

**UNITED
NATIONS**



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-09-92-T
Date: 15 July 2015
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 15 July 2015

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE DECISION ON THE ADMISSION OF THE
EVIDENCE OF MILAN TUTORIĆ**

Office of the Prosecutor

Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 22 May 2015, the Chamber denied a Defence motion to present Milan Tutorić as an expert witness having found that neither his CV nor his statement demonstrated the specialised knowledge required to testify as an expert pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules") ("Impugned Decision").¹ On 29 May 2015, the Defence sought certification to appeal the Impugned Decision ("Motion").² On 12 June 2015, the Prosecution responded to the Motion ("Response").³

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Impugned Decision prevents it from leading Tutorić's evidence in relation to the events in Srebrenica in 1995.⁴ The Defence further submits that Tutorić's evidence is unique and that, as a result, its inability to present this evidence due to the introduction of a more stringent legal standard for according expert status is an issue that fundamentally affects the fairness of the proceedings, including the Accused's right to a fair trial, and therefore the outcome of the trial.⁵ Referring to previous guidance of the Chamber, the Defence also submits that the inconsistent legal standard applied for expert witnesses adversely affects its ability to present its case and, as the Defence may soon wish to call further expert witnesses, the immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.⁶

3. The Prosecution opposes the Motion, arguing that the Defence fails to demonstrate that the criteria for certification to appeal pursuant to Rule 73 (B) of the Rules are met.⁷ The Prosecution submits that the Defence's argument that the Chamber unreasonably precluded Tutorić's evidence is not substantiated in the Motion.⁸ Accordingly, the Prosecution submits that the Impugned Decision does not result in an appreciable loss of evidence or compromise the ability of the Defence to call evidence challenging the Prosecution's evidence.⁹

¹ T. 36068-36069.

² Defence Motion for Certification to Appeal the Decision on Defence Request to Admit the Written Statement and Oral Testimony of Expert Witness Milan Tutorić, 29 May 2015.

³ Prosecution Response to Defence Motion for Certification to Appeal the Decision on Defence Request to Admit the Written Statement and Oral Testimony of Expert Witness Milan Tutorić, 12 June 2015.

⁴ Motion, paras 2, 6.

⁵ Motion, paras 2, 6-9, 11-15.

⁶ Motion, paras 8, 13-16.

⁷ Response, paras 1, 3-4, 6-8.

⁸ Response, paras 4-5.

⁹ Response, para. 5.

III. APPLICABLE LAW

4. Rule 73 (B) of the Rules requires two cumulative criteria to be satisfied in order for a trial chamber to grant a request for certification to appeal a decision. First, the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and second, the issue must be one for which, in the opinion of the trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

IV. DISCUSSION

5. As a preliminary matter, with regard to the Defence's assertion that the Trial Chamber committed a judicial error in applying an incorrect legal standard in the Impugned Decision, the Chamber reminds the Defence that the appropriate forum for arguments concerning alleged judicial errors in an impugned decision is the appeal itself and not the motion for certification to appeal.¹⁰ Accordingly, the portions of the Motion concerned with this alleged judicial error will not be further considered by the Chamber. The Chamber further considers that the Defence has misrepresented parts of its guidance, for example in suggesting that the Chamber views as irrelevant the methodology underpinning an expert report. The Chamber further notes that it is the totality of a witness's qualifications that determines whether they are recognised as an expert and that the absence of one particular qualification, for example publications in the field, does not in and of itself prevent that witness from being accorded expert status.

6. With regard to the first prong of Rule 73 (B) of the Rules, the Chamber finds the Defence's submission that the Impugned Decision prevents it from leading Tutorić's evidence in relation to the events in Srebrenica in 1995 unconvincing. The Chamber recalls that the Defence initially sought to present Tutorić under Rule 92 *ter* of the Rules, which the Chamber denied, without prejudice, due to a Defence failure to address a specific Prosecution objection.¹¹ In the Impugned Decision, the Chamber has denied Tutorić the status of an expert pursuant to Rule 94 *bis* of the Rules only. The Defence may therefore still lead Tutorić's evidence by presenting him as a fact witness, subject to meeting the requirements under Rules 89 (C), 92 *bis* or *ter* of the Rules. Further, the fact that Tutorić does not qualify as an expert does not in itself prevent the Defence from seeking to present expert evidence, if needed, that may assist the Chamber in better understanding

¹⁰ Motion, paras 2, 6-10, 14-15.

¹¹ T. 30674; Defence Motion Pursuant to Rule 92 *ter* to Admit the Written Testimony of Milan Tutorić, 19 November 2014.

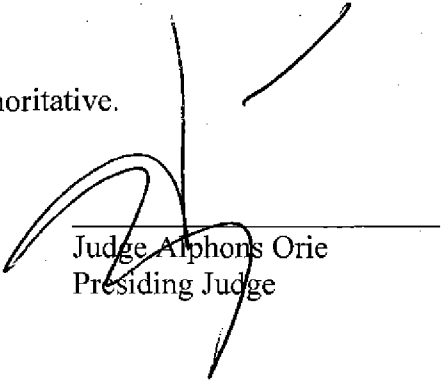
what the Defence claims to be unique information Tutorić can provide, which it may still seek to elicit from him as a witness of fact. For the foregoing reasons, the Chamber finds that the Defence has not established that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. Accordingly, the request for certification to appeal the Impugned Decision fails on the first prong of Rule 73 (B) of the Rules.

7. As the first prong of Rule 73 (B) of the Rules has not been met, and the requirements of this provision are cumulative in nature, there is no need to determine whether the second prong has been met.

V. DISPOSITION

8. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this fifteenth day of July 2015
At The Hague
The Netherlands