



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: 17 October 2006
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 17 October 2006

PROSECUTOR

v.

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

**DECISION DENYING PROSECUTION'S REQUEST FOR CERTIFICATION OF
RULING ON PROPOSED EXHIBITS P438 AND P473**

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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

Background

1. On 1 September 2006, the Trial Chamber issued its “Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams” (“Decision”), in which the Chamber ruled that proposed Prosecution exhibits P438, *Under Orders*, and P473, *As Seen, As Told*, were “presently denied admission.”¹ These documents are reports, prepared by international humanitarian organisations, which contain hearsay accounts of events in Kosovo during the indictment period. The reports are based on statements given by unidentified Kosovo Albanians to the organisations’ field workers, who took the statements and submitted them to supervisors who edited and summarised the material for inclusion in the reports. As the Trial Chamber ruled,

these organisations’ careful methods can at best assure the *accuracy* of the process for recording the information contained in the eventual report[s], not the *reliability* of the material contents Not having had the opportunity of hearing any of the persons upon whose statements these [reports] are based, the Chamber is not in a position to assess the reliability of the factual contentions contained therein.²

Thus unable to find the reports reliable, which Rule 89(C) of the Rules of Procedure and Evidence (“Rules”) requires of all proffered evidence,³ the Chamber denied the Prosecution’s request to admit the reports. In its “Request”,⁴ the Prosecution now seeks certification of that ruling for interlocutory appeal. One of the Accused, Dragoljub Ojdanić, filed a response in opposition.⁵

Applicable Law

2. Rule 73(B) “governs the exercise of the Chamber’s discretion to grant certification for an interlocutory appeal.”⁶ The rule provides that a Trial Chamber “may grant [] certification if the [impugned] 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

¹ Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006 (the “Decision”), paras. 33(1)-(2).

² *Ibid.*, para. 21 (emphasis in original).

³ See Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 September 2006, para. 4 (“As for any piece of proffered evidence, Rule 89 obliges the party to show that the material is relevant, probative and bears ‘sufficient indicia of reliability.’”) (quoting *Prosecutor v. Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998 (dated 4 March 1998), para. 20 (“The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value.”)).

⁴ See Prosecution’s Request for Certification of Leave to Appeal the Trial Chamber’s Decision on Admissibility of Exhibits P475 [*sic*] and P438 Pursuant to Rule 73(B), 8 September 2006 (the “Request”).

⁵ See General Ojdanic’s Response to Prosecution Request for Certification of Leave to Appeal the Trial Chamber’s Decision on Admissibility of Exhibits P475 [*sic*] and P438, 12 September 2006 (“Ojdanić’s Response”).

⁶ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁷

3. A proper request for certification is “not concerned with whether a decision was correctly reasoned or not.”⁸ “[E]ven 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”.⁹ Of particular import to the Request here, “challenging a decision made on a case-by-case basis wherein the Trial Chamber is assessing the relevance and probative value of a particular piece of evidence is not the province of Rule 73(B) of the Rules, absent a showing that the challenged decision involves an issue that fulfils the criteria of the Rule”.¹⁰

Submissions

4. The Prosecution states that the reports contain “significant evidence of the systematic and widespread nature of the crimes against the civilian population in Kosovo which corroborates the core evidence of several crime base witnesses already called or to be called in the trial.”¹¹ The reports, says the Prosecution,

complement and complete the evidence provided by the limited number of crime base witnesses the Prosecution has selected to give evidence. . . . It is not proposed that exhibits P475 [*sic*] and P438 should be admitted as evidence to prove the specifics of crimes charged in the indictment . . . , but [the reports] provide general corroboration of the core of the evidence given by the crime base witnesses by, for example, confirming the time, date and circumstances of events mentioned by crime base witnesses. Exhibits P475 [*sic*] and P438 also provide evidence of the scale of the crimes . . . , which cannot otherwise be testified to in full by the limited number [of] crime-base witnesses selected by the Prosecution.¹²

Moreover, the Decision also affects the Prosecution’s ability to provide evidence about the reasons why 800,000 Kosovo Albanians fled Kosovo after 24 March 1999 as the aggregated evidence in exhibits P475 [*sic*] and P438 is probative on this point.¹³

⁷ Rule 73(B).

⁸ *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, para. 4. *See also ibid.*, para. 3 (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”) (*quoting Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, p. 5).

⁹ *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, p. 1. *See also 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.

¹⁰ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, 18 May 2005 (dated 17 May 2005), p. 7.

¹¹ Request, para. 5.

¹² *Ibid.*, 7.

¹³ *Ibid.*, para. 8.

In sum, the proffered reports are said to contain material that corroborates or supplements the evidence of in-court witnesses. The Prosecution thus submits that the reports offer, “in a summary form, a more complete picture of the events in Kosovo in 1998 and 1999.”¹⁴

5. The Prosecution does not substantively contend that the decision to exclude such reports will significantly affect the fair conduct of the proceedings. Rather, it maintains that the Decision “could either affect the outcome of the trial and/or would affect the expeditiousness of the proceedings. The first criterion for certification under Rule 73(B) is therefore met.”¹⁵ Specifically, the Prosecution states that it is “likely to have to request leave to amend its witness list to include additional witnesses. Such an approach would [] negatively affect the expeditiousness of the proceedings in this case.”¹⁶ Concerning the trial’s outcome, the Prosecution makes two arguments:

The Decision disallows significant evidence of the systematic and widespread nature of the crimes against the civilian population in Kosovo which corroborates the core evidence of several crime base witnesses already called or to be called in the trial. The Decision could therefore affect the outcome of the trial.¹⁷

[T]he Trial Chamber has prevented the Prosecution from presenting, in a summary form, a more complete picture of the events in Kosovo in 1998 and 1999. Ultimately, this may affect the Trial Chamber’s assessment of the reliability and credibility of the crime base witnesses the Prosecution can call in the time available to it. The Decision also affects the Prosecution’s ability to provide evidence about the reasons why 800,000 Kosovo Albanians fled Kosovo after 24 March 1999. The Decision therefore could affect the outcome of the trial.¹⁸

6. Regarding the second prong of Rule 73(B), whether “an immediate resolution by the Appeals Chamber may materially advance the proceedings”, the Prosecution makes three arguments. It first submits that, if it appeals the eventual judgement in this case and the Appeals Chamber rules that the Trial Chamber erred prejudicially in excluding the two reports, “the Appeals Chamber would have to assess the impact they would have had on the Trial Chamber’s assessment of the evidence” or “send the matter back to the Trial Chamber. In either case, a significant time-consuming delay in the final determination of this case would ensue.”¹⁹ Second, the Prosecution argues that “[g]etting the matter resolved by the Appeals Chamber would [] materially advance the proceedings by eliminating the need for the Prosecution to seek leave to call additional witnesses to

¹⁴ *Ibid.*, para. 9.

¹⁵ *Ibid.*, para. 11.

¹⁶ *Ibid.*, para. 10.

¹⁷ *Ibid.*, para. 5.

¹⁸ *Ibid.*, para. 9.

¹⁹ *Ibid.*, para. 13.

lead evidence to compensate for the evidence not admitted through exhibits P475 [*sic*] and P438.”²⁰ Third, the Prosecution states that “the Decision is a departure from a line of previous decisions on the admission of overview and summary document [*sic*] in a number of other cases In the *Limaj* case, the Trial Chamber admitted and relied on exhibit P438. . . . P475 [*sic*] was admitted in the *Milošević* case.”²¹ The Prosecution argues that this Chamber’s “departure from the above jurisprudence could lead to future litigation in this case Having the Appeals Chamber clarify the application of Rule 89(C) to overview and summary documents like exhibits P475 [*sic*] and P438 would therefore be beneficial . . . to this case”.²²

7. Ojdanić opposes the Prosecution’s Request:

First, it cannot be said that the exclusion of [the reports] will affect the fairness or outcome of the trial when the prosecution will call witnesses such as Patrick Ball, Wolfgang Petrisich, Wesley Clark, Klaus Naumann, William Walker, Paddy Ashdown, John Crosland, and General John Drewienkiewicz to testify about the overall situation in Kosovo.²³

Second, it cannot be claimed that the decision will affect the expeditiousness of the trial because yet more witnesses will have to be called. The Prosecution has no right to call any additional witnesses in this trial, save through a successful application for leave pursuant to Rule 73 *bis*[(F)]. Given the plethora of evidence already available to it to prove the overall events in Kosovo and reasons for Albanians leaving their homes, it seems unlikely that such leave would be granted.
 . . .²⁴

Third, an immediate resolution by the Appeals Chamber is not needed. Like any other decision by a Trial Chamber on the admission or exclusion of evidence, the Appeals Chamber can determine in review of a final judgement whether the Trial Chamber’s decision was reasonable. . . .²⁵

Discussion

8. An applicant can satisfy the first prong of Rule 73(B) by demonstrating that the issue at hand (i) will significantly affect the fair and expeditious conduct of the proceedings, or (ii) will significantly affect the outcome of the trial. Regarding the former, the Prosecution objects that it has been prevented from offering a “more complete picture” of evidence already, or eventually to be, admitted. The Trial Chamber considers it doubtful that fairness generally requires the admission of such material, and the Prosecution’s burden here is to demonstrate that not admitting

²⁰ *Ibid.*, para. 14

²¹ *Ibid.*, para. 16.

²² *Ibid.*, para. 17.

²³ Ojdanić’s Response, para. 3.

²⁴ *Ibid.*, para. 4. See Rule 73 *bis*(F) (“After commencement of the trial, the Prosecutor may file a motion to vary . . . the number of witnesses . . . and the Trial Chamber may grant the Prosecutor’s request if satisfied that this is in the interests of justice.”).

²⁵ Ojdanić’s Response, para. 5.

the reports significantly affects the fairness of this specific trial.²⁶ The Prosecution lists 160 witnesses in its 6 July 2006 “Notice of Filing Revised *65ter* Witness List”, and in his response to the Request, Ojdanić submits that “it cannot be said that the exclusion of [the reports] will affect the fairness or outcome of the trial when the prosecution will call witnesses such as Patrick Ball, Wolfgang Petrisich, Wesley Clark, Klaus Naumann, William Walker, Paddy Ashdown, John Crosland, and General John Drewienkiewicz to testify about the overall situation in Kosovo.”²⁷ The evidence of these witnesses may not make the points that the Prosecution offers the reports to prove, but it does not necessarily follow that excluding the reports is significantly unfair to the Prosecution. Indeed, the Prosecution makes no persuasive submission that declining to admit the reports, which offer merely a “more complete picture” of competent evidence, will significantly impact the fairness of this trial.

9. Overlooking this fact, the Prosecution also has not demonstrated that the issue at hand will significantly affect the expeditious conduct of the proceedings. The Prosecution obviously is free to request leave to call additional witnesses, but it is not certain either that such leave would be granted at this point in the proceedings²⁸ or that, if it were, the number of additional witnesses called, when compared to the 160 already on the Prosecution’s list, would significantly affect the expeditiousness of trial. Consequently, the Prosecution has not shown that the issue here will “significantly affect the fair and expeditious conduct of the proceedings”.

10. As set out above, the Prosecution makes two arguments regarding the Decision’s potential impact on the outcome of trial, but for neither argument does the Prosecution explain its reasoning. First, the Prosecution states that the Decision “disallows significant evidence of the systematic and widespread nature of the crimes . . . which corroborates the core evidence of several crime base witnesses”,²⁹ but opts not to mention that the Trial Chamber was unable to find this “significant evidence” reliable enough to admit. Accordingly, the Prosecution does not explain how excluding such material will “significantly” affect the outcome of the trial. Even if the reports were to be admitted,³⁰ it stands to reason that the Trial Chamber would not give them meaningful weight on account of the deficiencies which led the Chamber not to admit them in the first place. Second, the Prosecution fails to explain how excluding the reports “may affect the Trial Chamber’s assessment

²⁶ See Decision Denying Prosecution’s Request for Certification of Rule 73 *bis* Issue for Appeal, 30 August 2006, para. 11 (“The Prosecution’s complaint in this case, however, asserts unfairness more as a matter of principle than of fact. . . . The Prosecution does not explain how, and thus has not shown, that the Chamber’s action will significantly affect the fair and expeditious conduct of these proceedings or the outcome of this particular trial.”) (citations omitted).

²⁷ Ojdanić’s Response, para. 3.

²⁸ See *ibid.*, para. 4 (“The Prosecution has no right to call any additional witnesses in this trial, save through a successful application for leave pursuant to Rule 73 *bis*[(F)].”).

²⁹ Request, para. 5.

³⁰ The reports were only “presently denied admission.” Decision, paras. 33(1)-(2).

of the reliability and credibility of the crime base witnesses”,³¹ and the Chamber doubts that it will find such witnesses less believable because their evidence is not reinforced by material which lacks such indicia of reliability as to render it inadmissible. Moreover, many witnesses will give or have given evidence concerning the “reasons why 800,000 Kosovo Albanians fled Kosovo after 24 March 1999”.³² Not having a bit more evidence on that score will not significantly affect the outcome of trial. In sum, the Prosecution has failed to satisfy the first prong of Rule 73(B).

11. Regarding the second prong of the rule, the Prosecution advances three arguments, set out above, that “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”³³ Despite the fact that the Prosecution has not satisfied the first prong, the Trial Chamber will consider these arguments because they arguably apply to the “expeditious conduct of the proceedings” or “outcome of the trial” elements of Rule 73(B)’s first prong.

12. First, the Trial Chamber finds the Prosecution’s argument regarding post-judgement appeal unpersuasive. The Decision at issue concerns two documents, already found to lack sufficient indicia of reliability, whereas the record in this trial ultimately will contain hundreds or thousands of pieces of competent evidence. The Prosecution’s argument depends on a series of questionable assumptions that, after the judgement in this trial is issued, the Appeals Chamber will review the Decision at all, find it erroneous, find further that the error invalidates the judgement³⁴ and accordingly order that the reports be considered. Aside from the fact that the Prosecution has not offered any compelling argument or legal authority to support certification on this basis, the Trial Chamber finds that certifying to avoid such a speculative effect on expeditiousness or outcome could not materially advance this trial.

13. Second, the Trial Chamber rejects the Prosecution’s argument that “[g]etting the matter resolved by the Appeals Chamber would [] materially advance the proceedings by eliminating the need for the Prosecution to seek leave to call additional witnesses”.³⁵ Merely “seek[ing] leave” will not significantly delay the trial or affect its outcome, and even if such leave is granted, the number

³¹ Request, para. 9.

³² *Ibid.*

³³ Rule 73(B).

³⁴ *See, e.g., Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 7 (“On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute.”). *See also* Statute of the Tribunal, art. 25(1) (“The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice.”).

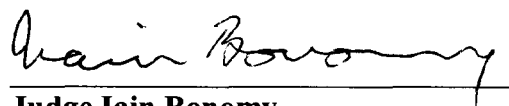
³⁵ Request, para. 14.

of additional witnesses would be relatively small.³⁶ Consequently, certifying to avoid the Prosecution's seeking leave could not materially advance these proceedings.

14. Third, the Prosecution states that the reports and others like them have been admitted in other trials, and argues that this Trial Chamber's "departure" from such "jurisprudence could lead to future litigation in this case Having the Appeals Chamber clarify the application of Rule 89(C) to overview and summary documents like exhibits P475 [*sic*] and P438 would therefore be beneficial . . . to this case".³⁷ The Trial Chamber considers that this argument essentially concerns the merits of the Decision, and that the Prosecution has not shown how the Decision's purported departure from precedent significantly affects the fairness, expeditiousness, outcome or timely advance of this particular trial.

15. For the reasons above, the Prosecution has not satisfied the requirements of Rule 73(B) and the Request accordingly is **DENIED**.

Dated this seventeenth day of October 2006
At The Hague,
The Netherlands.



Judge Iain Bonomy
Presiding

[Seal of the Tribunal]

³⁶ See *supra* paragraph 9.

³⁷ Request, para. 17.