



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: 23 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: 23 June 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION ON PROSECUTION'S MOTION REQUESTING
CERTIFICATION TO APPEAL DECISION OF 24 MARCH 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 seised of “Prosecution’s request for certification of decision denying Prosecution’s motion for leave to amend its Rule 65 *ter* exhibit list with regard to documents related to witnesses ST187 and ST126, with annexes A and B,” filed on 31 March 2010 (“Motion”).

I. BACKGROUND

1. In the Motion, the Prosecution requests certification to appeal the Trial Chamber’s decision of 24 March 2010 (“Impugned Decision”) insofar as it denied a Prosecution motion to add to its exhibit list two documents – Rule 65 *ter* nos. 3575 and 1609, pertaining respectively to witnesses ST187 and ST126.¹ Neither the Defence of Mićo Stanišić nor the Defence of Stojan Župljanin has responded.

II. APPLICABLE LAW

2. In order to challenge a decision by way of interlocutory appeal, Rule 73(B) requires the Prosecution to show that the Impugned Decision meets both requirements of that Rule:² that it involves, first, “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and second, that “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

3. Decisions on certification are not concerned with whether or not an impugned decision was correctly reasoned.³ Rule 73(B) permits certification only where the Trial Chamber finds both

¹ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Prosecution’s request for certification of decision denying Prosecution’s motion for leave to amend its Rule 65 *ter* exhibit list with regard to documents related to witnesses ST187 and ST126, with annexes A and B, 31 Mar 2010 (“Motion”).

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 (“Halilović Decision”), 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 *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 (“Milošević Decision”), 20 Jun 2005, para. 4.

requirements of the Rule are satisfied.⁴ However, even where both requirements are satisfied, certification remains within the Trial Chamber's discretion.⁵

III. SUBMISSIONS

4. The Prosecution submits that the Trial Chamber erred in law and incorrectly applied the appropriate legal test by either failing to consider or by failing to "give proper weight to" the relevance of the documents and the lack of prejudice to the Accused.⁶ It also states that the two documents are representative of categories of documents that it will seek to add to its Rule 65 *ter* list in the future.⁷ These categories are defined by the Prosecution as:

- a) recently discovered documents that are relevant and would not cause prejudice to the Defence, and
- b) documents that the Prosecution had previously removed from its Rule 65 *ter* list that are relevant and would not cause prejudice to the Defence.⁸

It therefore seeks a "definitive ruling" from the Appeals Chamber on the issue of whether documents within these categories should be added to its Rule 65 *ter* list where there is "little or no prejudice to the Defence" ("Main issue").⁹ It is noted that the Prosecution also more broadly submits that it seeks a definitive Appeals Chamber ruling defining "the circumstances in which the Prosecution can add documents to its exhibit list" ("Broader issue").¹⁰

5. The Prosecution argues that a determination by the Appeals Chamber will significantly affect the fair and expeditious conduct of the trial since amendment of the exhibit list is a recurring matter which repeatedly expends court time.¹¹ It also submits that an immediate determination by the Appeals Chamber will materially advance the proceedings "by laying this issue to rest."¹²

⁴ *Halilović* Decision, p. 1.

⁵ *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; *Milošević* Decision, para. 2.

⁶ Motion, para. 4, citing *Prosecutor v. Popović et al.*, 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").

⁷ Motion, para. 5.

⁸ *Id.*, paras 5-7.

⁹ *Id.*, para. 5.

¹⁰ *Id.*, fn. 12.

¹¹ *Id.*, para. 8.

¹² *Ibid.*

IV. DISCUSSION

6. As a preliminary matter, the Trial Chamber holds that the Broader issue on which the Prosecution seeks a ruling of the Appeals Chamber is not specific enough to be considered an “issue” within the meaning of Rule 73(B).

7. In respect of the Main issue, the Trial Chamber considers that the Prosecution’s submission – that it will continue to file motions to amend its exhibit list with resulting occupation of time – does not support the request for certification. A party’s future actions, being largely speculative, neither “significantly affect the fair and expeditious conduct of the proceedings” nor “the outcome of the trial.” To accept this argument would make meeting the first prong contingent upon future actions of the relevant party.

8. The Prosecution also submits that “[a]n immediate resolution by the Appeals Chamber will materially advance the proceedings by laying this issue to rest.”¹³ This argument, however, is also speculative. The Trial Chamber assesses each motion to amend a Rule 65 *ter* list based on the parties’ submissions. Given that the Trial Chamber cannot now assess possible future submissions of the parties, this argument does not persuade the Trial Chamber that the second prong is met.

9. For these reasons, the Trial Chamber is not persuaded that the Impugned Decision involves an issue that significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber would materially advance the proceedings.¹⁴

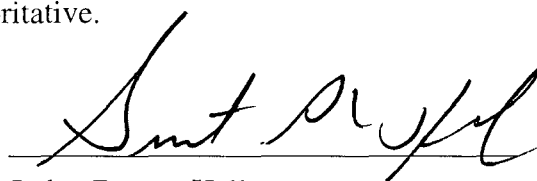
¹³ Motion, para. 8.

¹⁴ The Prosecution’s request for certification rests on its assertion that the Trial Chamber incorrectly applied the *Popović* Test. While an application for certification for leave to appeal is not concerned with the merits of the underlying issue, a Trial Chamber may at any time reconsider its decision. Here, however, the Trial Chamber is satisfied that its decision of 24 March 2010 properly applied the *Popović* Test on the basis of the parties’ submissions.

V. DISPOSITION

10. Pursuant to 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 twenty-third day of June 2010

At The Hague

The Netherlands

[Seal of the Tribunal]