



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: 13 May 2009

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Mehmet Güney
Judge Liu Daqun

Acting Registrar: Mr. John Hocking

Decision of: 13 May 2009

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

**DECISION ON MOTION FOR CERTIFICATION TO
APPEAL TRIAL CHAMBER'S DECISION ON
DEFENCE MOTION FOR RECONSIDERATION DATED
14 JANUARY 2009**

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 on Defence Motion for Reconsideration dated 14 January 2009”, (“Motion”) filed publicly on 9 February 2009, and hereby renders its decision thereon.

I. PROCEDURAL HISTORY

1. On 9 January 2009, the Defence filed a motion requesting a voir-dire hearing and the termination of the mandate of the *amicus curiae* Prosecutor (“Prosecutor”).¹ On 14 January 2009, the Defence filed a motion requesting the Trial Chamber to reconsider its decision to initiate contempt proceedings against Florence Hartmann (“the Accused”).²

2. The Prosecution responded to the Motion for Voir-Dire and Motion for Reconsideration on 16 January 2009 and 19 January 2009 respectively.³ The Defence filed a reply to the Motion for Reconsideration on 22 January.⁴

3. On 29 January 2009, the Chamber issued its “Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor”, (“Impugned Decision”) denying the Defence Motions.

4. On 9 February 2009, the Defence filed its Motion. The Prosecution responded to the Motion on 17 February 2009.⁵

II. SUBMISSIONS

5. The Defence submits that the Chamber erred in law and/or in fact and abused its discretion with respect to a total of 13 findings in the Impugned Decision.⁶ With respect to the errors of law and abuse of discretion, it submits that (i) the Chamber refused or failed to review the effect of the

¹ Motion for Voir-Dire Hearing and for Termination of Mandate of the *Amicus* Prosecutor, filed both confidentially and publicly on 9 January 2009 (“Motion for Voir-Dire”).

² Motion for Reconsideration, filed confidentially on 14 January 2009 and publicly on 16 January 2009 (“Motion for Reconsideration”).

³ Prosecution’s Response to Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor, 16 January 2009; Prosecution’s Response to Defence Motion for Reconsideration, 19 January 2009. A public, redacted version of the Response was filed on 26 January 2009.

⁴ Defence Reply Regarding Motion for Reconsideration, 22 January 2009.

⁵ Prosecution Response to Defence Motion for Leave to appeal Decision on Motion for Reconsideration dated 14 January 2009, 17 February 2009 (“Response”).

⁶ Motion, para 8(i)-(xiii).

investigative failures of the now *Amicus Curiae* Prosecutor (“Prosecution”) on the Chamber’s decision to initiate contempt proceedings against Florence Hartmann (“the Accused”), (ii) that it wrongly suggested that the issues raised by the Defence could and would be more appropriately dealt with at trial and (iii) it failed to give a reasoned decision as to how this could be the case.⁷ With respect to the numerous alleged “errors of law and/or fact”, these include, *inter alia*, the failure to review the regularity of investigative actions carried out by the *Amicus Curiae* investigator, the failure to consider the fact that the underlying facts in relation to which the Accused has been indicted were already in the public domain, and the failure to consider the prejudicial effects of its decision on the Accused’s fundamental rights.⁸

6. In his Response, the Prosecution submits that the Motion makes general assertions unsupported by argument and therefore does not fulfil the criteria as set out in Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”).⁹

III. APPLICABLE LAW

7. Rule 73 (B) of the Rules requires two cumulative criteria to be satisfied to allow a Trial Chamber to grant a request for certification to appeal: 1) that the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that, in the opinion of a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Both prongs must be met in order for certification to be granted.¹⁰

8. A request for certification “is not a further opportunity [for the requesting party] to inform the Trial Chamber that it disagrees with a decision it has made”.¹¹ Neither is certification concerned with the question of whether the impugned decision was correctly reasoned, as this is a matter for appeal, be it an interlocutory appeal or one after final judgement has been rendered¹²

9. The Chamber recalls further 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

⁷ Motion, para 8, (i) and (ii).

⁸ Motion, para 8.

⁹ Response, para 5.

¹⁰ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/I-T, Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses, 9 April 2009, para 11.

¹¹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005.

¹² *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 Proceedings, 20 June 2005, para 4.

both conditions are satisfied.”¹³ In addition, it should be noted that, even where both requirements of the Rule are satisfied, certification remains in the discretion of the Trial Chamber.¹⁴

IV. DISCUSSION

10. The Chamber does not consider that numerous alleged errors of facts and/or law in the Impugned Decision as outlined by the Defence in its motion involve issues that may affect the fair and expeditious outcome of the proceedings in this case. The Defence appears to be taking issue with the merits of the decision. In verifying issues which are suitable for an interlocutory appeal, the Chamber is not assisted by the broad and general allegations of errors of fact and/or law. The Chamber is of the view that they are expressions of disagreement or dissatisfaction with the reasoning and determinations made by the Chamber in the Impugned Decision. They do not constitute issues suitable for an interlocutory appeal, and the Defence makes no effort to demonstrate how, in fact, these issues – separately or taken together – would satisfy the first prong of Rule 73(B) of the Rules.

11. Further, assuming *arguendo*, that any of the alleged errors of fact and/or law would meet the standard set out in the first prong of the test in Rule 73(B), the Chamber is of the view that the second prong would also not be fulfilled. Proceedings concerning allegations of contempt of the Tribunal pursuant to Rule 77 are such that they require to be dealt with expeditiously and without undue formalities.¹⁵ As a rule, contempt proceedings do not concern, unlike other cases before the Tribunal, complex Indictments with broad timeframes and multiple allegations. In this case, trial has been estimated to last no more than a few days. The Chamber is mindful, in this regard, that the Order in Lieu of Indictment against the Accused was filed in August of 2008 and that the pre-trial phase in this case, therefore, has already lasted for a period of over eight months. Against this backdrop, possible resolution by the Appeals Chamber of the issue would not materially advance the proceedings.

¹³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Motion for Interview of Defence Witnesses, 22 April 2009, para 7 (“Karadžić Decision”); *Prosecutor v. Sefer 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.

¹⁴ Karadžić Decision, para 7; *Prosecutor v. Zdravko 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. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, p. 1.

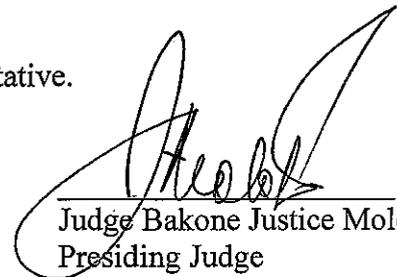
¹⁵ *Prosecutor v. Radoslav Brđanin Concerning Allegations Against Milka Maglov*, Case No. IT-99-36-R77, Decision on Request to Trial Chamber Under Rule 73 to Certify Permission to Appeal Decision on Motion for Acquittal under Rule 98bis dated 19 March 2004, 20 April 2004, p. 3.

V. DISPOSITION

For the foregoing reasons, and pursuant to 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 Judge

Dated this 13th of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]