



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-02-60-T
Date: 2 September 2004
Original: English

IN TRIAL CHAMBER I, SECTION A

Before: Judge Liu Daqun, Presiding
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Decision of: 2 September 2004

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ**

**DECISION ON REQUEST FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER'S DECISION ON VIDOJE BLAGOJEVIĆ'S ORAL
REQUEST & REQUEST FOR THE APPOINTMENT OF AN
INDEPENDENT COUNSEL FOR THIS INTERLOCUTORY APPEAL
SHOULD CERTIFICATION BE GRANTED**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. Miodrag Stojanović and Mr. Branko Lukić for Dragan Jokić

TRIAL CHAMBER I, SECTION A, (“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”),

NOTING the Trial Chamber’s “Decision on Vidoje Blagojević’s Oral Request,” issued on 30 July 2004 (“Decision”), in which the Trial Chamber found that by his refusal to adhere to the procedure established in the Rules of Procedure and Evidence (“Rules”) for the presentation of evidence, Vidoje Blagojević (“Accused”) had effectively waived his right to appear as a witness in this case, and that “unless there is a change of circumstances,” the options available to the Accused are either to make a sworn or unsworn statement under the control of the Trial Chamber pursuant to Rule 84 *bis* of the Rules or to remain silent,

BEING SEISED OF the “Request for Certification to Appeal the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request & Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted,” dated 8 August 2004 and filed on 9 August 2004 (“Request”) and the response thereto filed by the Office of the Prosecutor (“Prosecution”),¹

CONSIDERING the request by the Accused for permission to appeal the Decision,² written on 10 August 2004 and filed in English on 25 August 2004 (“Blagojević Request”),

NOTING the Trial Chamber’s “Order for Additional Submissions from the Parties in Relation to Request for Certification,” issued on 24 August 2004 (“Order”), in which the Trial Chamber ordered the Parties to file additional submissions on the question of whether the Trial Chamber should certify the Decision for interlocutory appeal, taking into account the criteria set-out in Rule 73(B) of the Rules and stayed the Decision pending a decision on the Request,

NOTING the additional submissions filed by the Blagojević Defence³ and the Prosecution,⁴ in accordance with the Order, and that the Prosecution further included a request for modification of

¹ Prosecution’s Response to Vidoje Blagojević’s Request for Certification to Appeal the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request & Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted (“Response”), 19 August 2004.

² Request to the Trial Chamber for permission to enter a written appeal against the Decision on Vidoje Blagojević’s oral request rendered by Trial Chamber I, Section A, adopted on 30 July 2004, handwritten letter dated 10 August 2004 and filed in English on 25 August 2004.

³ Additional Submissions on the Question of Whether the Trial Chamber Should Certify the Decision on Vidoje Blagojević’s Oral Request for Interlocutory Appeal, 26 August 2004 (“Defence Additional Submissions”).

⁴ Prosecution’s Additional Submission on Vidoje Blagojević’s Request for Certification to Appeal and Request for Modification of the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request, 27 August 2004 (“Prosecution Additional Submissions”).

the Decision in the Prosecution Additional Submissions, to which the Blagojević Defence responded,⁵

NOTING Rule 73 (B) of the Rules, which provides:

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 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.

CONSIDERING that, should the Trial Chamber determine that the decision in question involves an issue that would either significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Trial Chamber retains the discretion (“may grant certification” and “in the opinion of the Trial Chamber”) to determine the second condition for certification: whether an immediate resolution by the Appeals Chamber may materially advance the proceedings,

CONSIDERING THEREFORE that, under the Rules, decisions on motions, other than preliminary motions, are without interlocutory appeal unless the criteria set-out in Rule 73 (B) have both been satisfied,⁶

NOTING that the Accused seeks certification to appeal the Decision as he “understood [from the Decision] that [he] was not allowed to testify under oath in the courtroom in [his] case, but other options were made available to him], which in [his] opinion are less significant,”⁷

NOTING that in the Request and the Defence Additional Submissions, the Blagojević Defence submits that the Decision involves an issue that would affect the outcome of the trial in that: (a) the point would ultimately need to be raised before the Appeals Chamber in the event of a conviction; and (b) if the issue is resolved in favour of the Accused on the basis that this Trial Chamber’s

⁵ Response to the Prosecution’s Request for Modification of the Trial Chamber’s Decision on Vidoje Blagojević’s Oral Request, 30 August 2004.

⁶ The Trial Chamber recalls the amendment history of Rules 72 and 73 in relation to the appeal process for motions.

⁷ Blagojević Request, page 1. The Trial Chamber observes that Mr. Blagojević stated further objectives in seeking access to the Appeals Chamber by appealing the Decision: “In my appeal I should also like to speak more broadly about the omissions which were made of hearing or failing to hear witnesses, hearing “military experts” and in particular in their material registered under 94 *bis*, about which I have not yet been informed, etc.” In relation to the military expert report tendered by the Blagojević Defence, the Trial Chamber notes that it has supported a request by the Blagojević Defence to have the report translated into B/C/S in order that the Accused can read the report.

The Blagojević Defence makes further submissions in relation to Mr. Blagojević’s position: “Mr. Blagojević contends that given his personal decision not to recognize his assigned counsel [...] a deviation from the procedure established in the Rules is both warranted and it is in furtherance of the interest of justice. Simply, it is manifestly unjust to force him to be led on direct examination by his assigned counsel whom he refuses to recognize or to be assisted by as a result of certain irreconcilable differences, or in the alternative, to deny him the right to testify under oath in his own trial.” Defence Additional Submissions, para. 10.

practice implies that he did not receive a fair trial, it is likely to be of such importance that the conviction may be quashed and a re-trial ordered,⁸

NOTING FURTHER that the Blagojević Defence asserts that an immediate resolution by the Appeals Chamber of the issue raised in the Decision would materially advance the proceedings as “it will assist in removing any perception of bias or unfairness, resulting from the fact that he is being denied the right to testify, albeit, as a result of his refusal to follow the procedure established in the Rule, for what he believes, good cause has been shown,”⁹

NOTING that the Prosecution submits that the Decision involves an issue¹⁰ that significantly affects the fair and expeditious conduct of the proceedings in that the right of an accused to appear as a witness in his own case is a central right to a fair trial as the “testimony of the accused and the weight it is given are critical to the Trial Chamber’s overall review and analysis of the evidence in the case,”¹¹ and that as the issues raised in the Decision are likely to be raised on appeal following the judgement, should the Appeals Chamber come to a contrary decision, it is better to have the issues resolved at this stage of the proceedings,¹²

NOTING FURTHER that the Prosecution submits that the Decision involves an issue that would affect the outcome of the trial in that testimony of the accused will be one of the most significant pieces of evidence, and cross-examination of the accused plays a critical role in determining the truth and veracity of his evidence,¹³

CONSIDERING that the Prosecution’s request for modification of the Decision¹⁴ submitted on 27 August 2004 is understood by the Trial Chamber as a request for certification of the Decision, and as such, has not been filed within the time limits provided for in Rule 73 (C) of the Rules, and is therefore not considered by the Trial Chamber,

⁸ Request, para. 2; Defence Additional Submissions, para. 9.

⁹ Defence Additional Submissions, para. 11.

¹⁰ The Prosecution frames the issue as whether any examination-in-chief must be conducted by the Accused’s counsel under Rule 85(B), and if so, whether the Accused’s refusal to abide by the procedure amounts to a waiver of his right to testify under Rule 85(C), given that the Accused still had the option to present his defence through a sworn or unsworn statement under Rule 84 *bis*, Prosecution Additional Submissions, para. 7.

¹¹ Prosecution Additional Submissions, para. 8.

¹² Prosecution Additional Submissions, para. 9.

¹³ Prosecution Additional Submissions, para. 10.

¹⁴ See, Prosecution Additional Submissions, paras 15-17.

CONSIDERING that while the Accused enjoys the privilege against self-incrimination and the right to remain silent under the Statute of the Tribunal,¹⁵ the Accused also enjoys the right to be heard,¹⁶

CONSIDERING that under the Rules of the Tribunal, an accused can be heard by a chamber in two ways: by making a sworn or unsworn statement under Rule 84 *bis* or by testifying as a witness under Rule 85,

CONSIDERING that, having been informed of the consequences of each option, it is for the Accused to choose whether he exercises his right to remain silent or his right to be heard,¹⁷ and if he chooses to exercise his right to be heard, whether he does so through a statement or as a witness,

CONSIDERING that in addition to the overarching obligation to ensure that the Accused receive a fair and expeditious trial, it is the duty of the Trial Chamber to regulate the conduct of the proceedings and particularly that the proceedings are conducted in accordance with the Rules,¹⁸

CONSIDERING that the question of the weight of either the testimony or a statement by the Accused is a matter to be decided by the Trial Chamber in the context of the trial record as a whole,¹⁹

CONSIDERING that neither of the Parties or the Accused has demonstrated that the matter under consideration in the Decision, and the Trial Chamber's resolution of that matter, involves an issue that *would* – rather than *could* - either significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,²⁰

CONSIDERING FURTHER that in light of the advanced stage of the proceedings,²¹ the right of the Accused to an expeditious trial may be compromised should certification be granted,²² and therefore that even if the Trial Chamber found that the Decision raises issues that satisfy either of

¹⁵ Article 21(4)(g) of the Statute of the Tribunal. See also, International Covenant on Civil and Political Rights, Article 14(3)(g).

¹⁶ See, e.g., Prosecution Additional Submissions, fn. 10.

¹⁷ See, generally, *Prosecutor v. Milomir Stakić*, Case No. IT-92-24-PT, Order for Filings of Motions and Related Matters, 7 March 2002, pp. 3-4, Order (8).

¹⁸ Article 20(1) of the Statute of the Tribunal.

¹⁹ Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003, Annex, 1 and 5.

²⁰ While recognising that the views of the Appeals Chamber on the application of Rule 84 *bis* and Rule 85 may be of general interest, the Trial Chamber recalls that this is not the test to be applied when considering applications for certification. See, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 (“*Strugar* Decision”), para. 8.

²¹ Following the appearance of Vidoje Blagojević before this Trial Chamber, the Parties have been ordered to present any evidence in rebuttal or rejoinder during the week of 13 September 2004; to file Final Briefs by 21 September 2004; and to make their closing arguments during the week of 27 September 2004.

²² See, *Strugar* Decision para. 2.

the first criteria of Rule 73 (B), it is unable to find that an immediate resolution by the Appeals Chamber would materially advance the proceedings,

PURSUANT TO Rule 73(B) of the Rules,

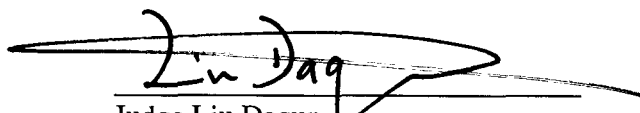
HEREBY DENIES the Request; and

ORDERS that, unless there is a change of circumstances, should Mr. Blagojević choose to make a statement:

1. The statement shall be made on **Thursday, 9 September 2004**;
2. The statement shall be limited to those matters raised by the Indictment brought against him, dated 23 May 2003;

AND REQUESTS that this Decision is translated into B/C/S and provided to the Accused as soon as practicable.

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


Judge Liu Daqun
Presiding

Dated this second day of September 2004,
At The Hague
The Netherlands

[Seal of the Tribunal]