



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: 18 January 2006
Original: ENGLISH

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 18 January 2006

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION'S REQUEST FOR CERTIFICATION OF APPEAL
UNDER RULE 73(B)**

Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused

Mr. Slobodan Milošević

Court Assigned Counsel

Mr. Steven Kay
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”),

BEING SEIZED of the “Prosecution’s Request for Certification of Appeal Under Rule 73(B)”, filed on 20 December 2005 (“Request”), seeking certification from the Trial Chamber for interlocutory appeal of the Chamber’s “Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case”, which was issued on 13 December 2005 (“Decision”);

NOTING that the Prosecution seeks certification “only insofar as the Decision relates to the Scorpions video and related materials, including the witness statements of B-345 and TA-378”;¹

NOTING that the Defence filed no response to the Request;

CONSIDERING that Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (1) that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings;²

NOTING that the Prosecution defines the issue implicated by the Decision as involving four errors of fact and law on the part of the Trial Chamber, namely that the Chamber:

- i. Applied too high a threshold to the evidence in question.
- ii. Failed to appreciate the significance of circumstantial evidence.
- iii. In doing so, failed to give the evidence any or any adequate weight in the exercise of its discretion under Rule 89(D) of the Rules.
- iv. Erred in drawing an artificial line through the evidence of B-345 thereby failing to take any or any proper account of the fact that B-345 was an entirely new witness.³

NOTING that the Prosecution argues that the first criterion for a grant of certification is satisfied “because the ... Decision has left the Prosecution unable to put before the Trial Chamber evidence of

¹ Request, para. 2.

² See *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 (“*Halilović* Decision”), p. 1; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005 (*Milošević* June 2005 Decision), para. 2.

³ Request, para. 8.

central importance”, a situation which will significantly affect the outcome of the trial;⁴ and, more particularly, that “the issue as formulated would significantly affect the expeditious conduct of these proceedings[, because i]f the Appeals Chamber determines on a final appeal that this matter be reverted to the Trial Chamber for reconsideration ... , then this would clearly result not only in delaying the trial, but also in unfairness to the Accused”;⁵

NOTING that the Prosecution offers two arguments in support of its contention that the second criterion for a grant of certification has been satisfied, asserting first that “[f]or the same broad reason,” that is, because the Decision denied the Prosecution’s application to present important evidence, “resolution of the issue at this stage, rather than at the final Appeals stage, may—the Prosecution submits, *will*—materially advance the proceedings”;⁶ and second, that “the Decision ... cannot be left to an appeal [because i]t is infinitely preferable and just that this evidence is put before the Trial Chamber at this stage”;⁷

CONSIDERING that, while the Request correctly states that “[r]ecent decisions of this Chamber have emphasised that a request for certification is ‘not concerned with whether a decision was correctly reasoned or not’”,⁸ acceptance of the Prosecution’s arguments with regard to the first criterion requires agreement with the premise that the evidence in question would in fact significantly affect the outcome of the trial;⁹

CONSIDERING that the rationale for the Trial Chamber’s Decision with regard to those items of evidence was that, “in order to have sufficient probative value to be accepted as an appropriate basis for re-opening, the evidence proposed should have significant bearing on the individual criminal responsibility of the Accused”,¹⁰ and that, therefore, any item of evidence rejected by the Trial Chamber in the probative value stage of its analysis was deemed not to have significant bearing on the ultimate legal question of these proceedings, the Accused’s individual criminal responsibility for the crimes charged in the indictments;

CONSIDERING, therefore, that the issue resolved by the Decision would not significantly affect the outcome of the trial;

⁴ Request, para. 14.

⁵ *Ibid.*, para. 20.

⁶ *Ibid.*, para. 14.

⁷ *Ibid.*, para. 41.

⁸ *Ibid.*, para. 13 (quoting *Milošević* June 2005 Decision, *supra* note 2, para. 4).

⁹ The Request appears to concede this point. *See ibid.*, para. 21 (“Consideration of whether or not this issue will significantly affect the fairness of these proceedings, and the outcome of the trial, is naturally linked to a consideration of how important the evidence excluded by the Decision is.”).

¹⁰ *Milošević*, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case, 13 December 2005 (“Decision”), para. 37.

CONSIDERING that under the Rules, jurisprudence, and practice of the Tribunal, the Prosecution may present additional evidence at the appellate stage of proceedings if it meets the relevant standards;¹¹

CONSIDERING that immediate resolution of the issue by the Appeals Chamber is unnecessary, because the Prosecution may raise it during an eventual appeal from a trial judgement on the merits, and may seek admission of the evidence during such an appeal;

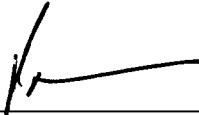
CONSIDERING, therefore, that even if the first criterion for a grant of certification were met, the second criterion would not be satisfied;¹²

CONSIDERING that the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied;¹³

PURSUANT TO Rules 54 and 73(B) of the Rules,

HEREBY DENIES the Request.

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



Judge Patrick Robinson
Presiding

Dated this eighteenth day of January 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

¹¹ See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 4. The Prosecution is well aware of this are of the Tribunal's law. See Decision, paras. 20, 22 (summarising the Prosecution's arguments in the original application for re-opening and its later reply, which urged the Chamber to apply one of the appellate standards at the trial level, and rejecting them).

¹² See *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 8 (denying a request for certification on the ground, *inter alia*, that "the question of the correctness of the decision ... can then be made the subject of appeal in the ordinary way, and at the normal stage of the proceedings. This course could also better facilitate a full and measured consideration of the important legal issues relevant to this question.").

¹³ See *Halilović* Decision, *supra* note 2, p. 1; *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-17-R77.2, Decision on Prosecution Motion to Request Certification of Appeal, 25 October 2005, p. 3.