



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-05-87-T

Date: 30 August 2006

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve

Registrar: Mr. Hans Holthuis

Decision of: 30 August 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON PROSECUTION REQUEST FOR CERTIFICATION OF INTERLOCUTORY
APPEAL OF DECISION ON ADMISSION OF WITNESS PHILIP COO'S EXPERT REPORT**

Office of the Prosecutor

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Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 the “Prosecution’s Request for Certification of Appeal Pursuant to Rule 73(B)”, filed on 20 July 2006 (“Request”), and hereby renders its decision thereon.

I. Background

1. On 13 July 2006, the Trial Chamber issued an oral decision regarding the expert witness Philip Coo (“Decision”), in which the Trial Chamber “rule[d] him out as an expert” and decided that his report will “not be received as an expert report.”¹ The Trial Chamber held that “he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.”² The Prosecution filed the Request seeking certification of an interlocutory appeal of the Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”).³

2. On 25 July 2006, the Defence for Ojdanić filed the “General Ojdanic’s Consolidated Response to Prosecution Applications for Certification to Appeal” (“Ojdanić Response”), in which it opposes the Request and requests the Trial Chamber to deny certification of the Decision.⁴ The Defence for Milutinović, Pavković, and Lukić adopted and joined in Ojdanić Response.⁵ On 2 August 2006, the Defence for Šainović filed the “Defence Response: ‘Prosecution’s Request for Certification of Appeal Pursuant to Rule 73(B)’” (“Šainović Response”), in which it also requests the Trial Chamber to deny the Request.

II. Submissions of the parties

3. The Prosecution, in support of its request for certification, argues the following:
 - a. the Decision fails to apply or apply consistently the Tribunal’s jurisprudence on expert witnesses, in particular, as it applies to employees of the Office of the Prosecutor (“Prosecution”);
 - b. the Decision erroneously introduces a new subjective test for exclusion of expert testimony and reports, *i.e.*, “closeness to the team”;

¹ T. 840–844 (13 July 2006).

² T. 840 (13 July 2006).

³ Request, para. 1.

⁴ Ojdanić Response, paras. 7, 10.

⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Submission by Mr. Milutinović to Join General Ojdanić’s Consolidated Response to Prosecution Applications for Certification to Appeal, 27 July 2006, p. 2; Pavković Joinder in Ojdanić Response to Prosecution Application for Certification to Appeal, 28 July 2006, p. 2; Sreten Lukic’s Joinder in Co-Accused Ojdanic’s Consolidated Response to Prosecution Application for Certification to Appeal, 1 August 2006, para. 3.

- c. the Decision ignores or fails to give appropriate weight to the fact that Mr. Coo has been qualified as an expert in this area in two previous cases before the Tribunal;
- d. the Decision denies the Prosecutor the opportunity to present expert testimony on important parts of its case; and
- e. the Decision ignores or fails to give appropriate weight to the fact that concerns about closeness to the team can be addressed in weighing the evidence after full cross-examination.⁶

4. In support of its Request, the Prosecution submits that “the immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings by clarifying this important legal and procedural issue and would ensure consistency in the jurisprudence of the Tribunal regarding the qualification of an expert witness.”⁷ The Prosecution argues, *inter alia*, that “[e]mployment with the OTP and working closely with the investigators or prosecutors does not disqualify a person from being an expert witness”⁸ and that “the jurisprudence of the Tribunal has repeatedly held that Prosecution employees may testify as expert witnesses, provided that they meet the relevant requirements.”⁹

5. The Prosecution further argues that the issue “would also significantly affect the fair and expeditious conduct of the proceedings permitting the Prosecution to call expert testimony on military and police structures”.¹⁰ According to the Prosecution, “Mr. Coo is the only witness who will testify on site specific military and police functions and structures in place in Kosovo in 1998 and 1999. As such, the Decision significantly affects the fair and expeditious conduct of the proceedings in that it precludes the Prosecution from calling an expert witness to testify on the joint operations of the military and the police in Kosovo during the relevant period.”¹¹

6. The Defence for Ojdanić, Milutinović, Pavković, and Lukić oppose the Request, arguing that it is not clear how the Trial Chamber’s Decision can be said to significantly affect the fairness of the trial or its outcome. The Defence argue that “[t]he Trial Chamber has allowed Mr. Coo to testify to the same underlying facts as requested by the [P]rosecution, but just not his opinions.”¹² The Defence further submit that the Trial Chamber has “[a] broad discretion to determine whether

⁶ Request, para. 2.

⁷ *Ibid.*, para. 5.

⁸ *Ibid.*, para. 6 (footnote omitted).

⁹ *Ibid.*, para. 6

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibid.*, para. 10.

¹² Ojdanić Response, para. 8.

testimony from a particular expert, or testimony on a particular topic, would be of assistance”¹³ and that “it is difficult to see how immediate appellate review would advance the proceedings.”¹⁴ The Defence for Šainović contends, *inter alia*, that the Prosecution has erred in its conclusions advanced in its Request and submits that “nowhere did the Trial Chamber attempt to jeopardise the Prosecution’s case to any such effect such as to deny it the right to call an expert witness”; “[it] merely did not deem this particular witness, Mr. Coe, fit for such task.”¹⁵

III. Legal standard for certification

7. Rule 73(B) requires two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (1) 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.¹⁶

8. Furthermore, this Trial Chamber has previously held 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.”¹⁷ Request for certification is therefore “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.”¹⁸

IV. Discussion

9. At the outset, the Trial Chamber notes that a number of arguments put forward by the parties in their submissions are irrelevant since they go to the substance of the Decision, *i.e.*,

¹³ Ojdanić Response, para. 9.

¹⁴ *Ibid.*

¹⁵ Šainović Response, para. 7.

¹⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request for Certification of Appeal Under Rule 73(B), 18 January 2006, p. 1; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *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 Decision*”), para. 2; *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. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds”, 16 July 2003, at p. 3.

¹⁷ *Halilović Decision*, p. 1; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend, 14 July 2006, p. 1.

¹⁸ *Milošević Decision*, para. 4.

whether Mr. Coö qualifies as an expert witness, rather than to the criteria to be satisfied for certification to be granted.¹⁹ The Trial Chamber has carefully considered all the arguments advanced by the parties that are relevant to a determination of the Request under Rule 73(B).

10. The basic facts are as follows. The Prosecution explained to the Trial Chamber that Mr. Coö has been employed by the Office of the Prosecutor (“OTP”) since 1999 when investigations into this case first began. He provided advice to the OTP on how to shape the case and other advice on how to conduct the interviews of some of the accused and other military personnel. He also carried out investigations to identify documents which support the case.²⁰ Furthermore, his report does not merely provide facts established on the basis of the information gathered during the investigation, but also contains his opinions regarding that information and how it relates to the individual criminal responsibility of the accused. The Trial Chamber decided that the particular circumstances of his involvement in the investigation and preparation of the Prosecution case were such that it could not regard his opinion as bearing the appearance of impartiality on which findings crucial to the determination of guilt of criminal charges might confidently be made.

11. The Trial Chamber did not rule Mr. Coö out as a fact witness.²¹ The bulk of his report dealing with factual matters, including the results of his investigations, may therefore form a part of the evidence, if the Prosecution calls Mr. Coö as a fact witness pursuant to the Rules. Stated differently, the Trial Chamber is willing to allow Mr. Coö to testify about facts, but not his opinions. Accordingly, the Trial Chamber has yet to decide which portions of the report will be admitted and which will be excluded. Only then will the full extent to which his proposed evidence will be excluded be clear. A hearing to determine that will be held some time prior to the projected date of his testimony.

12. For this reason, the Prosecution argument that the Decision precludes the Prosecution from calling an expert witness to testify on joint operations and thus significantly affects the fair and expeditious conduct of the proceedings must fail. The Decision does not preclude the Prosecution from adducing the evidence on joint operations during the relevant period and calling Mr. Coö to

¹⁹ See Request, paras. 2, 6–10; Šainović Response, paras. 4–12.

²⁰ See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Prosecution Submissions Regarding Expert Witnesses Philip Coö and Ingeborg Joachim, 28 June 2006, para. 19; Transcript of Pre-Trial Conference, T. 314–317 (7 July 2006).

²¹ The Trial Chamber held the following:

On the other hand, we are entirely satisfied that it [is] appropriate for [Mr. Coö] as an investigator to give evidence on matters of fact, and indeed we will be greatly assisted ... by his evidence in relation to matters of fact, identifying what document he found. And we [will] strike ... the right balance in eliminating from our consideration matters ... of his opinion and concentrating exclusively on matters of fact.” T. 840 (13 July 2006).

testify “on site specific military and police functions and structures in place in Kosovo in 1998 and 1999” in accordance with the Rules.²²

13. Additionally, Mr. Coo is not the only witness who will testify on “site specific military and police functions and structures in place in Kosovo in 1998 and 1999”. According to the Prosecution Rule 65 *ter* list dated 10 May 2006 and revised 6 July 2006, evidence regarding joint operations will also be available through other witnesses.²³ The Trial Chamber therefore finds that the appeal does not involve an issue that would significantly affect the fair and expeditious conduct of the proceeding or the outcome of the trial.

14. Having established that the Prosecution has not satisfied the first prong of Rule 73(B), the Trial Chamber is not obliged to make an assessment on the basis of the second criterion.²⁴ The Trial Chamber will, nonetheless, consider if the immediate resolution of this issue by the Appeal Chamber would materially advance the proceedings.

15. The only argument that the Prosecution puts forward to explain that the second prong under Rule 73(B) has been met is that the proceedings would be materially advanced by clarifying this important legal and procedural issue relating to the skills and qualifications required for a witness to be qualified as an expert and to the general definition of expert witness. The immediate resolution would in the Prosecution view also ensure consistency in the jurisprudence of the Tribunal regarding the qualification of expert witnesses.²⁵

16. As discussed above, “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.”²⁶ With respect to the argument regarding consistency in the jurisprudence, the Prosecution is correct in noting that the Decision differs with the approach previously taken in *Milošević* and *Limaj*. In both cases, the Trial Chambers admitted Mr. Coo’s

²² Cf. *Prosecutor v. Simba*, No. ICTR-2001-76-I, Decision on Prosecutor’s Request for Certification to Appeal Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness, 16 August 2004, para. 6 (observing “that the written expert report of 17 May 2004 contains information relating to the widespread and systematic character of attacks. Furthermore, several Prosecution witnesses will, according to the disclosed information, testify directly to events in Gikongoro and to widespread and systematic attacks. As similar evidence is available through other witnesses, the appeal does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.”).

²³ Pursuant to the Prosecution Rule 65 *ter* list, witness Lilić, Zoran will “explain how the Supreme Defence Council functioned and the role of Milošević in the decision-making process regarding the military matters. He will explain the structure and functions of other bodies with responsibility in Kosovo, the MUP Staff for Kosovo and the Joint Command....” p. 95. See further witness Marković, Radomir, pp. 102–107; witness Pesić, Zlatomir, pp. 118–120; witness Vasiljević, Aleksander, pp. 153–157, etc. *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Prosecution’s Submissions Pursuant to Rule 65 *ter* (E) with Confidential Annex A and Annexes B and C, 10 May 2006; revised by [Confidential] Notice of Filing of Revised 65 *ter* Witness List, 6 July 2006.

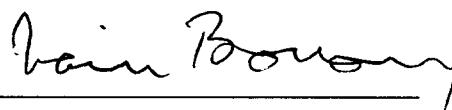
²⁴ Cf. *Prosecutor v. Popović et al.*, Decision on Request for Certification to Appeal Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 26 June 2006, p. 3.

²⁵ Request, paras. 5, 7.

report as an expert report, and recognised Mr. Coo as an expert witness. He testified in both cases and his report was admitted into evidence after cross-examination.²⁷ However, “the decisions of Trial Chambers ... have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”²⁸ The Trial Chamber’s decision depends upon the particular circumstances of Mr. Coo’s involvement in this case. Furthermore, by merely focusing on the argument regarding the need to ensure consistency in the jurisprudence of the Tribunal, the Prosecution has failed to explain satisfactorily how the resolution of this issue would materially advance *these* proceedings.

17. For all the foregoing reasons, the Trial Chamber finds that the Prosecution has not sufficiently demonstrated that the two criteria of Rule 73(B) of the Rules have been satisfied and, pursuant to Rule 73 of the Rules, hereby DENIES the Request.

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



Judge Iain Bonomy
Presiding

Dated this thirtieth of August 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ *Halilović* Decision, p. 1.

²⁷ In *Milošević*, Parts I and II of the Report were admitted into evidence on 10 September 2002 as exhibit 318; a few parts of the expert report that were not admitted into evidence by the Trial Chamber (*see* T. 9969–9970) have been, according to the Prosecution, removed from the version of the expert report submitted in the instant case. The respective report was admitted in *Limaj* on 12 April 2005 as exhibit 230.

²⁸ *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Appeal Judgement, 24 March 2000, para. 114.