



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-08-91-T
Date: 18 June 2010
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 18 June 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING PROSECUTION'S MOTION
REQUESTING CERTIFICATION TO APPEAL
DECISION OF 14 APRIL 2010 (AMENDMENT OF
EXHIBIT LIST)**

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

TRIAL CHAMBER II (“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 seized of “Prosecution’s motion for certification of decision granting in part Prosecution’s motion of 18 February 2010 to amend its Rule 65*ter* exhibit list and denying Prosecution’s supplemental motion of 2 March 2010,” filed on 21 April 2010 (“Motion”).

I. BACKGROUND

1. In the Motion, the Prosecution requests certification to appeal the Trial Chamber’s decision of 14 April 2010 (“Decision”) insofar as it denied the Prosecution motion to add to its exhibit list documents that were subject of the underlying motions.¹ Neither the Defence of Mićo Stanišić nor the Defence of Stojan Župljanin has responded.

II. APPLICABLE LAW

2. In order to challenge a decision at this stage of the proceedings the Prosecution must show that an issue therein meets both requirements of Rule 73(B).² Namely, the impugned decision must involve “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (the ‘first prong’), and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings (the ‘second prong’).”³ Decisions on certification are not concerned with whether or not an impugned decision was correctly reasoned.⁴

3. Rule 73(B) precludes certification unless the Trial Chamber finds both requirements of the Rule are satisfied, even when an important point of law is raised.⁵ Even where both requirements are satisfied, certification remains at the Trial Chamber’s discretion.⁶

¹ Prosecution’s motion for certification of decision granting in part Prosecution’s motion of 18 February 2010 to amend its Rule 65*ter* exhibit list and denying Prosecution’s supplemental motion of 2 March 2010, 21 Apr 2010 (“Motion”), para. 1.

² *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Gotovina Defence request for certification to appeal the Trial Chamber decision of 4 November 2009, 20 Jan 2010, 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 Jan 2005, p. 2; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence motion for certification, 17 Jun 2004, para. 2; *Prosecutor v. Slobodan 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. 3.

³ Rule 73(B), Rules of Procedure and Evidence.

⁴ *Prosecutor v. Tolimir*, Case No. IT-05-82/2-PT, Decision on request for certification of decision on Prosecution motion for judicial notice of adjudicated facts, 23 Feb 2010, p. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence motion for certification to appeal decision on Prosecution motion for judicial notice of adjudicated facts, 20 Oct 2006, p. 2; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution motion for certification of Trial Chamber decision on Prosecution motion for *voir dire* proceedings, 20 Jun 2005, para. 4.

⁵ *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 Jan 2005, p. 1.

III. SUBMISSIONS

4. With regard to the first prong, the Prosecution “seeks clarification on appeal whether the Trial Chamber properly applied the legal test for deciding a motion to amend a Rule 65*ter* exhibit list” established by the Appeals Chamber in *Popović*,⁷ submitting that the application of the *Popović* test is “absent from the Trial Chamber’s reasoning” in the Decision.⁸

5. The Prosecution contends, in particular, that the Trial Chamber “made no findings regarding: (1) whether the documents are relevant and important to this case; (2) the extent to which adding the documents to the exhibit list would unduly prejudice the Accused; and (3) whether the rights of the Accused could be adequately safeguarded through means other than excluding potentially relevant and important material.”⁹ Instead, the Prosecution argues, the Trial Chamber “based its denial of the Prosecution’s request solely on the finding that the Prosecution failed to establish sufficient good cause for seeking to amend its exhibit list.”¹⁰

6. The Prosecution further submits that the Trial Chamber “on at least two occasions equated ‘good cause’ with ‘due diligence’, failing to consider the many other factors relevant to this inquiry”, as well as “applied a narrow definition of due diligence.”¹¹

7. The Prosecution submits that the “issue” of whether the Trial Chamber is properly applying the *Popović* test “significantly affects the fair conduct of the proceedings in this case and will have a substantial impact on the outcome of the trial,” in that its “case relies heavily on documentary evidence”, “[t]he documents that [it] has selected to add to its exhibit list are highly probative to contested issues in this case and are only a small fraction of the total number of documents that are relevant to these issues,” and the Decision “denies [it] the opportunity to adduce this evidence in order to meet its burden of proof, despite the absence of any demonstrable undue prejudice to the

⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s application for certification to appeal decision on motions for extension of time: Rule 92*bis* and response schedule, 8 Jul 2009, para. 11; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s request for certification of appeal of decision on Vladimir Lazarević and Sreten Lukić’s preliminary motions on form of the indictment, 19 Aug 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-03-54-T, Decision on Prosecution motion for certification of Trial Chamber decision on Prosecution motion for *voir dire* proceeding, 20 Jun 2005, 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 Jan 2005, p. 1.

⁷ Motion, para. 1, referring to *Prosecutor v. Popović*, Case no. IT-5-88-AR73.1, Decision on appeals against decision admitting material relevant to Borovčanin’s questioning, 14 Dec 2007, para. 37 (“*Popović* test”) (“In the exercise of its inherent discretion in managing the trial proceedings, and if satisfied that this is in the interests of justice, a Trial Chamber [...] may grant a Prosecution’s request to amend [the Rule 65*ter*] list. In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of the case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition. Moreover, a Trial Chamber must carefully balance any amendment to the lists in Rule 65 *ter* with an adequate protection of the rights of the accused.”)

⁸ Motion, para. 9.

⁹ *Ibid.*

¹⁰ *Ibid.*

Accused that would result from allowing the Prosecution to add these documents to its exhibit list.”¹²

8. With regard to the second prong, the Prosecution argues that an “immediate appellate review of the [Decision] will materially advance these proceedings,” as the “issue of adding documents to its Rule 65*ter* list is consuming the parties’ and the Trial Chamber’s dwindling time and resources.”¹³ The Prosecution submits that, as a result of the Trial Chamber’s “decisions thus far”, it “has reached the point where it is uncertain how to proceed with documents that it discovers during its ongoing review of this case that are probative of the evidence of upcoming witnesses or issues raised by the Defence in the course of this trial.”¹⁴ In this regard, the Prosecution notes its “ongoing duty to review materials within the Tribunal’s evidence databases that may fall under Rules 66 and 68 as issues are raised for the first time, or further clarified, during the trial.”¹⁵

9. Additionally with regard to the second prong, noting the “diminishing number of witnesses through whom to admit its remaining documentary evidence”, the Prosecution submits that the “[i]mmediate resolution of this issue will [...] allow the Prosecution the opportunity to examine witnesses concerning the documents at issue before” the “rapidly approaching” end of its case-in-chief.¹⁶

IV. DISCUSSION

10. Having considered the Prosecution arguments, the Trial Chamber is not persuaded that the issue involved in the Decision, that is, the exclusion of specific documents from the Prosecution exhibit list, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Prosecution has not provided any indication as to how or why the absence of these particular documents would lead to such a result or reduce its ability to meet its burden of proof. Nor does the Prosecution’s mere assertion that the documents it seeks to add to its exhibit list are highly probative convince the Trial Chamber that this issue would have such a significant effect.

11. Moreover, despite the fact that Tribunal jurisprudence consistently states that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned, it is largely on that basis that the Prosecution claims to have satisfied the first prong.

¹¹ Motion, para. 10.

¹² Motion, para. 11.

¹³ Motion, para. 12.

¹⁴ *Ibid.*

¹⁵ Motion, fn. 21.

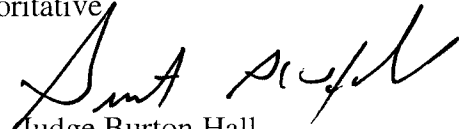
¹⁶ Motion, para. 13.

12. As such, the Trial Chamber is of the view that the Prosecution has failed to establish that the Decision involves an issue that satisfies the first prong of Rule 73(B). Accordingly, the Trial Chamber will not address the Prosecution's submissions regarding the second prong.

V. DISPOSITION

13. For the foregoing reasons, in accordance with Rule 73(B), the Trial Chamber **DENIES** the Motion.

Done in English and French, the English version being authoritative


Judge Burton Hall
Presiding

Dated this eighteenth day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]