



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-02-54-T  
Date: 20 June 2005  
Original: ENGLISH

**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge O-Gon Kwon  
Judge Iain Bonomy

**Registrar:** Mr. Hans Holthuis

**Decision:** 20 June 2005

**PROSECUTOR**

v.

**SLOBODAN MILOŠEVIĆ**

---

**DECISION ON PROSECUTION MOTION FOR  
CERTIFICATION OF TRIAL CHAMBER DECISION ON  
PROSECUTION MOTION FOR VOIR DIRE PROCEEDING**

---

**Office of the Prosecutor:**

Ms. Carla Del Ponte  
Mr. Geoffrey Nice

**The Accused:**

Mr. Slobodan Milošević

**Court Assigned Counsel:**

Mr. Steven Kay, QC  
Ms. Gillian Higgins

**Amicus Curiae:**

Prof. Timothy McCormack

**THIS 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 a “Prosecution’s Request for Certification Pursuant to Rule 73(B)”, filed 15 June 2005 (“Motion”), and hereby renders its decision thereon.

1. In the Motion, the Prosecution requests the Trial Chamber to certify an interlocutory appeal of its “Decision on Prosecution Motion for Voir Dire Proceeding”, issued 9 June 2005 (“Decision”), in which the Trial Chamber denied the Prosecution’s request to conduct a voir dire proceeding (or “trial within a trial”) in order to determine whether evidence prepared by Defence witness Dragan Jasović (“witness”) should be excluded pursuant to Rule 95 of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

2. Rule 73(B) provides the following:

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.

This provision sets forth two cumulative criteria that must be satisfied by the Prosecution before the Trial Chamber *may* certify an interlocutory appeal of a decision it has made.<sup>1</sup>

3. The Trial Chamber has recently stated that “a request for certification is not a further opportunity for the Prosecution to inform the Trial Chamber that it disagrees with a decision it has made”.<sup>2</sup> In its Motion, the Prosecution argues that the Decision “illogically and unfairly links the determination of exclusion of evidence under Rule 95 to possible Prosecution considerations of prejudice to its case”,<sup>3</sup> utilises “inapposite reasoning”,<sup>4</sup> “effectively sanctioned [an] illogical approach”,<sup>5</sup> “ignores the purpose of Rule 95”,<sup>6</sup> “effectively circumvents Rule 95’s impact on the

<sup>1</sup> See *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Radoslav Brđanin’s Motion for the Issuance of Rule 73(B) Certification Regarding the Chamber’s Rule 70 Confidential Decision, 24 May 2002, para. 3 (“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.”). Trial Chamber II also added emphasis to the word “and” in a subsequent quotation of the new, present version of the Rule, thereby indicating the cumulative nature of the criteria. The Trial Chamber agrees with this interpretation of the Rule.

<sup>2</sup> Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, issued 17 May 2005, at 5.

<sup>3</sup> Motion, para. 3.

<sup>4</sup> Motion, para. 9.

<sup>5</sup> Motion, para. 10.

issue of the admissibility of the hearsay material produced by” the witness,<sup>7</sup> and “creates confusion”.<sup>8</sup> The Prosecution also comments, in advance of the Trial Chamber’s rulings on admission of the Jasović material, that “the Chamber has abdicated [its] responsibility” “to ensure that every piece of evidence admitted passes the test of Rule 95” and that this abdication “casts a shadow of unfairness over the proceedings.”<sup>9</sup>

4. The Prosecution takes issue with the reasoning underpinning the Decision and argues that it is this reasoning, in and of itself, that “leads to unfairness in these proceedings.”<sup>10</sup> This is a good example of the Prosecution’s misunderstanding of Rule 73(B). A request for certification is not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal. If it does, then the reasoning of the appealed decision immediately will be assessed by the Appeals Chamber. If it does not, the reasoning may be challenged by the Prosecution after the rendering of the final Judgement, and the Appeals Chamber, at that time, will assess the reasoning of the decision.

5. The Trial Chamber also notes that the Prosecution argues that the Decision raises important issues relating to the use of voir dire proceedings in proceedings before the Tribunal, as well as practice generally under Rules 89 and 95.<sup>11</sup> The Trial Chamber has recently stated that “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.”<sup>12</sup>

6. In light of all the above, the Trial Chamber will focus on the legal test to be applied under Rule 73(B) and will cull from the Motion the arguments of the Prosecution that relate to this legal test.

7. With respect to the first criterion of Rule 73(B), the Prosecution argues that the Decision – in combination with a prior decision of the Trial Chamber – has hindered its ability to demonstrate

---

<sup>6</sup> Motion, para. 11.

<sup>7</sup> Motion, para. 13.

<sup>8</sup> Motion, paras. 13-14.

<sup>9</sup> Motion, para. 13.

<sup>10</sup> Motion, para. 9.

<sup>11</sup> Motion, paras. 3, 15.

<sup>12</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005, at 2.

the unreliability of Defence materials by precluding application of Rule 95, and that the proceedings, as a result, will be unfair and the outcome adversely affected.<sup>13</sup>

8. The Prosecution's argument fails because it erroneously assumes that the only method by which Rule 95 can operate is through the procedural mechanism of the proposed voir proceeding.<sup>14</sup> Rule 95 does not prescribe a mechanism by which it is to be applied, and a voir dire proceeding is only one of these possible mechanisms; cross-examination is another example that may assist the Prosecution in its efforts to challenge admission of such material. Finally, the Prosecution's reliance upon a prior decision<sup>15</sup> of the Trial Chamber and its effect upon the present situation does not bolster its argument that the Decision fulfils the first criterion of Rule 73(B).

9. The Prosecution argues that the Trial Chamber, as a result of its Decision, will only have a minimum of evidence with which to assess the reliability of the witness' evidence because he will deny the veracity of Prosecution documents put to him in cross-examination and thus they will not be admitted into evidence. The Prosecution then reasons that the "Chamber's intention . . . to base its determination of the admissibility of [the witness'] evidence on only a *portion* of the material available to it, ignores the purpose of Rule 95 and thereby creates unfairness to the proceedings."<sup>16</sup>

10. This argument employs the logical fallacy of denying the antecedent:<sup>17</sup> the Prosecution argues that a voir dire proceeding will enhance the fairness of the trial, and then reasons that, if the Chamber does not conduct a voir dire proceeding, the trial will be unfair. The position of the Prosecution leaves no room for the fact that trials can be conducted in a fair manner without the use of voir dire proceedings. The Chamber, for example, will take into account the cross-examination of the witness during its deliberations regarding admission of the Jasović material and for purposes of the final Judgement in this case. The Prosecution's argument thus fails on its own terms.

<sup>13</sup> Motion, para. 6.

<sup>14</sup> The Prosecution argues that "Rule 95 itself, as well as the factors warranting exclusion of evidence under the rule, demand consideration of *all* evidence proposed by a party which suggest that material offered by another party should be excluded, *prior to* any decision as to admissibility" and that the Trial Chamber, by denying the motion for a voir dire proceeding, "has effectively sanctioned [an] illogical approach." Motion, para. 10 (emphasis in original). The Prosecution here seems to be advancing the extraordinary position that a voir dire proceeding would *have* to be conducted in each and every case where the Prosecution is in possession of information going to the credibility of a witness or the unreliability of documents sought to be tendered through him.

<sup>15</sup> Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobre Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, issued 17 May 2005.

<sup>16</sup> Motion, para. 11 (emphasis in original); *see also* Motion, paras. 12-14 (advancing a similar argument with respect to rebuttal, *i.e.*, if the Chamber denies leave for the Prosecution to call its proposed evidence during rebuttal, "then no meaningful mechanism to challenge the admissibility of [the Jasović material] pursuant to Rule 95 would be available to the Prosecution").

<sup>17</sup> *See* Irving M. Copi, *Introduction to Logic*, 5th ed. (MacMillan Publishing Inc., 1978) at 295; Stephen F. Barker, *The Elements of Logic*, (McGraw-Hill Inc., 1965), at 95.

11. The Prosecution argues that the Decision “potentially obstructs the expeditious completion of these proceedings” because if the Trial Chamber admits “the hearsay statements produced by Dragan Jasović, all the admitted evidence must be evaluated by the Trial Chamber and therefore becomes the subject of argument by the parties”, thus delaying the completion of the trial. The Prosecution also comments that “[t]ime spent on the review of irrelevant and unreliable evidence could be better used to address the important issues and evidence in this case.” Finally, the Prosecution argues that “the prospective admission of unreliable material would signal the Accused that material obtained through methods that do not fulfil the highest ethical standards are acceptable before this Court. A voir dire proceeding at this stage, where the hearsay statements produced by Dragan Jasović would be exposed for what they are, would send a clear message that only reliable material should be tendered, thereby streamlining the completion of the trial.”<sup>18</sup>

12. The Prosecution’s argument on this point is predicated upon the premise that evidence will be admitted that is irrelevant and unreliable. Such a contention misunderstands Rule 89(C), which provides that a Chamber may admit any relevant evidence that it deems to have probative value. Thus, the Trial Chamber is bound by the Rules of Procedure and Evidence only to admit material into evidence that is relevant. The weight that the Trial Chamber attributes to the evidence is another matter entirely. The Prosecution’s fears that the parties will be forced to waste their resources in dealing with “irrelevant evidence” is thus unfounded. And this leads to the second reason why the Prosecution’s argument fails: it is not enough to predict that a decision may potentially affect the fair and expeditious conduct of the proceedings; rather, the Prosecution must demonstrate that the decision “involves an issue that *would* significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” (emphasis added). Finally, the Chamber passes on the Prosecution’s invitation to “send a clear message” to the Accused that he should only tender as evidence reliable materials in order to streamline completion of the trial. The admission of evidence is regulated by the Rules of Procedure and Evidence and the jurisprudence of the Tribunal; and, it is for the Accused to tender evidence he deems appropriate, and for the Chamber to continue to make decisions as to the admissibility of that evidence accordingly.

13. With respect to the second criterion of Rule 73(B), the Prosecution argues (1) that, “[i]f this issue is not resolved immediately and the hearsay statements of Dragan Jasović are admitted into evidence . . . , the parties . . . and the Chamber will have to review and argue the relative weight to

---

<sup>18</sup> Motion, para. 16.

be given to each hearsay statement prior to Judgement” and (2) that this “will be a wasteful use of time and resources, and may result in an unfair verdict, which will be subject to appeal.”<sup>19</sup>

14. The Prosecution’s argument on this point again is premised upon the assumption that the evidence is irrelevant. The evidence has not been admitted yet; if it is ultimately admitted, it will have been determined to be relevant. Moreover, the weighing of evidence is a perfectly normal task in which the Chamber engages, for purposes of deliberating upon the final Judgement in a case. The Prosecution thus fails to demonstrate how the Decision will result in an unfair verdict. Finally, the Decision has done nothing more than deny the Prosecution’s efforts to conduct a trial within a trial; the Prosecution’s ability to impeach the credibility of the witness and challenge the reliability of his documentary evidence is left intact and indeed is proceeding apace. As such, an immediate resolution of this issue on interlocutory appeal would not materially advance the proceedings, but rather impede them.

15. In conclusion, the Trial Chamber hereby finds that the criteria of Rule 73(B) have not been satisfied because the Prosecution has failed to demonstrate that the Decision involves issues that 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 may materially advance the proceedings.

16. Pursuant to Rules 54 and 73(B) of the Rules, the Trial Chamber hereby DENIES the Motion.

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



Judge Robinson  
Presiding

Dated this twentieth day of June 2005  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

---

<sup>19</sup> Motion, para. 17.