



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-04-81-T

Date: 5 February 2010

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 5 February 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON THE DEFENCE REQUEST FOR LEAVE
TO APPEAL THE CONFIDENTIAL DECISION ON THE
RULE 65 TER SUMMARIES**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 Defence “Request for Certification for Appeal From 3 February 2010 Confidential Decision on Prosecution’s Motion for Compliance with 65ter (G), filed publicly on 05 February 2010 (“Request”). The Trial Chamber hereby renders its Decision.

A. Submissions

1. In its Request the Defence seeks certification for interlocutory appeal of the Trial Chamber “Decision on Prosecution Motion for Defence Compliance with 65 *ter*(G)” filed confidentially on 3 February 2010 (“Impugned Decision”), wherein the Trial Chamber granted the Prosecution’s motion for Defence to comply with its Rule 65ter (G) obligations regarding witness summaries (“Prosecution Motion”).¹
2. The Defence additionally requests the Trial Chamber to stay its Confidential Decision of 3 February 2010 pending the resolution of the matter.²
3. The Defence, in submitting that both prongs of Rule 73 (B) dealing with the requirements for certification for interlocutory appeal have been met, contends that the Trial Chamber committed two errors and that each on its own suffices to warrant review and would significantly affect the fair and expeditious conduct of the proceedings.³
4. Firstly, the Defence argues that the trial Chamber erred by failing to address the issue regarding the Defence’s inability to have access to two confidential decisions being relied upon by the Prosecution. The Defence contends that the Trial Chamber cited the same two decisions as the only law in support of its findings thereby rendering the Decision of the Trial Chamber predicated upon information which the Defence was unable to view or address.⁴
5. Further, the Defence submits that the Trial Chamber by holding that the Defence should “provide information regarding what each witness actually is expected to say”, erred in the second instance as this holding is “confusing and in contradiction to the requirement of providing a summary of facts”.⁵

¹ Prosecution Motion for Defence Compliance with Rule 65ter(G), filed confidentially on 28 January 2010; Request, paras. 1, 15.

² Request, paras 2, 16.

³ Request, paras 9, 10.

⁴ Request, para. 11.

⁵ Request, para. 12.

6. In addressing the second criterion of Rule 73 (B), i.e. that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings, the Defence contends that the resolution of this issue will permit the Defence case to commence since it had been deferred until further notice *inter alia* due to the Prosecution's objection to the 65ter summaries.⁶

7. The Defence finally argues that the resolution of this issue at the present time would remedy the potential problem of further litigation on this issue at a later point in trial thereby also avoiding additional delays and waste of court time on this issue.⁷

8. In light of the merits of the Request and the need for the Trial Chamber to decide urgently on it, the Trial Chamber finds it appropriate to issue its decision even in the absence of a response from the Prosecution.

B. Applicable Law and Discussion

9. 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.

10. 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."⁸ Furthermore, even in case where both requirements of the Rule are satisfied, certification remains in the discretion of the Trial Chamber.⁹

11. In relation to the first prong of Rule 73 (B), the Trial Chamber notes that the Defence advances two arguments in its Request. The first argument is that both the Prosecution Motion and the Impugned Decision rely on confidential Decisions which the Accused was not able to view or address, thereby significantly affecting the fair and expeditious conduct of the proceedings. The second argument is that the Trial Chamber erred in the standard applicable to Rule 65 *ter*(G) witness summaries.

⁶ Request, para. 13.

⁷ Request, para. 14.

⁸ 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.

⁹ *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.

12. The Chamber is not satisfied that the first argument meets the first prong of Rule 73 (B). Indeed, instead of advancing the expeditious conduct of the proceedings, the Trial Chamber is of the view that referring the matter to the Appeals Chamber would result in undue delay. Furthermore, in relation to whether the Defence inability to have access to confidential decisions significantly affect the fairness of the proceedings, the Trial Chamber is of the view that the issue raised by the Defence is not suitable for an interlocutory appeal and can be dealt with at trial.

13. In this regard, the Trial Chamber deems it important to clarify that it did not address the issue of the Defence inability to review the mentioned confidential decisions for the reason that the Defence did not *request* access to the said decisions. More specifically, the Trial Chamber recalls that the Defence in its Response stated that since “the Defence is unable to properly assess the factual and legal underpinnings of the *Prlić* decision and its references[,] [a]s a result, the Prosecution’s assertion in the second half of paragraph 5 should be given no weight at all.”¹⁰ The Trial Chamber duly considered this argument in its Impugned Decision and did not interpret it as a request by the Defence to have access to these decisions. It was always open to the Defence to request access to the confidential material.

14. As for the second argument that the Trial Chamber erred in the legal standard to be applied in relation to Rule 65 *ter* summaries, the Trial Chamber finds that this argument put forward by the Defence is related to the correctness of the Impugned Decision and does not substantiate the claim that the alleged error of the Trial Chamber would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

15. In light of the foregoing, as the prongs of Rule 73 (B) are cumulative and the Defence has not met the first prong, the Trial Chamber will not deal with the second prong.

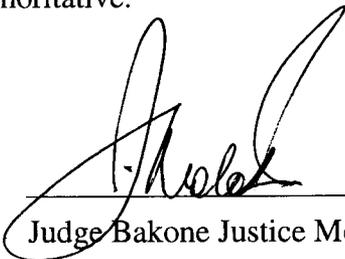
C. Disposition

16. For the foregoing reasons and pursuant to the Rule 73(B) and 126 *bis* of the Rules, the Trial Chamber

DENIES the Request.

¹⁰ Response to Prosecution Motion for Defence Compliance with Rule 65 *ter*(G), publicly redacted version filed on 5 February 2010, para. 5. *See also* Hearing of 29 January 2010, T. 9811.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fifth day of February 2010

At The Hague

The Netherlands

[Seal of the Tribunal]