



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: 14 March 2007
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: 14 March 2007

PROSECUTOR

v.

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

**DECISION ON PROSECUTION REQUEST FOR CERTIFICATION OF
INTERLOCUTORY APPEAL OF SECOND DECISION ON ADDITION OF
WESLEY CLARK TO RULE 65 TER LIST**

Office of the Prosecutor

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Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
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 to Appeal the Second Decision Regarding the Addition of General Wesley Clark to the Prosecution’s Witness List”, filed on 23 February 2007 (“Request”), and hereby renders its decision thereon.

Brief Background

1. On 16 February 2007, the Trial Chamber issued its “Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark” (“Decision”), refusing the addition of Wesley Clark to the Prosecution’s witness list.¹ The Chamber did so because of its concern regarding the proposed Rule 70 restrictions on the cross-examination of General Clark, as well as its apprehension regarding the delay caused by the manner in which the Prosecution has chosen to conduct this matter.² The Prosecution in its Request asks the Chamber to certify the Decision for interlocutory appeal to the Appeals Chamber.

2. On 1 March 2007, the Defence filed its “Joint Defence Response to Prosecution Application for Certification to Appeal: Testimony of General Wesley Clark” (“Response”), in which it opposes the certification.

Applicable Law

3. Rule 73(B) governs the exercise of the Chamber’s discretion to grant certification of an interlocutory appeal against one of its decisions³ and provides that a Trial Chamber “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.” The “effect of Rule 73(B) is to preclude certification unless its conditions are

¹ For a full procedural history of this matter, see Decision, para. 1; Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark, 15 January 2007, para. 1; and confidential Decision on Joint Defence Motion to Exclude Evidence for Failure to Comply with Disclosure Obligations, 18 October 2006, paras. 1–8.

² Decision, para. 32.

³ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 (“*Strugar* Decision”), para. 2.

satisfied, but, in a case where they are satisfied, certification remains in the discretion of the Trial Chamber.”⁴

4. A proper 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.”⁵ Although matters of obvious importance might commend themselves for certification, “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”.⁶

Submissions

5. The Prosecution argues that its Request meets both requirements of Rule 73(B). With respect to the first prong, it submits that there are three aspects of the Decision which satisfy it. First, the Decision addresses the scope of witness examination, more specifically, the rejection of proposed evidence due to potential restrictions on cross-examination. According to the Prosecution, in analogous situations in the *Martić*⁷ and *Simić*⁸ cases, where the issue was one of examination of witnesses and consideration of evidence for which there had been incomplete cross-examination, the Trial Chambers granted certification.⁹ The Prosecution thus argues that, since the Decision here prevents General Clark from testifying due to restrictions upon his cross-examination, it meets the first prong.¹⁰

6. Second, the Decision also satisfies the first prong, according to the Prosecution, because it defines the relationship between Rules 70(B) and 75, and the authority of one Trial Chamber to

⁴ *Strugar* Decision, para. 2.

⁵ *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 (observing 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”) (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).

⁶ *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. *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.

⁷ *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Defence Application for Certification of Appeal Pursuant to Rule 73(B), 20 June 2006 (“*Martić* Decision”).

⁸ *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Decision on Prosecutor’s Motion for Trial Chambers [*sic*] Redetermination of Its Decision of 2 April 2003 Relating to Cross-Examination of Defence Rule 92 *bis* Witnesses or Alternatively Certification Under Rule 73(B) of the Rules of Procedure and Evidence, 28 April 2003 (“*Simić* Decision”).

⁹ Request, paras. 13–14.

¹⁰ Request, para. 15.

revisit “protective measures” imposed by another.¹¹ Finally, the Decision, according to the Prosecution, raises the issue of determining prejudice under Rule 70(G), and, in particular, the issue of whether the Defence must demonstrate actual or potential prejudice to exclude otherwise relevant evidence.¹² In that respect, the Prosecution submits that it is the former that must be demonstrated. In this particular case, it should be determined only after the Defence has put a question to General Clark, which he then refuses to answer on the basis of Rule 70. It is at that point, the Prosecution argues, that the Chamber would be fully informed in the exercise of its discretion under Rule 70(G) to prevent actual, unfair prejudice to the Defence.¹³

7. As far as the second prong of Rule 73(B) is concerned, the Prosecution puts forth three aspects of the Decision that meet it. First, it is argued that the advanced stage of the proceedings here justifies immediate resolution by the Appeals Chamber. This, again, is analogous to the situations in *Martić* and *Simić*, where the parties were nearing the beginning of the defence case and the end of the trial, respectively, when certification was sought.¹⁴ Second, the Prosecution argues that the Decision concerns an unsettled legal issue, namely the propriety of restrictions on the scope of examination of the same witness across multiple cases, an issue which is likely to arise in other cases. In addition, the Decision is in conflict with a decision in the *Milošević* case, which provided the same witness with the same protections sought by the Prosecution here.¹⁵ In support of this line of argumentation, the Prosecution cites two decisions where the Trial Chamber found that an unsettled legal issue satisfies the second prong of Rule 73(B).¹⁶

8. Finally, the Prosecution states that the Request meets a threshold showing of materiality, that is, it shows some basis for believing that the Trial Chamber committed an error of law in respect of four matters. These relate to the fact that the conditions imposed in the *Milošević* Decision were predicated upon Rule 75 rather than Rule 70; that the Trial Chamber does in fact retain control of the proceedings at all times, notwithstanding conditions of a Rule 70 provider; that the Defence can seek the agreement of the United States Government to vary the Rule 70 conditions without disclosing to the Prosecution its strategy and theories; and that the Chamber’s rejection of the conditions imposed in the *Milošević* Decision will create uncertainty and have a

¹¹ Request, para. 16.

¹² Request, para. 17.

¹³ Request, para. 18.

¹⁴ Request, paras. 20–23; *Martić* Decision, p. 2 ; *Simić* Decision, p. 3.

¹⁵ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Application for a Witness Pursuant to Rule 70(B), 30 October 2003 (“*Milošević* Decision”).

¹⁶ *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, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decisions of the Trial Chamber, 6 May 2003, p. 2.

chilling effect upon the willingness of Rule 70 providers to share sensitive information with the Tribunal, thereby undermining the very purpose of Rule 70(B).¹⁷ In support, the Prosecution cites a number of decisions.¹⁸

9. The Defence in its Response argues that the Request does not come close to meeting the standard for certification to appeal set forth in Rule 73(B). It starts with the second prong first, arguing that it is not satisfied because certification at this stage would impede rather than advance the proceedings since the trial would have to be suspended until the Appeals Chamber renders its decision on the merits. According to the Defence, it cannot reasonably be expected to file its “pre-defence briefs” and lay out its case while the prospect remains that General Clark may testify and attempt to remedy any deficiencies or rebut factual issues previewed in the Defence filings.¹⁹

10. Furthermore, the first prong is also not satisfied, according to the Defence, because this is not an issue which will seriously affect the fairness of the trial.²⁰ The Defence notes that even if the Prosecution is correct and the conditions imposed in the *Milošević* Decision applied to this case, *mutatis mutandis*, the Chamber has the authority to modify them, as shown by the Prosecution’s own request to do so. Accordingly, the outcome would have been the same.²¹ As far as the Prosecution’s argument that the Chamber erred by ruling upon the proposed Rule 70 conditions in advance, rather than waiting until specific questions were put to General Clark on the stand, the Defence argues that this position is totally opposite to the position originally held by the Prosecution and Rule 70 provider before the Chamber. In other words, the United States Government was the one who imposed a condition that the requested Rule 70 measures be adopted. Since that condition could not be met, the United States never gave consent for General Clark to testify in the first place. Thus, it was the provider, and not the Trial Chamber, who decided that General Clark would not testify.²²

¹⁷ Request, paras. 26–27.

¹⁸ Request, para. 26, note 19.

¹⁹ Response, paras. 3–4.

²⁰ Response, para. 5.

²¹ Response, para. 6.

²² Response, para. 7.

Discussion

11. The Trial Chamber will now address the parties' arguments with respect to the two prongs of Rule 73(B).

12. As far as the first prong is concerned, the Chamber first notes that the *Simić* Decision and the *Martić* Decision can be distinguished from the Decision currently at issue. In both those cases, the issue related to a party to the proceedings being *denied* an opportunity to cross-examine the witness on certain parts of his evidence. In *Martić*, this happened because the witness committed suicide half-way through his cross-examination and his evidence was later admitted by the Trial Chamber despite the defence not being able to conclude the cross-examination.²³ In *Simić*, portions of the witness's statement were struck from the record and yet the Prosecution sought to cross-examine upon them, which was then denied by the Trial Chamber.²⁴ In the Decision here, the Chamber, far from denying the parties an opportunity to cross-examine General Clark, attempted to ensure the Defence's right to conduct cross-examination on the relevant topics the Defence wished to raise, including the credibility of the witness. Accordingly, this Decision is not about an important right being curtailed by the Chamber, but rather the preservation of a right of the parties (here, the Defence) to a fair trial, in line with the relevant provisions of the Statute of the Tribunal and the Rules of Procedure and Evidence, as referred to in the original Decision.²⁵

13. Nevertheless, the Chamber is of the view that the issue in both *Simić* and *Martić* cases can broadly be defined as one relating to a right of an accused to cross-examine witnesses and that the impugned Decision, as correctly stated by the Prosecution, is concerned with essentially the same matter, namely the right of a party to adduce potentially important evidence in a trial (here, the Prosecution). Like the Chamber in *Martić* and *Simić*, the Chamber here is of the view that this is an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In addition, this Decision ultimately also deals with the issue of a Trial Chamber's ability to control its own proceedings by controlling cross-examination of the witnesses appearing before it. As such, it is concerned with the very core of any judicial exercise, namely, the issue of judicial independence. This is certainly a matter that is able significantly to affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

²³ *Simić* Decision, p. 2.

²⁴ *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together With Associated Exhibits, from Evidence, 20 June 2006, para. 2.

²⁵ The Chamber, relying upon Articles 20 and 21 of the Statute, as well as Rules 70(G) and 89(D), held that "[t]o restrict cross-examination to the subject matter predetermined by anyone other than the Chamber, with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence". Decision, para. 27.

14. Finally, the Chamber notes that the first requirement of Rule 73(B) is concerned not only with expeditiousness but also with *fairness* of the conduct of the proceedings or the outcome of the trial. The Chamber recalls the Prosecution's argument that the impugned Decision prevents General Clark from testifying and, as such, affects the fair and expeditious outcome of this trial. While not necessarily accepting this assertion, since it is the Rule 70 provider that is ultimately preventing General Clark from testifying, the Chamber is aware that its Decision is the *likely* proximate cause of the loss of his evidence. The Chamber also acknowledges the Prosecution's position that the evidence General Clark is expected to give is to be of a highly relevant and probative nature, as he is someone who dealt personally with some of the Accused. For that reason also, the Chamber is of the view that the Decision significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the first prong of Rule 73(B) is satisfied.

15. With respect to the second prong of Rule 73(B), in support of its argument that the test is met, the Prosecution has principally relied upon the arguments that the Chamber has erred in law in a number of respects and that its different approach to the Rule 70 conditions proposed for the witness from that adopted in the *Milošević* trial has caused uncertainty about the procedure to be followed. These arguments have little or nothing to do with the question of whether an immediate resolution of the matter by the Appeals Chamber may materially advance the proceedings. Of much more importance to that issue is the question of whether leaving the matter to be resolved in any later appeal creates a risk of unnecessarily complicating and delaying the proceedings, all of which could be avoided by having the matter resolved at this stage.

16. The Chamber is mindful of the fact that its Decision involved the exclusion of evidence. If the Appeals Chamber were to reverse that Decision it would be necessary for it to hear the evidence. In the interim, that evidence could be lost to the Tribunal. The Chamber also notes its recent "Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Defence Rule 65 *ter* Filings," issued on 5 March 2007, in which it indicated that it was giving consideration to granting a Defence request for a significant period of the adjournment of the trial between the close of the Prosecution case and the start of the Defence case, which is likely to lead to the start of the Defence case being fixed for a date in the summer. It should be possible for an appeal to be dealt with as a matter of urgency and disposed of well within that period. In the meantime, the Defence can continue to make use of that period for the preparation of its case. There will inevitably be some disruption to these preparations caused by the demands of presenting its response to the appeal but that disruption should not be very significant. For these reasons the Chamber considers

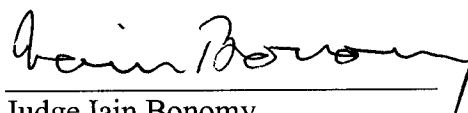
that an immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings. The second prong of the test is accordingly also met.

17. In deciding whether to pursue this appeal the Prosecution will be conscious of the importance of ensuring that it is not, ultimately, a futile exercise in view of the possible unavailability of the witness.²⁶

Disposition

18. For the foregoing reasons and pursuant to Rule 73(B), the Trial Chamber hereby GRANTS the Request.

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



Judge Iain Bonomy
Presiding

Dated this fourteenth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ The Chamber notes that, on 14 March 2007, during the hearing, the Prosecution informed the Chamber and the parties that one of the Rule 70 witnesses, namely Shaun Byrnes, who was added to the Prosecution witness list by the Chamber on 12 March 2007, is now most likely unavailable to come and give evidence before the scheduled end of the Prosecution case. In respect of General Clark, the Prosecution informed the Chamber that, even assuming that the proposed Rule 70 conditions are modified by the Rule 70 provider, General Clark would also not be available to come and give evidence before the scheduled closing of the Prosecution case, that is, before 23 March 2007.