁵ Response, para. 1.

of the Chamber's discretion to grant certification for an interlocutory appeal.⁷ Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the decision in question involves 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.⁸

5. This Trial Chamber has previously held 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";⁹ furthermore, other Trial Chambers have held that "even where both requirements of Rule 73(B) are satisfied, certification remains in the discretion of the Trial Chamber".¹⁰ A request for certification is "not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal".¹¹

6. The Chamber, in line with its previously expressed views on this matter,¹² is satisfied that both prongs of the test are met. The issues addressed in the Decision go to the heart of the authority of this Tribunal to keep the Accused in its custody and conduct a criminal case against him. Thus, it is evident that the fairness and outcome of any trial of the Accused is significantly affected by it. Given that this is a fundamental challenge to the jurisdiction of the Tribunal, the Chamber considers that an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings.

⁶ Rule 73(B).

⁷ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 ("Strugar Decision"), para. 2.

⁸ *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, 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, 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.

⁹ *Halilović Decision*, p. 1.

¹⁰ *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; *Strugar Decision*, para. 2; *Prosecutor v. Popović*, IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2001, p. 1.

¹¹ *Lukić Decision*, para. 42, *Milošević Decision*, para. 4.

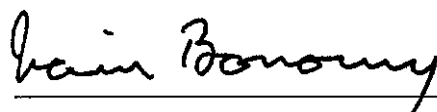
¹² *Decision*, para. 44.

7. Being satisfied that both prongs of the test are met, notwithstanding its opinion on the issues surrounding the alleged agreement and the Accused's abuse of process claim, the Chamber has decided to certify the Decision.

V. Disposition

8. 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 seventeenth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]