



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-04-79-PT  
Date: 16 January 2008  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr. Hans Holthuis

**Decision of:** 16 January 2008

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ**

***PUBLIC***

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**DECISION ON DEFENCE MOTION FOR CERTIFICATION**

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**The Office of the Prosecutor:**

Ms Anna Richterova

**Counsel for the Accused:**

Mr Stevo Bezbradica

1. This decision of the Trial Chamber is in respect of a Defence motion of 3 January 2008 (“Motion”)<sup>1</sup> to grant certification to appeal from the “Decision on Judicial Notice” of 14 December 2007 (“Decision”) in which the Trial Chamber *inter alia* took judicial notice of a number of adjudicated facts proposed for judicial notice by the Prosecution and the Defence in their respective submissions dated 31 August 2006, 1 February 2007, and 10 May 2007.<sup>2</sup> The Motion was duly filed.<sup>3</sup>

2. On 7 January 2008, the Prosecution filed a “Prosecution’s Response to Defence’s Rule 73(B) Request for Interlocutory Appeal Joint Defence Request for Certification of Trial Chamber II’s 14 December 2007 Decision on Adjudicated Facts” (“Response”), by which it requests the Chamber to deny the Motion. The Prosecution submits that the Defence has failed to fulfil the criteria necessary for certification under Rule 73(B). On 15 January 2008, the Defence filed a reply to the Response (“Reply”).<sup>4</sup> In the Reply, the Defence seeks leave from the Chamber to file a reply and refutes the Prosecution’s arguments in the Response.

4. Pursuant to Rule 73(B), decisions on motions are “without interlocutory appeal save with certification by the Trial Chamber”. The Chamber may nevertheless exercise its discretion to grant certification “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”.<sup>5</sup>

3. In the Motion, the Defence expresses concern about the fact that in the impugned Decision the Trial Chamber did not properly take into account the Defence’s objections to the Prosecution’s submissions on judicial notice.<sup>6</sup> In relation to this concern, the Defence further submits that the Trial Chamber did not ensure the proper administration of justice and safeguard the rights of the Accused.<sup>7</sup> In the Response, the Prosecution argues that the Defence has not identified a relevant

<sup>1</sup> “Defence’s Rule 73(B) Request for Interlocutory Appeal Certification of Trial Chamber II’s 14 December 2007 Decision on Adjudicated Facts”.

<sup>2</sup> Prosecution’s Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, with Annex, 31 August 2006; Defence Motion for Judicial Notice of Adjudicated Facts with Annex, 1 February 2007; Prosecution’s Second Motion for Judicial Notice of Adjudicated Facts, with Revised and Consolidated Annex, 10 May 2007.

<sup>3</sup> Pursuant to Rule 73(C) of the Rules of Procedure and Evidence (“Rules”), requests for certification must be filed within seven days of the filing of the impugned decision. By a decision from the duty judge in charge, the Defence was granted an extension of time for filing its request for certification to appeal the Decision until 7 January 2008 (*See*, Decision on Urgent Defence Motion for Extension of Time for Filing Certification of Appeal pursuant to Rule 73(B), 19 December 2007).

<sup>4</sup> Defence’s Motion for Leave to Reply and Proposed Reply to Prosecution’s Response to Rule 73(B) Request for Interlocutory Appeal Certification of Trial Chamber II’s 14 December 2007 Decision on Adjudicated Facts, 15 January 2008.

<sup>5</sup> Rule 73(B) of the Rules.

<sup>6</sup> Motion, para 8.

<sup>7</sup> Motion, para 9.

issue for appeal, and has simply manifested its broad disagreement with the impugned Decision.<sup>8</sup> The Trial Chamber agrees with these propositions, and finds that the Defence has not provided specific grounds for its assertions. Nor has the Defence demonstrated how and to what extent the Trial Chamber has failed to ensure the proper administration of justice and to safeguard the rights of the Accused as set forth in Articles 20(1), 21(2) and 21(4) of the Statute of the Tribunal. In its Decision, the Trial Chamber has carefully considered all objections raised by the Defence in its numerous submissions related to the impugned Decision.<sup>9</sup> Further, in its Decision, the Trial Chamber thoroughly evaluated the proposed facts for notice pursuant to Rule 94(B) taking into account in particular the Accused's right to a fair and expeditious trial. The Trial Chamber is therefore of the view, that the Defence has not identified any issue in the Decision that can be said to significantly affect the fair conduct of the proceedings or the outcome of the trial.

4. With more particular regard to the expeditiousness of the proceedings or the outcome of the trial, the Defence submits, although once again without specificity, (a) that it will need to "use hips (sic) of documentary evidence at trial to enable [the Accused] to challenge facts established under Rule 94(B)", and (b) that it will need to challenge "the authenticity and otherwise the admissibility of a number of the exhibits, as well as the testimonies of the Prosecution's witnesses, concerning the disputed facts". The Defence argues that this would result in an excessive amount of court time used by the Defence to challenge the adjudicated facts, and that it will probably have to seek leave for additional time to prepare for trial.<sup>10</sup>

5. The Trial Chamber is mindful that if the Defence seeks at trial to dispute an adjudicated fact of which judicial notice has been taken, the Defence must adduce evidence in support of its contest. However, it is observed that all facts to be judicially noticed by virtue of the Decision do not relate to the responsibility of the Accused, and judicial notice does not have the effect of shifting the ultimate burden of proof, which remains with the Prosecution. The Trial Chamber is not persuaded, therefore, that significant trial time would be wasted should the Decision be final. To the contrary, it appears to the Chamber that the effect of the Decision will be, without unfairness to the Accused, to avoid time and resources being wasted at trial on issues which have been the subject of previous final judicial determination. Further, in the view of the Trial Chamber, it has not been demonstrated by the Defence the Decision would significantly affect the outcome of the trial.

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<sup>8</sup> Response, para 6.

<sup>9</sup> Defence Response to Prosecution's Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts with Annex, 19 September 2006; Defence Clarification of Defence Response to Prosecution's Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts with Annex, 11 October 2006; Defence Response to Prosecution's Motion for Leave to Reply and Proposed Reply to Defence Response and Clarification Concerning Prosecution's Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, 25 October 2006; Defence Motion for Judicial Notice of Adjudicated Facts with Annex, 1 February 2007.

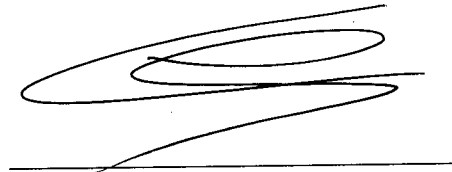
<sup>10</sup> Motion, paras 11-13.

6. The Defence further submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings by shortening and facilitating “trial proceedings a great deal if this issue were to be clarified at this stage rather than engender lengthily (sic) litigation during trial”.<sup>11</sup> As discussed in the paragraph above, the Trial Chamber cannot agree with the Defence contention that lengthy and unnecessary disputes will take place during trial as a result of the impugned Decision. In the Response, the Prosecution submits that the effect of the Decision on the Defence case is negligible.<sup>12</sup> The Trial Chamber is in agreement with this proposition. Further, the Chamber is of the view, that an interlocutory appeal at this time will only cause unnecessary delay to the close of the pre-trial phase and the upcoming start of trial.

7. For these reasons the Trial Chamber is not persuaded that what has been submitted by the Defence would significantly affect the conduct of the proceedings or the outcome of the trial. Nor is the Trial Chamber of the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Trial Chamber, therefore, finds that it will not exercise its discretion to grant certification as the conditions in Rule 73(B) of the Rules have not been met.

8. The Chamber, for the reasons now stated, therefore, **DENIES** the Motion, and **GRANTS LEAVE** to the Defence to file the Reply.

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



**Judge Christine Van Den Wyngaert**

Dated this 16<sup>th</sup> of January 2008,  
At The Hague,  
The Netherlands

[Seal of the Tribunal]

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<sup>11</sup> Motion, para 16.

<sup>12</sup> Response, para 14.