

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

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

~~Acting~~
Registrar: Mr. John Hocking

Date Filed: 9 January 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON HOLBROOKE AGREEMENT DISCLOSURE

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. On 17 December 2008, the Trial Chamber issued its *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (the "Impugned Decision").

2. Dr. Radovan Karadzic respectfully applies, pursuant to Rule 73(B), for certification to appeal that decision.

3. Rule 73(B) provides that:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the 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.

4. In the Impugned Decision, the Trial Chamber held that:

The Trial Chamber considers it well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid under international law.¹

5. The Trial Chamber went on to hold that:

The Trial Chamber further considers that, pursuant to the Statute and Rules of the Tribunal, neither its own mandate or that of the Prosecutor is affected by any alleged undertaking made by Mr. Holbrooke.²

6. While allowing disclosure of notes and recordings of the meeting at which the promise was made, the Trial Chamber denied inspection or disclosure of other documents which could prove the existence of the agreement and facts which could establish that the agreement is binding on the ICTY.³ In doing so, it promulgated a standard that the prosecution must "in every case" be able to determine whether a particular document falls into a particular category.⁴

¹ *Decision* at para. 25

² *Decision* at para. 25

³ *Decision* at para. 20

⁴ *Decision* at para. 20

7. Dr. Karadzic contends that the issues decided by the Trial Chamber in the Impugned Decision satisfy the two-pronged test of Rule 73(B).⁵ The decision prevents him from obtaining the documents he needs to factually support a motion to dismiss the indictment and foreshadows a decision on the merits of such a motion. This clearly significantly affects the fairness of the proceedings and the outcome of the trial, since, if Dr. Karadzic were successful in his motion to dismiss the indictment based upon the Holbrooke agreement, he would have to be released without a trial.

8. Likewise, an interlocutory decision on these issues by the Appeals Chamber, rather than waiting until after judgement, would materially advance the proceedings since a trial would be unnecessary should Dr. Karadzic obtain the disclosure he needs and prevail on the merits of his motion to dismiss.

9. In the *Nikolic* case, where the accused contended that his indictment should be dismissed because of an illegal arrest, it was held that the issue met the criteria for certification to appeal.⁶ Likewise, where Dr. Karadzic contends that his indictment should be dismissed because of the agreement that he not be prosecuted at the ICTY, the issue should also be found to meet the criteria for interlocutory appeal.

10. In the *Todorovic* case, decided under a previous version of Rule 73(B), it was held that a decision denying disclosure of material which was relevant to factually support a motion to dismiss the indictment based upon an illegal arrest met the criteria for certification to appeal.⁷ The Trial Chamber granted certification, reasoning that:

CONSIDERING that the Defence in the Motion sought an evidentiary hearing and an order directing the Prosecution to afford discovery as a preliminary step to an envisaged subsequent request for the dismissal of the indictment against the accused Stevan Todorovic and his release from detention;

FINDING that in these circumstances the Trial Chamber's decision not to grant the Defence requests could cause such prejudice to the accused Stevan Todorovic as could not be cured by the final disposal of the trial

⁵ While strongly disagreeing with Trial Chamber's legal conclusions, Dr. Karadzic does not argue the correctness of the decision here, in accordance with decisions of the Trial Chambers that the merits of the decision are not relevant to the decision whether to grant certification. See. i.e. *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coe's Expert Report* (30 August 2006) at para. 8

⁶ *Prosecutor v Nikolic*, No. IT-94-2-PT, *Decision to Grant Certification to Appeal the Trial Chamber's Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal* (17 January 2003)

⁷ *Prosecutor v Simic et al*, No. IT-95-9-PT, *Decision on Application by Stevan Todorovic for Leave to Appeal Against the Oral Decision of Trial Chamber III of 4 March 1999* (1 July 1999)

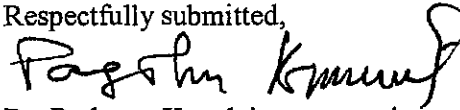
including post-judgement appeal.

11. Likewise, the Impugned Decision in Dr. Karadzic's case sought disclosure as a preliminary step to an envisaged subsequent request for dismissal of the indictment. As in the *Todorovic* case, the refusal of disclosure prejudices the accused's right to obtain material which could result in the dismissal of his case and render his detention during a lengthy trial unnecessary—thus affecting the fairness and outcome of the trial and warranting immediate appellate review.

12. In addition, given the mission of this Tribunal to promote justice and reconciliation, the failure to allow full disclosure and airing of the Holbrooke Agreement will result in suspicion that the Tribunal is interested in concealing the true facts surrounding this agreement. By granting certification, the Trial Chamber can contribute to a full and fair hearing of this important issue.

Word count: 987

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Dr. Radovan Karadzic