



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: 12 February 2009

Original: English

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 12 February 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION
TO APPEAL DECISION ON RULE 70(B)**

Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
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 Rule 70(B)”, filed on 3 February 2009 (“Application”), and the “Prosecution Response to Karadžić’s Application for Certification to Appeal Decision on Rule 70(B)”, filed on 10 February 2009 (“Response to the Application”), and hereby renders its decision thereon.

I. Brief procedural background

1. On 4 December 2008, the Accused filed a “Motion for Disclosure of Rule 68 Material Obtained under Rule 70(B)”, (“Motion”), in which he requested that the Prosecution be required to notify him and the Chamber of the number of Rule 68 exculpatory documents being withheld from disclosure pursuant to the provisions of Rule 70(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and of the steps, if any, being taken by the Prosecution to obtain disclosure.¹ On 10 December 2008, the Prosecution filed its “Response to Motion for Disclosure of Rule 68 Material Obtained under Rule 70”, (“Response to the Motion”), in which it avowed its full compliance with its disclosure obligations under Rule 68 including disclosure of documents obtained under Rule 70(B),² and further proposed that “[s]hould the Trial Chamber consider it useful, the Prosecution would continue to file regular reports on its disclosure for the benefit of the Chamber and the Accused”.³ The Accused filed a “Motion for Leave to Reply: Rule 68/70 Disclosure” on 16 December 2008 (“Reply”), indicating that this proposal would address his concern, and asking the Trial Chamber to order that such reports “include the number of Rule 68 documents, if any, that Rule 70(B) providers have not authorised be disclosed to the accused”.⁴

2. On 15 January 2009, having sought and obtained a further submission from the Prosecution on the structure and content of the proposed disclosure reports,⁵ the Trial Chamber issued its “Decision on Accused Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B) and Order on Prosecution Disclosure Report” (“Decision”). In that Decision, the Trial Chamber approved the Prosecution’s proposals with respect to disclosure reports, and

¹ Motion, para. 3.

² Response to the Motion, para. 3.

³ Response to the Motion, para. 13.

⁴ Reply, para. 5.

⁵ See Order on Proposed Disclosure Report, filed on 19 December 2008; Prosecution Submission on Proposed Disclosure Report, filed on 5 January 2009.

ordered that such reports be filed on a monthly basis.⁶ With respect to the Accused's particular request to be informed of the number of Rule 68 documents, if any, provided pursuant to Rule 70(B) in respect of which the providers have not yet authorised disclosure, the Trial Chamber considered that "the language of Rule 68(iii), by its reference not only to the need to obtain consent of the provider of Rule 70(B) material to its disclosure but also to 'the fact of its existence', militates against the disclosure of the specific information sought by the Accused", but held that the Prosecution may, if it so wishes, include that information in its reports.⁷

II. Submissions

3. In the Application, the Accused, pursuant to Rule 73(B) of the Rules, requests certification for interlocutory appeal of the Decision.⁸ He submits that "the issue at stake in the Impugned Decision",⁹ which he characterises as "the Trial Chamber's failure to put a mechanism in place to monitor the withholding of exculpatory evidence", meets the test under Rule 73(B) for interlocutory appeal, "particularly in an issue of first impression".¹⁰ Under the first limb of Rule 73(B), he argues that "[t]he issue of notice of exculpatory evidence being withheld from disclosure under Rule 70(B) goes to the very heart of a fair trial", and that "[u]nder the Trial Chamber's ruling, there is no way for the defence or the Trial Chamber to know if Rule 70(B) material which is also exculpatory is being withheld from disclosure".¹¹ Under the second limb, he submits that "[i]f the Trial Chamber is in error, and it later turns out exculpatory material should have been disclosed, it would affect the integrity of any final judgement".¹²

4. In the Response to the Application, the Prosecution moves for the dismissal of the Application on the basis that it does not meet the test for certification, and that the Accused does not substantiate his assertion that it does so.¹³ The Prosecution submits that the Accused's argument is premised on the "erroneous assumption that material is being or may be 'withheld' by the Prosecution", and that he does not indicate on which facts he bases his concern that the Prosecution is not fulfilling its disclosure obligations in good faith.¹⁴ The Prosecution avers that it is discharging its obligations diligently and has provided detailed disclosure information to the

⁶ Decision, p. 2.

⁷ Decision, p. 2.

⁸ Application, para. 1.

⁹ Application, para. 4.

¹⁰ Application, para. 9.

¹¹ Application, para. 5.

¹² Application, para. 6.

¹³ Response to the Application, paras 1, 3.

¹⁴ Response to the Application, paras 4, 6.

Trial Chamber and Accused, including disclosure reports.¹⁵ Finally, the Prosecution submits that the authorities relied on by the Accused are not on point,¹⁶ and that the question of whether or not the issue at stake is one of first impression is irrelevant for a decision on certification.¹⁷

III. Applicable law

5. 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.¹⁸

6. 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”;¹⁹ 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”.²⁰ 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.”²¹

IV. Discussion

7. The Accused has not set out any basis upon which the Chamber could conclude that the legal standard for certification of an interlocutory appeal has been satisfied. While it fully

¹⁵ Response to the Application, para. 6.

¹⁶ Response to the Application, para. 8.

¹⁷ Response to the Application, para. 9.

¹⁸ *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; *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 (“*Milošević Decision*”), 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.

¹⁹ *Halilović Decision*, p. 1.

²⁰ *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; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, 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.

²¹ *Lukić Decision*, para. 42, *Milošević Decision*, para. 4.

recognises the fundamental importance of compliance by the Prosecution with Rule 68,²² the Trial Chamber is not satisfied that the issue at hand—namely, whether or not the Accused has notice of the number of Rule 68 documents obtained by the Prosecution pursuant to Rule 70(B) for which consent to disclosure has not yet been given—is an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The arguments put forth in the Application do not substantiate this claim.

8. It is incumbent upon the Prosecution to ensure fulfilment of its disclosure-related obligations under the Rules and Statute of the Tribunal, and there is a presumption that it is doing so in good faith.²³ Pursuant to the language of Rule 70(B) and Rule 68(iii), the Accused is not entitled to disclosure of the existence of confidential information absent the consent of its provider. Where the Prosecution's confidentiality obligations under Rule 70(B) compete with its disclosure obligations under Rule 68, it is for the Prosecution to take measures to resolve those concerns without falling in breach of either provision, with the supervision of the Trial Chamber if necessary—for example, under Rule 68(iv).²⁴

9. As the Accused has not met the first limb of the test under Rule 73(B), there is no need for the Trial Chamber to consider the second.

²² See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264; *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeal Judgement, 17 December 2004 (“*Kordić Appeal Judgement*”), para. 183; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3.

²³ *Kordić Appeal Judgement*, para. 183; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 45.

²⁴ See also *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Prosecution's Notification Regarding Rule 70 Material, Confidential and *Ex Parte*, 18 May 2004, p. 5; Response to the Motion, para. 6.

V. Disposition

10. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73 of the Rules, hereby **DENIES** the Application.

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



Judge Iain Bony
Presiding

Dated this twelfth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]