



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-03-67-T

Date: 6 November 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 6 November 2008

PROSECUTOR

V

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR CERTIFICATION TO
APPEAL THE TRIAL CHAMBER'S DECISION REGARDING PUBLIC
ACCESS TO TRIAL EXHIBITS**

Office of the Prosecutor

Mr. Daryl Mundis
Ms. Christine Dahl

The Accused

Mr. Vojislav Šešelj

I. INTRODUCTION

1. TRIAL CHAMBER III (“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 Prosecution motion filed on 25 September 2008 (“Motion”),¹ which seeks certification to appeal the Trial Chamber’s “Decision Regarding Public Access to Trial Exhibits” rendered on 18 September 2008 (“Decision”).²

II. BACKGROUND

2. On 5 September 2008, the Deputy Registrar filed a submission pursuant to Rule 33(B) of the Rules of Procedure and Evidence of this Tribunal (“Rules”) following a State request for access to certain public exhibits in the present case.³ In particular, the Deputy Registrar sought guidance from the Trial Chamber concerning: (i) the release to the State in question of BCS audio recordings, together with their transcripts, of intercepted conversations between Radovan Karadžić and various other individuals that were played during the hearing of 15 July 2008 and admitted into evidence;⁴ and (ii) the release of public exhibits as a general matter in the present case.⁵

3. On 18 September 2008, the Trial Chamber rendered its Decision, wherein it indicated that it would stay its ruling on any public request, including that of the State in question, to obtain access to public exhibits admitted into evidence pending the end of trial.⁶ The Trial Chamber noted that tendering exhibits into evidence was only a preliminary phase and that “their ultimate weight would not be evaluated by the Chamber until the final deliberations, in light of the case file as a whole, with the Chamber reserving the possibility, at that stage, of reconsidering their admission”.⁷ As a result, it concluded that “the Chamber cannot make exhibits available to the public before the evidence has been finalised by the above-mentioned exercise”.⁸ The Trial Chamber noted however, that it would immediately consider requests from accused before the Tribunal or national courts

¹ Prosecution Motion for Certification to Appeal the Trial Chamber’s “Decision Regarding Public Access to Trial Exhibits”, 25 September 2008 (“Motion”).

² Decision Regarding Public Access to Trial Exhibits, original in French dated 18 September 2008 (“Decision”).

³ Submission of the Deputy Registrar Pursuant to Rule 33(B) on Access to Exhibits, confidential and *ex parte*, 5 September 2008 (“Rule 33(B) Submission”).

⁴ The following intercepted conversations were tendered into evidence: P502, P503, P504, P506, P507, P508, P509, P510 and P511.

⁵ Rule 33(B) Submission, para. 4.

⁶ Decision, p. 3.

⁷ Decision, p. 2.

⁸ Decision, p. 3.

who might need exhibits for the preparation of their defence prior to the conclusion of the present trial.⁹

4. During the hearing of 23 September 2008, the Trial Chamber clarified that the Parties' use of non-confidential exhibits in public sessions would not run afoul of the Decision.¹⁰

III. PROSECUTION ARGUMENTS

5. In its Motion, the Prosecution requests, pursuant to Rule 73(B) of the Rules, that the Trial Chamber certify its Decision for interlocutory appeal.¹¹ It argues that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings given the link "between publicity and fairness of trials".¹² In particular, the Prosecution contends that limits on the public's ability to access evidence, other than those required by Rule 70 of the Rules, compromise the fairness of the proceedings themselves.¹³ Transparency, it adds, must be an ongoing process, such that it is not sufficient to grant the public access to exhibits only at the conclusion of the trial.¹⁴

6. The Prosecution submits that an "immediate resolution" by the Appeals Chamber at this stage is necessary in order to prevent hearings and a judgement at trial that are impacted by the lack of publicity and fairness.¹⁵ Further, it argues that the access of the public to exhibits tendered into evidence before the end of trial is an important legal issue that favours granting certification, particularly given that no countervailing reasons exist which would justify the Trial Chamber's refusal of the Motion's request.¹⁶

7. The Accused did not respond to the Motion within the 14-day deadline set out in Rule 126bis.¹⁷

IV. APPLICABLE LAW

8. In accordance with Rule 73(B) of the Rules, 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

⁹ Decision, p. 3.

¹⁰ Hearing of 23 September 2008, T. 9856-9864.

¹¹ Motion, paras 4, 19.

¹² Motion, para. 9.

¹³ Motion, paras 7-10.

¹⁴ Motion, paras 11-13.

¹⁵ Motion, para. 15.

¹⁶ Motion, 17-18.

¹⁷ See Procès-verbal of reception of BCS translation signed by the Accused on 16 October 2008.

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. A Trial Chamber must thus first verify whether the two cumulative conditions set out in Rule 73(B) of the Rules have been met before determining whether to grant certification.

9. The purpose of a motion for certification is not to demonstrate that the reasoning of an impugned decision is incorrect, but to demonstrate that the conditions set out in Rule 73(B) of the Rules have been met. Moreover, even if the conditions set out in Rule 73(B) of the Rules are satisfied, certification remains a matter within the discretionary power of the Trial Chamber.¹⁸

V. DISCUSSION

A. Preliminary matter: scope of the Decision

10. The Trial Chamber considers it important to clarify the scope of its Decision in light of the current Motion. Notably, the Decision states that “*the Chamber cannot make exhibits available to the public before the evidence has been finalised*”.¹⁹ Indeed, the Trial Chamber has decided not to provide the public with — and therefore confer its imprimatur on — exhibits whose admission it may ultimately reconsider prior to its ultimate evaluation of the evidence in view of a judgment and in light of the case file as a whole. The Decision does not, however, bar the Prosecution from responding to requests for access to non-confidential documents from the public. In fact, both parties can, subject to any provisions of the Rules or decisions of the Trial Chamber to the contrary, respond to requests for public documents while the trial is ongoing.

B. Certification request

11. The Trial Chamber recalls that the Decision in no way infringes on the Parties’ ability to use public exhibits in public sessions. Nor does the Decision hamper the public’s ability to follow those public proceedings or view the exhibits used by the Parties when these are publicly displayed.²⁰ Members of the public that wish to consult public exhibits prior to the conclusion of the trial may also request copies of those exhibits from the Parties. Moreover, the Trial Chamber will consider all of its pending requests for public documents, and grant them where appropriate, once all of the

¹⁸ Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008, original in French dated 21 May 2008, paras 10-12.

¹⁹ Decision, p. 3.

²⁰ See Hearing of 23 September 2008, T. 9858-9861.

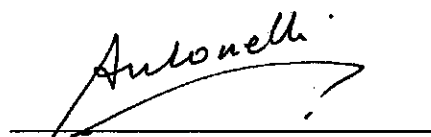
evidence has been finalised.²¹ Thus, the Decision only concerns a narrow issue, namely that of the public's right to request copies of public documents directly from the Trial Chamber while the trial is ongoing. The Trial Chamber considers that this is not an issue that would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

12. Further, though the Trial Chamber need not address the additional condition set out in Rule 73(B) of the Rules, it similarly finds that an immediate resolution by the Appeals Chamber would not materially advance the proceedings. Indeed, the Appeals Chamber's reversal of the Decision would not impact the proceedings given that only the timing of when the Trial Chamber rules on the requests for public documents would be altered.

VI. DISPOSITION

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

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



Judge Jean-Claude Antonetti
Presiding

Dated this sixth day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²¹ The Trial Chamber notes, for example, that under the Serbian Criminal Procedure Code, the authority conducting a criminal proceeding is accorded discretion to determine whether to grant public requests for access to the record while the proceeding is ongoing. *See* Serbian Criminal Procedure Code (46/2006), art. 201.