



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: 7 April 2011

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: 7 April 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION REQUEST FOR CERTIFICATION TO APPEAL
DECISION ON ACCUSED'S THIRTY-SEVENTH TO FORTY-SECOND DISCLOSURE
VIOLATION MOTIONS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 “Prosecution Request for Certification to Appeal the Decision on Accused’s Thirty-Seventh to Forty-Second Disclosure Violation Motions”, filed by the Office of the Prosecutor (“Prosecution”) on 1 April 2011 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 29 March 2011, the Chamber issued a “Decision on Accused’s Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon” (“Impugned Decision”). The Chamber, by majority, with Judge Kwon dissenting, granted the Accused’s Forty-First and Forty-Second Motions for finding of disclosure violations¹, and partially granted the Thirty-Seventh, Thirty-Eighth and Fortieth Motions² for the same, and found that the Prosecution had violated Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) with respect to these motions.³

2. In its Request, the Prosecution seeks leave to appeal the portion of the Impugned Decision in which the Chamber granted the Accused’s request for a declaration that the Prosecution had violated Rule 68 of the Rules in the absence of material prejudice to him.⁴ It claims that the question of whether “proof of prejudice is a requirement for a remedy for non-compliance with the Rules” satisfies the Rule 73(B) test for certification.⁵ The Prosecution makes specific reference to the partially dissenting opinion of Judge Kwon, who held that “in the absence of prejudice, the Accused will not be given any remedy, including a declaration that the Prosecution has violated Rule 68”.⁶

3. The Prosecution submits that the issue in question would significantly affect the fair and expeditious conduct of proceedings, arguing that the majority in the Impugned Decision departed from the Rules, binding jurisprudence and its previous decisions which required proof of prejudice in order to grant a remedy for non-compliance with the Rules.⁷ It further argues

¹ Forty First Motion for Finding of Disclosure Violation, 11 February 2011; Forty-Second Motion for Finding of Disclosure Violation and for Remedial Measures, 16 February 2011.

² Thirty-Seventh Motion for Finding of Disclosure Violation and for Remedial Measures, 7 February 2011; Thirty-Eighth Motion for Finding of Disclosure Violation and for Remedial Measures, 8 February 2011; Fortieth Motion for Finding of Disclosure Violation and for Remedial Measures, 10 February 2011.

³ Impugned Decision, para. 40.

⁴ Request, paras. 1-2.

⁵ Request, para. 1.

⁶ Request, para. 2, referring to Impugned Decision, Partially Dissenting Opinion of Judge Kwon, para. 5.

⁷ Request, para. 4.

that “allowing for declaratory relief in the absence of prejudice” at this stage would “invite a proliferation of litigation” which would not be in the interests of ensuring the fair and expeditious conduct of proceedings.⁸ It notes that the Majority did not make any determination about prejudice with respect to two of the motions and claims that this would “impact on the fairness of the proceedings by creating an inadequate record for appellate review”.⁹ The Prosecution also submits that resolution of this issue would materially advance the proceedings, given that the Impugned Decision: (i) could result in unnecessary litigation over non-compliance with the Rules when there is no prejudice; (ii) creates an inadequate trial record which cannot be remedied at the end of trial; and (iii) indicates disagreement on the bench over an issue which could arise again during the proceedings.¹⁰

4. On 5 April 2011, the Accused filed the “Response to Application for Certification to Appeal Issue of Remedy for Disclosure Violations” (“Response”). In the Response, the Accused does not oppose the Request and submits that given the “serious and cumulative nature of the disclosure violations” it is an issue which warrants the attention and guidance of the Appeals Chamber.¹¹

II. Applicable Law

5. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹² Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the said decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

6. A request for certification is “not concerned with whether a decision was correctly reasoned or not.”¹³ Furthermore, it has previously been held that “even when an important point

⁸ Request, para. 5.

⁹ Request, paras. 6, 8.

¹⁰ Request, paras. 7-9.

¹¹ Response, paras. 1, 3.

¹² See Rule 72(B), 73(C) of the Rules.

¹³ *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-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, 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 et al.*, 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.

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”.¹⁴

III. Discussion

7. While the Prosecution essentially repeats the same arguments with respect to both prongs of the test for certification, given the cumulative nature of the test, the Chamber is required to make a separate assessment as to whether each prong of the test has been met before it can grant certification.

8. With regard to the first prong of the test, the Prosecution submits that the Impugned Decision introduced a new regime which would impact on the fairness of the proceedings as it departed from the jurisprudence of the Tribunal, the Rules and the Chamber’s previous practice, and that the Impugned Decision would invite a “proliferation of litigation” which would not be in the interests of the fair and expeditious conduct of the proceedings.¹⁵ However, the Chamber is not satisfied that the approach taken by the majority could have any impact on the fair and expeditious conduct of proceedings or the outcome of the trial. The Chamber therefore finds that the elements of the first prong of the test for certification have not been met.

9. The Chamber also finds that the second prong of the certification test, namely whether an immediate resolution by the Appeals Chamber may materially advance the proceedings, is not met. The disagreement of the bench does not affect the Chamber’s overall approach towards the Prosecution’s disclosure obligations. The Chamber therefore does not consider that these proceedings may be materially advanced by an immediate resolution by the Appeals Chamber of the question of whether proof of prejudice is a requirement for any remedy, even a declaratory one, for non-compliance with the Rules.

¹⁴ *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.

¹⁵ Request, paras. 4-5.

IV. Disposition

10. Accordingly, the Trial Chamber, pursuant to Rule 54 and 73(C) of the Rules, hereby **DENIES** the Request.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]