



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-T

Date: 23 November 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 23 November 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON APPOINTMENT OF COUNSEL AND ORDER
ON FURTHER TRIAL PROCEEDINGS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

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 Appointment of Counsel and Order on Further Trial Proceedings”, filed on 11 November 2009 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 5 November 2009, this Trial Chamber issued its “Decision on the Appointment of Counsel and Order on Further Trial Proceedings” (“Decision”), finding that the Accused had substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such time as he considered himself to be ready, despite this Chamber’s decision, upheld by the Appeals Chamber, that he had had sufficient time to prepare, and despite the warnings that were given to him by the Chamber.¹ As a result, the Chamber found it necessary to instruct the Registrar to appoint counsel, who would begin immediately to prepare him or herself to represent the interests of the Accused when the trial resumes, if that should be required. The Chamber reiterated that the Accused would continue to represent himself, including by dealing with the day-to-day matters that arise, such as the filing of motions and responses to motions filed by the Prosecution, and by further preparing himself for the trial.² In light of the fact that the appointed counsel was to focus solely on preparation for trial, the Chamber considered that an appropriate preparation period was three and a half months, and ordered that the trial shall resume on 1 March 2010.³ The Chamber then stated that, should the Accused continue to absent himself from the resumed trial proceedings in March, or should he engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he would forfeit his right to self-representation, no longer be entitled to assistance from his assigned defence team, and the appointed counsel would take over as an assigned counsel to represent him. Should he not engage in such conduct, the trial would proceed with the Accused

¹ Decision, para. 21. The Chamber recalls that this Decision contains a detailed background section (paragraphs 1 through 12), that contains the relevant procedural history. The Chamber is of the view that it is not necessary to repeat that procedural history here.

² Decision, para. 25.

³ Decision, para. 26.

continuing to represent himself and the appointed counsel would attend the proceedings and remain available to step in at any time the Chamber determines it to be necessary.⁴

2. In the Application, the Accused asks, pursuant to Rule 73(B) of the Tribunal's Rules of Procedure and Evidence ("Rules") for certification to appeal the Decision. He argues that the "issue of imposition of counsel has already been held by two Trial Chambers to meet the criteria for interlocutory appeal" and cites to the *Milošević* and *Šešelj* cases in support.⁵ He then refers to a number of "errors" in the Decision all of which "enhance the need for certification to appeal in this case".⁶ These include the finding that three and a half month period is an adequate time for counsel to prepare for trial and the failure to "direct the Registrar to provide [the Accused] with the Rule 44 [*sic*] list from which he can select the standby counsel".⁷

3. The Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Karadžić's 'Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings'" on 13 November 2009 ("Response"). In it the Prosecution notes that the Application is vague, but states that it does not oppose it to the extent that the Accused seeks to appeal "the imposition of counsel." If, however, his aim is to appeal the determination of the time for counsel to prepare for trial and/or the absence of direction to the Registry, the Prosecution observes that the Accused has failed to explain how these issues meet the requirements of Rule 73(B).⁸

4. On 19 November 2009, as instructed in the Decision, the Registrar appointed Richard Harvey as "counsel to prepare to represent the interests of the Accused at trial."⁹

II. Applicable Law

5. According to the Rules, decisions on motions other than preliminary motions are without interlocutory appeal save with certification by the Trial Chamber.¹⁰ Under Rule 73(B), a Trial Chamber may grant certification to appeal if the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the

⁴ Decision, para. 27.

⁵ Application, paras. 1–7.

⁶ Application, paras. 9–10.

⁷ Application, para. 9.

⁸ Response, p. 2.

⁹ Decision by the Registrar, 19 November 2009, p. 3.

¹⁰ Rules 72 and 73.

trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹¹

6. It has previously been 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”.¹² A request for certification is “not concerned with whether a decision was correctly reasoned or not.”¹³

III. Discussion

7. The Chamber notes that the Accused’s Application is vague since it is not entirely clear from his arguments which aspect(s) of the Decision he claims meet the test for certification. Looking first at the appropriate time for the appointed counsel to prepare for the trial, as well as the argument that the Registrar should have been instructed to provide the Accused with a list of lawyers, the Chamber agrees with the Prosecution that the Accused has failed to show why these aspects of the Decision meet the requirements of Rule 73(B). In any event, it should be noted that it is not for the Accused to make arguments as to how much time the appointed counsel would need to prepare for trial. Furthermore, while the issue of necessary time may be one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it cannot be said that its immediate resolution by the Appeals Chamber may materially advance the proceedings at this point in time, rather than as of 1 March 2010 when the role of the appointed counsel, and the effect it may have on the Accused’s rights will become clearer. As for the claim that the Accused should have been provided with the list of lawyers, again, the Chamber does not see this as an issue that meets the certification test. The Chamber’s Decision to instruct the Registrar to appoint counsel is separate from the procedure followed by the Registrar in doing so.

¹¹ Rule 73(B).

¹² *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, p. 1.

¹³ *Prosecutor v. Milutinović*, 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*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92quater Motion, 19 May 2008, para. 16; *Prosecutor v. Popović*, Case No. IT-05-88-T, Decision on Motion for Certification of Rule 98bis Decision, 15 April 2008, para. 8; *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.

8. As far as the crux of the Decision is concerned, namely the issue of the appointment of counsel, which seems to be the Accused's main challenge, the Chamber is also of the view that the Accused has failed to show how this aspect of the Decision meets the certification test. The Accused mischaracterises the issue as one of imposition or assignment of counsel and then relies on previous certification decisions where this issue was deemed certifiable. However, unlike in the *Milošević* and *Šešelj* cases, the Chamber has not yet assigned counsel to the Accused.¹⁴ As for the *Šešelj* certification decision of 5 December 2006, the certification to appeal was granted at the moment when the stand-by counsel was instructed to take over the running of the case from the accused.¹⁵ However, the situation in the present case is different since this Trial Chamber has simply appointed counsel who is to prepare for the upcoming trial and who *might* be assigned to the Accused on 1 March 2010, if the Accused continues to be obstructive. In other words, as noted above, the Accused is still self-represented and is still able to utilise his defence team as he wishes. Thus, even in light of the *Milošević* and *Šešelj* decisions relied upon by the Accused, it cannot be said that the Decision involves an issue which has, at this point in time, significantly affected the fair and expeditious conduct of the proceedings or the outcome of the Accused's trial.

9. Even if the first limb of the Rule 73(B) test were met, the Chamber would deny certification on the basis that the second limb of the test is also not satisfied. An immediate resolution of the issues raised by the Chamber's Decision would not in any way advance the proceedings. This is because the Application is essentially premature in light of the fact that no counsel has yet been assigned to the Accused. Granting the Application now, and then potentially again on 1 March 2010, should the Accused absent himself from the further trial proceedings and the Chamber assign counsel to represent his interests, would hinder, rather than materially advance the proceedings.

10. For those reasons, the Chamber is of the view that the Application should be denied.

¹⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004; *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel, 29 August 2006.

¹⁵ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel, 5 December 2006. It should also be borne in mind that in that case, the same Trial Chamber had denied certification several days prior to its decision to instruct the stand-by counsel to take over the case on the basis that Šešelj's right to self-representation had not been affected by a mere appointment of the stand-by counsel. See *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Application for Certification to Appeal Order of 25 October 2006, 30 November 2006.

IV. Disposition

11. Accordingly, the Trial Chamber, pursuant to Rule 73(B) of the Rules, hereby **DENIES** the Application.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]