



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-99-36-T
Date: 24 May 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 24 May 2002

PROSECUTOR

v.

**RADOSLAV BRĐANIN
and
MOMIR TALIĆ**

**DECISION ON RADOSLAV BRĐANIN'S MOTION FOR THE
ISSUANCE OF RULE 73(B) CERTIFICATION REGARDING
THE CHAMBER'S RULE 70 CONFIDENTIAL DECISION**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojević, for Radoslav Brđanin
Mr. Xavier de Roux and Ms. Natacha Fauveau-Ivanović, for Momir Talić

TRIAL CHAMBER II (“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 “Motion for the issuance of Rule 73(B) Certification Regarding the Chamber’s Rule 70 Confidential Decision” (“Motion”) filed by Brđanin on 13 May 2002.

I. INTRODUCTION

1. On 6 May 2002 the Chamber rendered its “Confidential Decision on the Alleged Illegality of Rule 70” (“Decision”). In the Decision the Chamber dismissed the “Confidential Amended Motion Regarding Rule 70, its Use and Disclosure Thereunder”. On 13 May 2002 Brđanin filed a motion, seeking certification pursuant to Rule 73(B) as amended on 8 May 2002, permitting him to appeal the Decision (“Motion”). Brđanin argued that the Decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. In addition, it is argued that “[a]n immediate resolution by the Appeals Chamber may materially advance the proceedings”. The Prosecution responded orally to the Motion declaring that they would leave the matter entirely in the hands of the Trial Chamber and would not make any submissions.¹

II. DISCUSSION

2. By decision of the Judges at the Extraordinary Plenary Session of the International Tribunal held on 23 April 2002, Rule 73 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), dealing with the procedure to be applied in order to file an interlocutory appeal, was amended. This amendment entered into force on 8 May 2002. Since the Decision was filed prior to the entry in force of the new version of Rule 73 and the Motion was filed after that date, the first question that arises, is whether for the purpose of the present Motion it is the old or the new version of Rule 73 that is to be applied. Rule 6(D) of the Rules states that: “[a]n amendment [of the Rules] shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case”. This paragraph is an expression of the general principle of

¹ T 5624.

law that the entry into force of both substantial and procedural criminal laws can not be retroactive if it is prejudicial to the rights of the accused.

3. The Decision was “rendered during the course of the trial” and is incontrovertibly one “involving evidence and procedure”, which means that in respect of the old version of Rule 73, sections (B) and (C) apply. The Chamber is of the view that in respect of decisions rendered during the course of the trial on motions involving evidence and procedure, the new version of Rule 73 restricts further the right to appeal in that it defines a stricter test for the Chamber to apply, when considering whether to grant certification to a party intending to appeal a decision. While the old version of Rule 73(C) states that “[t]he Trial Chamber may certify that an interlocutory appeal during trial from a decision involving evidence or procedure is appropriate for the continuation of the trial”, the new version of Rule 73(B) sets a much higher threshold for the Chamber regarding certification to appeal a decision. It states that “[d]ecisions 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 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.” (emphasis added).

4. The Chamber is satisfied that under the new version of Rule 73 it would be more difficult for a party seeking certification from the Chamber to meet the standard required by the Rule. Therefore, considering that the right to appeal is a substantive right of each defendant, the retroactive application of the new version of Rule 73 in this case would operate to prejudice the rights of the accused. For this reason, the Chamber will apply the old version of Rule 73 in the present case.

5. The Chamber additionally considers that the right to appeal a decision is triggered when the decision is issued.² In the present case, this was on 6 May 2002, when the old version of Rule 73 was still in force. The fact that Brđanin exercised his right under Rule 73(E)³ to file the Motion within seven days but after the day when the amendment of the Rule entered into force can not mean that he was thereby opting for or subjecting to the more restrictive test set out in the new version of Rule 73, even if it appears from the wording of the Motion, that Brđanin relies on the new version of Rule 73. However, this does not prevent the Chamber from applying the old version of the same Rule, which according to the Chamber for the reasons given above constitutes the legal basis for the determination of the present issue.

6. Brdanin bases his application on the assertion that the alleged illegality of Rule 70 "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial". However, he gives no reasons for that assertion.

7. Brdanin has previously argued that Rule 70 is invalid because it violates the rights of the accused to a fair trial as set out in Articles 20 and 21 of the Tribunal's Statute. However, the Chamber is satisfied, for the reasons that it gave in its Decision, that Rule 70 does not in any way violate such rights and further contains sufficient safeguards to ensure that there are no such violations. As was made clear in the Decision, the Trial Chamber reiterates that the dispensation from the duty of the Prosecutor to disclose documents to the Defense under Rule 70 is limited to certain documents received in confidence and which are used only for the purpose of generating new evidence. Any of these documents which are put to further different use are subject to disclosure. Also, Rule 70 cannot override the obligations of the Prosecution to disclose all exculpatory material that comes into its hands in accordance with Rule 68.⁴

8. Most importantly, according Rule 70(G), the Chamber has the power under Rule 89(D) read in conjunction with Rule 70(G), to exclude evidence if it finds that the probative value of the evidence is substantially outweighed by the need to ensure a fair trial. The Decision further makes it clear that Rule 70 is equally available to the Defence to make use of, provided an application to the Trial Chamber is made by the accused or defence counsel as laid down in Rule 70(F), and explains the rationale behind that provision and why it does not amount to a inequality of arms in the criminal process before this Tribunal, especially since the Defence does not have a general duty to disclose documents to the Prosecution, but only a limited and conditional one under Rule 67(C). It is up to the Defence to invoke Rule 67(C) and in this way assume the obligations of reciprocal disclosure. There is absolutely nothing else decided by the Trial Chamber in its Decision that warrants certification on the basis that an appeal would be appropriate for the continuation of the trial.

9. The Chamber is therefore not satisfied that an interlocutory appeal from the Decision is "appropriate for the continuation of the trial". Further, even if the Chamber were to apply the new version of Rule 73, the Chamber is equally not satisfied that the assertion raised by Brdanin "involves an issues that would significantly affect the fair and expeditious conduct of the

² See in that regard the old version of Rule 73(E) as well as the new version of Rule 73(C).

³ Rule 73(C) of the new version of the Rules.

⁴ See paras 19-21 of the Decision.

proceedings or the outcome of the trial” and that “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

III. DISPOSITION

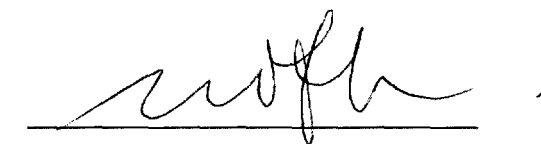
TRIAL CHAMBER II HEREBY denies the application for certification.

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

Dated this 24th day of May 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]