



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-04-75-T
Date: 21 June 2013
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 21 June 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
TRIAL CHAMBER'S DECISION CONCERNING ADMISSION OF
PRIOR INCONSISTENT STATEMENTS**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **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 Defence “Motion for Certification to Appeal the Trial Chamber’s Decision Concerning Admission of Prior Inconsistent Statements”, filed on 14 May 2013 (“Motion”). On 23 May 2013, the Prosecution filed its “Response to Defence Motion for Certification to Appeal Trial Chamber’s Decision Concerning Admission of Prior Inconsistent Statements” (“Response”).

A. Background

2. On 8 February 2013, during its cross-examination of Prosecution witness Samira Baranjek, the Defence sought the admission of two prior statements of the witness, Rule 65 *ter* numbers 03389 and 05961. The Defence submitted that the statements were inconsistent with the witness’s testimony and should be admitted in order to avoid putting every alleged discrepancy to a vulnerable witness during cross-examination.¹ The Defence further submitted that the admission of the documents would be useful for the Trial Chamber to assess their impeachment value.² The Prosecution opposed the admission of the statements on the basis that the statements were not reliable and so the relevant conditions for admission had not been met.³ After having heard the parties in court, the Trial Chamber did not decide finally upon the issue but directed Defence counsel to put any alleged inconsistencies in the prior statements to the witness during cross-examination.⁴ Following the cross-examination of the witness on the content of the two documents, the Trial Chamber affirmed that the Defence’s request to admit the statements was pending and directed the parties to provide written submissions to assist the Trial Chamber in making a final determination on the matter.⁵

3. After having received written submissions from the parties on this matter, the Trial Chamber issued on 7 May 2013 its “Decision on Defence Submissions in Support of Admission of Prior Inconsistent Statements of a Witness for Purposes of Impeachment” (“Impugned Decision”). In this decision, the Trial Chamber recalled that the Appeals Chamber has held that prior inconsistent statements may not only be received into evidence for assessing the credibility of the witness, but also may be admitted as hearsay evidence for the truth of their contents when they fulfil the criteria under the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to relevance, reliability,

¹ Evidentiary Matters, 8 February 2013, T. 3132.

² Evidentiary Matters, 8 February 2013, T. 3133-3134.

³ Evidentiary Matters, 8 February 2013, T. 3134.

⁴ Evidentiary Matters, 8 February 2013, T. 3137-3138.

⁵ Evidentiary Matters, 8 February 2013, T. 3175.

and probative value.⁶ Ultimately, the Trial Chamber observed, it is a matter of discretion for the Trial Chamber whether to admit a prior statement.⁷ The Trial Chamber stated that it was keen to prevent being burdened by the admission of superfluous material and found that the cross-examination of the witness was sufficient for the purposes of assessing her credibility, especially because the majority of the purported inconsistencies cited by the Defence pertained to alleged omissions from the prior statements, rather than discrepancies.⁸ Finally, the Trial Chamber noted that it would take the cross-examination of the witness into account when evaluating the weight to be given to her evidence.⁹

B. Applicable Law

4. According to the Rules, decisions on motions other than preliminary motions are without interlocutory appeal save with certification by the Trial Chamber. Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.¹⁰

C. Submissions

5. In the Motion, the Defence requests the Trial Chamber to certify the Impugned Decision for interlocutory appeal.¹¹ In relation to the first prong of the legal test for certification, the Defence argues that the witness is the only witness who attests to Hadžić's presence during the events described in her testimony and that her credibility is of vital importance to any potential factual findings. According to the Defence, the Trial Chamber's decision not to admit her prior statements deprives the Defence of the opportunity to make full submissions on the nature of the discrepancies between her testimony and the prior statements; that this, in turn, directly affects the Defence's ability to make full submissions on the witness's credibility; and that this significantly affects the

⁶ Impugned Decision, para. 7, citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 31.

⁷ Impugned Decision, para. 7, citing *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 25-26.

⁸ Impugned Decision, para. 8.

⁹ Impugned Decision, para. 8.

¹⁰ See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Commencement of Trial, 18 September 2009, paras 3-4; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *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. 2.

¹¹ Motion, para. 1.

fairness of the proceedings and, potentially, their outcome.¹² Regarding the second prong of the legal test, the Defence argues that an immediate resolution of this issue may materially advance the proceedings in at least two ways: (a) allowing the Defence to streamline its cross-examinations and (b) avoiding, assuming that adverse findings are reached, having the prior statements introduced for the first time on appeal and obliging the Appeals Chamber to make factual determinations *de novo*.¹³ The Defence also argues in relation to the second prong that immediate resolution by the Appeals Chamber will enhance certainty in the proceedings in relation to whether and when prior inconsistent statements may be admitted for impeachment.¹⁴

6. In the Response, the Prosecution opposes the Motion, arguing that it fails to meet the requirements of Rule 73(B).¹⁵ With respect to the first prong of the legal test, the Prosecution argues as follows:

The Accused argues that the impeachment value of GH-116's prior statements relates primarily to information omitted from them, but he also concedes that the major omissions were put to the witness during cross-examination. By implication, what remains are, at most, minor omissions in the prior statements, which are unlikely to significantly affect the weight given the witness's evidence, let alone the outcome of these proceedings.¹⁶

The Prosecution points out that the Impugned Decision does not establish a general rule that prior inconsistent statements will not be admitted, but rather is limited to the individual evidence of one witness.¹⁷ In relation to the second prong, the Prosecution avers that the Defence's argument—that the Impugned Decision will significantly impact the timing and organisation of cross-examination and the length of the Defence case in general—hinges upon a mischaracterisation of the Impugned Decision as establishing a general principle with regard to the admission of prior witness statements. According to the Prosecution, the Impugned Decision, when framed properly, is a discretionary decision of the Trial Chamber on a specific witness, and therefore an appeal will not provide additional certainty in relation to the admission of prior statements of witnesses in the future.¹⁸ Finally, the Prosecution argues that, if both prongs of the legal test are found to be satisfied, the Trial Chamber should nevertheless exercise its discretion to deny the Motion because none of the arguments raised therein are likely to result in a finding that the Chamber abused its discretion.¹⁹

¹² Motion, paras 1, 4-6.

¹³ Motion, paras 1, 7. *See also* para. 4 on p. 4 of the Motion.

¹⁴ Motion, para. 8.

¹⁵ Response, para. 1.

¹⁶ Response, para. 8, *referring to* Motion, para. 5.

¹⁷ Response, para. 10.

¹⁸ Response, para. 12.

¹⁹ Response, para. 13.

D. Discussion

7. At the outset, the Trial Chamber recalls that certification of an interlocutory appeal regarding a decision on the admission of evidence should only be granted in exceptional circumstances. As expressed by the Appeals Chambers of the International Criminal Tribunal for Rwanda,

[i]t is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence. [...] As the Appeals Chamber has previously indicated, Rule 89 (C) of the Rules grants a Trial Chamber a broad discretion in assessing admissibility of evidence.²⁰

8. The Trial Chamber recalls that, after having heard the parties on the initial matter of the admission of the two statements of witness Samira Baranjek, the Trial Chamber specifically directed the Defence to put any alleged inconsistencies to the witness during cross-examination. After the completion of the witness's evidence and after having considered written submissions from the parties on this matter (including a reply brief of the Defence), the Trial Chamber exercised its discretion to deny admission of the documents. In doing so, the Chamber was careful to note that the cross-examination of the witness was sufficient for the purposes of assessing her credibility and that it would take the cross-examination of the witness into account when evaluating the weight to be given to her evidence.

9. As can be seen from the above, the Defence was given the opportunity of putting the purported inconsistencies to the witness during cross-examination. The Trial Chamber therefore does not accept the submissions of the Defence that the Impugned Decision deprived the Defence of the opportunity to make full submissions on the nature of the purported discrepancies in the witness's evidence or on the witness's credibility. The Trial Chamber's decision not to admit these

²⁰ *Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, paras 5, 6. See also *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 6 ("It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to the admissibility of some types of evidence, as well as in defining the modalities of cross-examination and the exercise of this right by the Defence. The Trial Chamber's decision in this case to retain the evidence of Witness Milan Babić pursuant to Rule 89(D) following his death was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of 'the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case.'") (citation omitted); *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 32 ("The decision as to whether a particular piece of evidence will be admitted for the purposes of assessing a witness' credibility and/or for the substance therein must be left to the Trial Chamber's discretion."); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 8 ("Trial Chambers exercise broad discretion as regards admission of evidence.").

two documents—especially in light of the Defence’s opportunity to cross-examine the witness in relation thereto—will not significantly affect the fair and expeditious conduct of the trial.

10. Having determined that the Defence has failed to fulfil the first prong of the legal test for certification of an interlocutory appeal under Rule 73(B), it is not necessary for the Trial Chamber to deal with the second prong of the test.

E. Disposition

11. For the foregoing reasons, the Trial Chamber, by majority and pursuant to Rules 54 and 73 of the Rules, hereby **DENIES** the Motion.

Judge Antoine Kesia-Mbe Mindua appends a dissenting opinion.

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

Done this twenty-first day of June 2013,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. In this Decision, my colleagues, by majority, deny the Motion of the Defence for certification to appeal the Impugned Decision. I respectfully disagree with this conclusion and set forth my reasons below.

2. Rule 73(B) allows for an interlocutory appeal if two cumulative conditions are fulfilled: (a) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.¹ If the two requirements of the Rule are met, a Trial Chamber may exercise its discretion to grant a request for certification.²

3. While I recall that a request for certification is not concerned with whether a decision was correctly reasoned or not,³ I would like to note that, in my view, the Trial Chamber should have exercised its discretion to admit the prior statements of Ms. Baranjek in the Impugned Decision.⁴ During the hearing on 8 February 2013, “after having heard the parties in court, the Trial Chamber did not decide finally upon the issue but directed Defence counsel to put any alleged inconsistencies in the prior statements to the witness during cross-examination.”⁵ However, as I wrote in my Dissenting Opinion appended to the Impugned Decision, Defence counsel “chose solicitously not to do so, taking into account the particular vulnerability of Ms. Baranjek, an eye-witness and a victim who lost her husband during the events and who appeared to be very emotional since she cried very often during her testimony.”⁶

4. Turning to the first prong of the test for certification to appeal, I am of the view that not admitting the two prior statements will deprive the Defence of the opportunity to make full submissions on the nature of the discrepancies between Ms. Baranjek's testimony and her prior statements. This will be, of course, an obstacle to the Defence in its ability to make full submissions regarding the witness's credibility. It goes without saying that such a situation will negatively

¹ See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Commencement of Trial, 18 September 2009, paras 3-4; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. S. 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. 2.

² *Prosecutor v. S. 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. 2; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Radoslav Brđanin's Motion for the Issuance of Rule 73(B) Certification Regarding the Chamber's Rule 70 Confidential Decision, 24 May 2002, para. 3.

³ *Prosecutor v. S. 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.

⁴ Impugned Decision, Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua.

⁵ Impugned Decision, para. 2; Samira Baranjek, 8 February 2013, T. 3138.

impact the fairness of the trial, or possibly its outcome. According to the Defence, Ms. Baranjek is, to date, the only witness who attests to the presence of Hadžić during the events described in her testimony.⁷ Hence, her credibility may be of vital importance to any potential factual findings in relation to Hadžić's presence and conduct during the events she described.

5. Coming to the second prong, I am also of the view that a resolution of this matter may help to advance the proceedings. It seems obvious to me that an immediate resolution by the Appeals Chamber will clarify the issue as to whether and in what circumstances prior statements may be admitted for impeachment. This will allow the Defence to streamline its cross-examination. Such admission will avoid having the prior statements introduced for the first time on appeal and obliging the Appeals Chamber to make a factual determination *de novo*.

6. It is clear to me that the Impugned Decision does not establish a general rule that prior inconsistent statements will not be admitted and that it is limited to this particular situation. However, it shows an inclination of the Trial Chamber. Knowing that it is not the first time that the Trial Chamber is confronted with such a situation and that the parties themselves are not very coherent in their positions, it is time to solve the matter once and for all. In doing so the Trial Chamber will save significant time in the future, to the benefit of a fair and expeditious conduct of trial.

7. For the foregoing reasons, I consider that in its Motion, the Defence has succeeded in fulfilling the first and second prongs of the legal test for certification of an interlocutory appeal under Rule 73(B) and, pursuant to Rules 54 and 73 of the Rules, I would have granted the Motion.

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

Done this twenty-first day of June 2013,
At The Hague,
The Netherlands.



Judge Antoine Kesia-Mbe Mindua

[Seal of the Tribunal]

⁶ Impugned Decision, Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, para. 4.

⁷ Motion, para. 9.