



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 LEAVE TO
APPEAL TRIAL CHAMBER'S DECISION REGARDING
PROSECUTION WITNESS STATEMENTS**

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 for Leave to Appeal Trial Chamber’s Decision Regarding Prosecution Witness Statements”, filed publicly on 9 February 2009 (“Motion”) and hereby renders its Decision.

I. PROCEDURAL HISTORY

1. On 19 and 20 January 2009 the Defence filed respectively a “Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses”, and an “Addendum to Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses”. On 22 January 2009, the *Amicus* filed its “Prosecution Response to Defence Motion Seeking an Order for the *Amicus* to Take and to Disclose Witness Statements.” On 29 January 2009, the Chamber issued its “Decision on Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and Disclose to the Defence Statements of Proposed Witnesses” (“Impugned Decision”). On 9 February, the Defence filed its Motion, whereby the Defence seeks certification by the Chamber to appeal pursuant to Rule 73 of the Rules of Procedure and Evidence (“Rules”) the Impugned Decision. On 18 February 2009, the *Amicus* filed publicly its “Prosecution Response to Defence Motion for Leave to Appeal Decision Regarding Witness Statements” (“Response”).

I. SUBMISSIONS

2. In its Motion, the Defence submits that the Chamber in its Impugned Decision erred in law and abused its discretion

- (i) “when failing to consider or give due weight to the fundamental rights of the accused”, notably her right to adequate time and facilities to prepare and her right to be able to confront effectively the evidence presented against her. The Chamber also failed to give a reasoned decision as regards “the human rights consequences of the failure to provide statements”;¹
- (ii) in failing to apply Rule 18 (2) of the Statute and in the interpretation of Rules 39 and 66(A)(ii) of the Rules as well as in disregarding or failing to apply Appeals Chamber jurisprudence on those rules;²

¹ Motion, para. 7(i) and (xi).

² Motion, para. 7(ii), (iii) and (vi).

- (iii) in concluding that the “Practice Direction allowed the Chamber to deny the Defence disclosure of proposed Prosecution witness statements” or suggesting that “the failure of the Trial Chamber to specifically instruct the *amicus curiae* to take statement [...] could justify his failure to do so” and “result in the undermining of the defendant’s fundamental rights;”³
- (iv) in concluding that the 65 *ter* summaries provided by the *Amicus Curiae* Prosecutor (“*Amicus*”) to the Defence gave adequate and sufficient notice of the proposed evidence and suggesting that the “Defence ability to interview would-be Prosecution witness could make up or justify the absence of witness statements”;⁴
- (v) when it failed to account for the fact that it has been the constant and consistent practice of prosecutorial authorities to take and disclose witness statements (or records of interview) of those witnesses that they intended to call prior to their being called;⁵
- (vi) when suggesting that the relatively narrow scope of the charges and the relatively small number of proposed witnesses justified (or supported) its decision not to order the taking of statements;⁶

3. In the Defence’s view, the absence of witness statements clearly impacts both on its ability to prepare adequately and in timely fashion and to effectively confront Prosecution evidence.⁷ It is therefore the Defence contention that “the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings and, possibly, the outcome of the trial”.⁸ Furthermore, the Defence submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings as “it would allow the Defence to investigate and prepare more effectively and much more rapidly and would guarantee the fairness of these proceedings”.⁹

4. In its Response, the *Amicus* argues that the purpose of a request for certification is not to show alleged errors or abuses but “rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met”.¹⁰ In the *Amicus*’ view, the Motion does not demonstrate that granting certification would significantly affect the fair and expeditious conduct of the proceedings

³ Motion, para. 7(v).

⁴ Motion, para. 7(vii) and (viii).

⁵ Motion, para. 7(ix).

⁶ Motion, para. 7(x).

⁷ Defence Motion, para. 8.

⁸ Defence Motion, para. 8.

⁹ Defence Motion, para. 8.

¹⁰ Response, para. 4.

or the outcome of the trial. Furthermore, the *Amicus* notes that two notable changes have occurred since the Motion was filed. First, on 3 February 2009 the Chamber postponed the trial *sine die*. Secondly, on 4 February 2009, the *Amicus* filed a motion seeking to amend its 65 *ter*(E) witness list to remove Ms. Evelyn Anoya as a witness. It is the *Amicus*' position that, in combination, "these factors have reduced workload of the Defence by eliminating the need to interview this witness and have increased the time available to complete the reduced workload".¹¹

II. APPLICABLE LAW AND DISCUSSION

5. 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.

6. 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 Furthermore, even in case where both requirements of the Rule are satisfied, certification remains in the discretion of the Trial Chamber.¹³

7. The Chamber stresses at the outset that the arguments put forward in the Motion and referred to in paragraph 2 above are related to the correctness of the Impugned Decision and do not substantiate the claim that the failure of the *Amicus* to take any statements of his proposed witnesses would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

8. As regards the remainder of the Defence submissions related to the purported impact of the absence of witness statements on the Defence preparation for trial, the Chamber is also not satisfied that this argument meet the first prong of Rule 73 (B). The Chamber notes that the 65 *ter* summaries of the *Amicus*' witnesses have been made available to the Defence. The Chamber is of the view that the manner in which the Defence has been put on notice of the proposed testimony of these

¹¹ Response, para. 5.

¹² See e.g., *Prosecutor v. Karadžić*, Case no. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeals, 19 January 2009; *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.

¹³ *Prosecutor v. Karadžić*, Case no. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeals, 19 January 2009; *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.

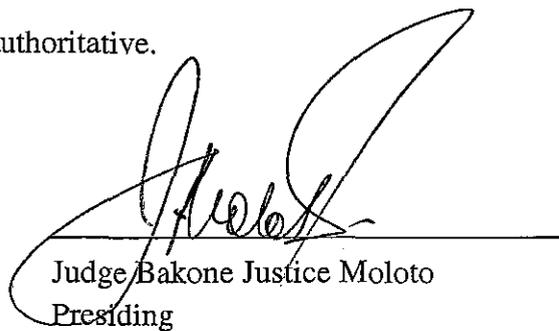
witnesses, *i.e.* by way of 65 *ter* summary in *lieu* of the witness statement, is not definitely an issue which would significantly affect the outcome of the trial.

9. As the prongs of Rule 73 (B) are cumulative and the Defence has not met the first prong, the Chamber will not deal with the second prong.

IV. DISPOSITION

2. 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.



Judge Bakone Justice Moloto
Presiding

Dated this nineteenth day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]