



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-95-5/18-T

Date: 20 April 2010

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 20 April 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION,
ALTERNATIVELY FOR CERTIFICATION, OF THE DECISION CONCERNING THE
EVIDENCE OF MIROSLAV DERONJIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 Motion for Reconsideration, Alternatively for Certification, of the Decision Concerning the Evidence of Miroslav Deronjić”, filed on 30 March 2010 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 23 March 2010, the Trial Chamber issued its “Decision on Prosecution’s Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *quater*” (“Deronjić Decision”) in which it denied a motion for admission of Deronjić’s evidence filed by the Office of the Prosecutor (“Prosecution”) under Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”). The Chamber denied admission of the evidence Deronjić gave in a number of previous cases, in its entirety, on the basis that it had serious concerns about his reliability, particularly with regard to his evidence concerning the Accused, and the probative value of his evidence was substantially outweighed by the need to ensure a fair trial.¹ The Chamber also provided examples of Deronjić’s evidence which caused it concern. Those examples related to his evidence about the events in Srebrenica in 1995.

2. In the Motion, the Prosecution seeks reconsideration of the Deronjić Decision, only insofar as it concerns Deronjić’s evidence relating to the period of 1991 to 1993, arguing that it involves several clear errors of reasoning which warrant this reconsideration.² The Prosecution first argues that the Chamber, when assessing Deronjić’s evidence, erred in its application of the applicable test under Rule 89(D) of the Rules, which posits that evidence may be excluded if its probative value is “substantially outweighed by the need to ensure fair trial.” According to the Prosecution, while identifying the test correctly in paragraphs 15 and 34 of the Deronjić Decision, the Chamber then made its ruling on the reliability of Deronjić’s evidence, omitting to use the term “substantially”.³ The Prosecution also argues that, once the Chamber decided “to reject the Srebrenica related evidence, it should have separately considered the admissibility of

¹ Deronjić Decision, para. 39. The Chamber notes that in paragraph 39 it stated that “the probative value of Deronjić’s evidence is outweighed by the need to ensure a fair trial”, which appears to have caused confusion concerning the test that was applied.

² Motion, paras. 2–3. With respect to Deronjić’s evidence relating to 1995, the Prosecution does not seek reconsideration of or certification to appeal the Deronjić Decision but states that this is without prejudice to any challenge the Prosecution may bring on appeal from judgement. See Motion, footnote 1.

³ Motion, paras. 4–5.

the evidence related to 1991–1993.”⁴ In other words, according to the Prosecution, the Chamber did not “sufficiently consider which portions of Deronjić’s evidence it might admit” and did not “distinguish between the evidence pertaining to 1991–1993 and the evidence related to 1995, nor did it consider to admit the parts of the evidence not dealing with the acts and conduct of the Accused.”⁵ The Prosecution then argues that Deronjić’s evidence relating to 1991–1993 is relevant and probative, and its probative value is not substantially outweighed by the need to ensure a fair trial, and provides reasons why that is so, including the fact that the *Krajišnik* Trial Chamber relied extensively on this evidence following Deronjić’s testimony in that case, and the fact that this evidence is corroborated by other evidence to be presented in this case.⁶

3. In the alternative, the Prosecution argues that the Chamber should certify this issue for interlocutory appeal. According to the Prosecution, “while issues concerning admission of evidence are not ordinarily suitable for interlocutory appeal, the admission or exclusion of evidence may meet the certification test.”⁷ In support, the Prosecution points to the *Popović et al.* case where the Chamber admitted portions of Deronjić’s evidence and, when certification of that decision was sought by the defence, it was granted on the basis that (i) the evidence admitted went to the acts and conduct of the accused and concerned an issue which would significantly affect the fair and expeditious conduct of the trial and (ii) the immediate resolution of the issue by the Appeals Chamber could reasonably advance the proceedings since, if the decision was wrong, the defence case of one of the accused would be reduced. The Prosecution submits that denying the admission of Deronjić’s evidence relating to 1991–1993 unfairly disadvantages the Prosecution and will have a negative impact on the expeditious conduct of the proceedings as the Prosecution will have to call additional evidence.⁸

4. The Prosecution finally adds that “if the Trial Chamber made the Decision without prejudice to the Prosecution filing a motion for admission of parts of Deronjić’s evidence, the Prosecution requests the Chamber to issue directions to that effect, as an alternative remedy.”⁹

5. The Accused filed his “Response to Prosecution’s Motion for Reconsideration/Certification re: Miroslav Deronjić Evidence” on 7 April 2010 (“Response”). He argues that reconsideration should be denied because no error of reasoning has been shown and the Prosecution made no attempt to show how exclusion of Deronjić’s evidence would

⁴ Motion, paras. 6–11.

⁵ Motion, para. 7.

⁶ Motion, paras. 12–25.

⁷ Motion, paras. 26–27.

⁸ Motion, paras. 27–30. See *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92 *quater* Decision, 19 May 2008.

result in an injustice given Deronjić's lack of reliability as a witness. According to the Accused, the Chamber was well aware that the original motion encompassed both 1995 and 1991–1993 events. The fact that it then illustrated its concerns about Deronjić's reliability by reference to Deronjić's 1995 evidence, does not mean that the same concerns would not apply to his 1991–1993 evidence.¹⁰

6. The Accused also argues that this issue should not be certified for an appeal because neither prong of the certification test has been met. First, exclusion of Rule 92 *quater* evidence cannot sufficiently affect the fairness of the trial or its outcome, since, even if admitted, the evidence cannot be relied upon as the sole basis of a conviction.¹¹ Second, an immediate resolution of this issue is unnecessary since the Prosecution could, on appeal of the final Judgement, attempt to persuade the Appeals Chamber that the result would have been different but for the erroneous exclusion of Deronjić's pre-1995 evidence.¹²

II. Applicable Law

7. There is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.¹³ However, the Appeals Chamber has articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"¹⁴ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.¹⁵

⁹ Motion, para. 32.

¹⁰ Response, paras. 3–7.

¹¹ Response, para. 8.

¹² Response, paras. 9–11.

¹³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

¹⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Réconsideration de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

¹⁵ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 3.

8. The Tribunal's Rules do contemplate applications for certification to appeal decisions issued by a Trial Chamber. According to the Rules, decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁶ Rule 73(B) provides that a Trial Chamber may grant certification to appeal 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."

III. Discussion

A. Reconsideration

9. Applying the first prong of the test for reconsideration to the present Motion, the Chamber is of the view that the Prosecution has failed to demonstrate a clear error of reasoning on behalf of the Chamber. With respect to the applicable test used by the Chamber in the Deronjić Decision, while the final ruling in paragraph 39 of the Deronjić Decision could perhaps have been formulated more clearly, the Chamber is of the view that the remainder of the Decision clearly indicates the test that was used and ultimately applied by the Chamber when considering the reliability of Deronjić's evidence was the correct one.

10. Furthermore, the Prosecution's claim that the Chamber failed to assess whether other portions of Deronjić's evidence should be admitted is also flawed. As noted in the Deronjić Decision, the Chamber was aware of the fact that Rule 92 *quater* allows for the admission of only parts of evidence that are found to meet the requirements of Rule 92 *quater* and Rule 89.¹⁷ Nevertheless, the Chamber denied his evidence in its entirety primarily because he admitted to not being honest when it came to this particular Accused and because he did not have a complete recollection of all the events in which he participated, as well as the fact that his evidence contained an inordinate amount of evidence about the acts and conduct of the Accused. Thus, having had serious concerns about Deronjić's reliability in relation to one aspect of his evidence, it was perfectly reasonable for the Chamber to conclude that his evidence, in its

¹⁶ Rules 72 and 73 of the Rules.

¹⁷ Deronjić Decision, para. 10. This can be seen from the approach the Chamber took in its subsequent decision relating to the evidence of another deceased witness, Milan Babić, where it declined to admit parts of his testimony on the basis that their probative value was substantially outweighed by the need to ensure a fair trial. See Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *quater*, 13 April 2010.

entirety, was tainted, and that the Accused's right to a fair trial would be compromised if this evidence was accepted without the Accused having an opportunity to cross-examine Deronjić.¹⁸

11. The Prosecution's submissions relating to the reliability of Deronjić's 1991–1993 evidence also do not help as these relate to assessments that were made by other Chambers in completely different contexts, including in a sentencing hearing, as well as in the *Krajišnik* case where Deronjić testified *viva voce* and was available for cross-examination. However, as stated earlier by this Chamber, it cannot rely on the assessments made by other Chambers as it is for this Chamber to make its own assessment of Deronjić's reliability, and to determine whether to admit his evidence under Rule 92 *quater*, in light of all the circumstances of this particular case. In addition, in the Deronjić Decision, the Chamber clearly considered the Prosecution's submissions in relation to the assessments of Deronjić made by the *Krajišnik* Chamber, and distinguished it on the basis that Deronjić was available for cross-examination in that case.¹⁹

12. As for the second prong of the test for reconsideration, the Chamber agrees with the Accused that the Prosecution does not appear to address it in the part of its Motion dealing with reconsideration.²⁰ Instead, the Prosecution provides a long list of other evidence it says corroborates Deronjić's evidence, and then simply notes that his evidence is necessary so that the "fullest information is available to the Trial Chamber to make the most informed determination."²¹ This submission, however, does not help the Prosecution when it comes to the second prong but rather detracts from it by showing that the Prosecution will not be greatly disadvantaged since it can make use of its other evidence instead.²² In addition, it is to be expected that any party whose attempt at tendering evidence is denied by a Chamber would feel disadvantaged in some way or another. However, this is not the type of "injustice" that the Chamber should be concerned with when considering whether or not to reconsider one of its decisions.²³ Accordingly, it cannot be said that the reconsideration of the Deronjić Decision is necessary to prevent injustice.

¹⁸ Deronjić Decision, paras. 27, 31.

¹⁹ Deronjić Decision, paras. 31–32.

²⁰ The Chamber notes that in the second part of its Motion, the one dealing with an application for certification, the Prosecution refers to the fact that it is being unfairly disadvantaged by the Chamber's refusal to admit Deronjić's evidence of events in 1991–1993. To the extent that this argument could be seen as going to the second prong of the test for reconsideration, the Chamber does not consider it persuasive, given that it could not convict the Accused based on Deronjić's evidence alone and the Prosecution has stated that it intends to present other evidence to support it.

²¹ Response, paras. 22–25.

²² The Chamber notes that this includes evidence from a survivor of the attack on Glogova. See Motion, para. 23(e).

²³ See Decision on Prosecution Request for Reconsideration of Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, para. 11.

13. For all those reasons, the Chamber considers that the Prosecution's application for reconsideration should be denied.

B. Certification

14. With respect to the first prong of the test for certification, while it may be true that the Deronjić Decision could have an impact on the expeditious conduct of these proceedings (in case the Prosecution decides to call additional evidence), given the amount of evidence which the Prosecution says is corroborative of Deronjić, this impact is likely to be minimal. Furthermore, as far as the fair conduct of the proceedings is concerned, the Prosecution has not, other than referring to the *Popović* decision and then saying that it will be "similarly" disadvantaged as the defence in that case, pointed the Chamber to any reason as to how the issues raised in the Deronjić Decision significantly affect the fair conduct of the trial. The Chamber reiterates once again that a conviction cannot be based on uncorroborated evidence admitted pursuant to Rule 92 *quater*. In light of this, even if Deronjić's evidence had been admitted, the Prosecution would have had to present other evidence to corroborate it, which it intends to do anyway. Thus, the issue of admission of Deronjić's evidence alone cannot have any significant effect on the fair conduct of the proceedings. The Chamber is of the view that the same argument can be made in relation to the final part of the first prong of the test, namely that the Deronjić Decision involves issues that significantly affect the outcome of the trial. Accordingly, the Chamber is not convinced that the first prong of the test for certification has been satisfied by the Prosecution.

15. Even if the Chamber had reached a different conclusion regarding the first prong of the test, the Prosecution's application for certification would have failed on the second prong as the Chamber cannot see how an immediate resolution of this issue by this Appeals Chamber would materially advance the proceedings. In case of an acquittal of the Accused on the charges relating to the events in 1991 to 1993 discussed by Deronjić, it will be open to the Prosecution to attempt to persuade the Appeals Chamber that, had it not been for the exclusion of this evidence, the convictions would have been entered. Indeed, the Prosecution has reserved its right to do so in relation to Deronjić's evidence relating to events in Srebrenica in 1995.

16. Accordingly, for all those reasons, the Chamber considers that the Prosecution's application for certification to appeal should also be denied.

IV. Disposition

17. For all the reasons outlined above, the Trial Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twentieth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]