



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-09-92-T
Date: 1 December 2016
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 1 December 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE THIRD DEFENCE CASE OMNIBUS
DECISION IN RELATION TO TABEAU AND CLARK**

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 30 June 2016, the Chamber issued an omnibus decision in which it (i) provided guidance in relation to the issue of the “matching keys” used by Prosecution expert witness Ewa Tabeau in drafting her Tomašica Proof of Death Report; (ii) found that the Prosecution was not in possession of these “matching keys”; and, (iii) denied a Defence request to compel Prosecution expert witness John Clark to provide all photographs from the autopsy reports in relation to Tomašica (collectively, the “Impugned Decision”).¹ On 7 July 2016, the Defence sought certification to appeal the Impugned Decision (“Motion”).² On 21 July 2016, the Prosecution responded (“Response”), opposing the Motion.³

II. SUBMISSIONS OF THE PARTIES

A. General Submissions

2. The Defence submits that both prongs of Rule 73 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) are satisfied because (i) in the Impugned Decision, the Chamber committed a number of judicial errors leading to an erroneous conclusion contravening the rights to equality of arms and a fair trial by imposing an undue additional burden on the Defence; and (ii) the potential harm to the Accused and the administration of justice caused by the Impugned Decision require an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁴

3. The Prosecution submits that the Motion is frivolous and represents a waste of valuable judicial resources.⁵ The Prosecution submits that not only has the Defence failed to satisfy either prong of Rule 73 (B) of the Rules, but also that much of the Motion is devoted to raising merit-based arguments.⁶ The Prosecution further submits that the Defence has flagrantly ignored the legal test for certification by failing to identify an issue that would satisfy the second prong of the test for certification, and instead only repeating arguments related to the first prong.⁷ In addition, the Prosecution argues that to the extent the Defence attempts to link either the “matching keys” or the

¹ Third Defence Case Omnibus Decision, 30 June 2016, paras 3-5.

² Defence Motion for Certification to Appeal the “Third Defence Case Omnibus Decision” as to the Issue of ‘Matching Keys’ and John Clark’s Photographs as to Tomašica, 7 July 2016.

³ Prosecution Response to Defence Motion for Certification to Appeal the “Third Defence Case Omnibus Decision” as to the Issue of ‘Matching Keys’ and John Clark’s Photographs as to Tomašica, 21 July 2016.

⁴ Motion, paras 2, 6-16.

⁵ Response, para. 2.

⁶ Response, paras 2, 3-9.

⁷ Response, paras 10-11.

photographs to disclosure obligations pursuant to Rule 68 of the Rules, such arguments are unfounded and purely speculative.⁸

B. Submission Concerning Guidance on Tabeau's Tomašica Report and "Matching Keys"

4. The Defence submits that the Chamber's conclusion that the Prosecution does not have the "matching keys" in its possession is erroneous because, as Tabeau was a direct employee of the Office of the Prosecutor at the time she performed the matching, these keys must, by definition, be in the possession of the Prosecution.⁹ The Defence submits that without access to the "matching keys", it is unable to assess Tabeau's methodologies.¹⁰ The Defence further submits that the disclosure of exculpatory material pursuant to Rule 68 of the Rules is fundamental to the fairness of the proceedings and that Impugned Decision is frustrating the application of this rule.¹¹

5. The Prosecution submits that the Defence's claim that the Impugned Decision is based on the Chamber's consideration that the "matching keys" are in the possession of Tabeau is a mischaracterization of the record as the list of "matching keys" does not exist.¹²

C. Submissions Concerning the Decision on Defence Request to Compel Witness Clark to Provide Photographs from the Tomašica Autopsies

6. The Defence submits that the Chamber is shifting the burden of the disclosure obligation as set out in Rule 68 of the Rules by requesting that the Defence exhaust all means of voluntary disclosure, thereby implying that the Defence has obligations to attain disclosure.¹³ The Defence further submits that as Clark heard the discussions on the record in relation to the disclosure of the photographs at stake and did not voluntarily provide them, there is strong evidence that he has declined to do so voluntarily.¹⁴ Finally the Defence submits that the Impugned Decision is at odds with its statement that it would consider the Defence's request for the Chamber to compel witness Clark to provide the photographs.¹⁵

7. In response to the Defence's argument that a contradiction exists between the Impugned Decision's conclusion that the Defence did not exhaust all avenues to voluntarily obtain photographs and the Chamber's prior statement that it would consider the Defence's request to

⁸ Response, para. 5.

⁹ Motion, paras 2, 6.

¹⁰ Motion, para. 7.

¹¹ Motion, paras 9-10.

¹² Response, para. 4.

¹³ Motion, paras 11-12.

¹⁴ Motion, para. 11.

¹⁵ Motion, para. 2.

compel the witness to produce such photographs, the Prosecution submits that there is no contradiction in considering a request and then denying that request.¹⁶

III. APPLICABLE LAW

8. The Chamber recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Rules, as set out in a previous decision.¹⁷

IV. DISCUSSION

A. Guidance on Tabeau's Tomašica Report and "Matching Keys"

9. In the Impugned Decision, the Chamber provided guidance in relation to Tabeau's Tomašica Report and the "matching keys". It did not issue a decision on a motion. Rule 73 (B) of the Rules only applies to decisions on motions and not guidance. Given that the Defence has failed to establish a procedural basis to seek certification to appeal guidance, the Chamber will not consider the Defence submissions with regard to the "matching keys" further.

B. Certification to Appeal Regarding Clark's Photographs

10. The Defence incorrectly premises its arguments for certification to appeal on alleged judicial errors. With regard to the first prong of Rule 73 (B) of the Rules, the Defence alleges, *inter alia*, that the Impugned Decision significantly affects the Accused's fair trial rights because the Chamber committed a number of judicial errors, leading to a "clearly erroneous conclusion". The Chamber reminds the Defence that the question of whether the standard for certification to appeal has been met is based not on whether a decision was correctly reasoned, but rather on whether the two cumulative conditions set out in Rule 73 (B) of the Rules have been met.¹⁸ Should a party wish to argue that a decision was incorrectly reasoned, the appropriate forum would be a motion for reconsideration or, should certification be granted, in the appeal itself.¹⁹ Accordingly, the portions of the Motion concerned with alleged judicial errors will not be further considered

¹⁶ Response, para. 5.

¹⁷ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutorić, 15 July 2015, para. 4.

¹⁸ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision on Protective Measures of 13 September 2007, 7 December 2007, p. 3.

¹⁹ See Decision on Defence Motion for Certification to Appeal Decision on Forty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 30 June 2015, para. 5.

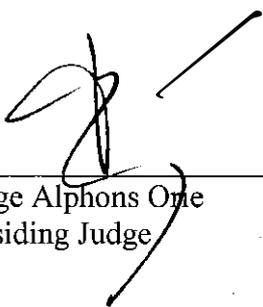
11. The Impugned Decision, insofar as it concerns Clark, relates to efforts to obtain a number of photographs from him. In that decision, the Chamber found that the Defence had not demonstrated that it had exhausted all avenues to receive voluntary cooperation from Clark.

12. The Chamber notes that the Motion does not contain specific submissions in relation to the first prong of Rule 73 (B) of the Rules. Neither has the Defence demonstrated, nor does the Chamber find, that the Impugned Decision, insofar as it relates to Clark, involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As the test under Rule 73 (B) of the Rules is cumulative and the first prong of the test has not been satisfied, the Chamber will not address the second prong of the test.

V. DISPOSITION

13. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this first day of December 2016
At The Hague
The Netherlands

[Seal of the Tribunal]