



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-95-5/18-T

Date: 3 February 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 3 February 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION REQUEST FOR CERTIFICATION TO APPEAL
DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF THE EVIDENCE
OF MILENKO LAZIĆ PURSUANT TO RULE 92 *QUATER***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 “Prosecution Request for Certification to Appeal Decision on Prosecution’s Motion for Admission of the Evidence of Milenko Lazić pursuant to Rule 92 *quater*”, filed by the Office of the Prosecutor (“Prosecution”) on 16 January 2012 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 9 January 2012, the Chamber issued the “Decision on Prosecution’s Motion for Admission of the Evidence of Milenko Lazić pursuant to Rule 92 *quater* and for Leave to Add Exhibits to Rule 65 *ter* Exhibit List” (“Impugned Decision”) in which it granted in part the Prosecution’s request for the admission into evidence of the oral testimony given by Milenko Lazić (“Witness”) in the *Popović et al.* case, as well as numerous associated exhibits, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹

2. In the Impugned Decision, the Chamber denied the admission of parts of the Witness’s prior testimony, and the related documents thereto, relating to an alleged meeting on 28 June 1995 between the Accused and Radislav Krstić at the Drina Corps headquarters in connection with the taking over of Srebrenica.² In the Chamber’s view, the probative value of this portion of the Witness’s evidence was substantially outweighed by the need to ensure a fair trial because it went to the acts and conduct of the Accused, was subject to limited cross-examination in the *Popović et al.* case, and the Accused was unable to cross-examine the Witness in this trial.³

3. In the Request, the Prosecution seeks certification to appeal the Impugned Decision insofar as it denied the admission of portions of the Witness’s previous testimony.⁴ It claims that the Chamber’s decision to exclude relevant, probative, reliable and previously cross-examined portions of the Witness’s evidence significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.⁵

4. The Prosecution submits that the excluded portions of the Witness’s evidence not only demonstrate the Accused’s personal involvement in the planning and execution of the plan to attack Srebrenica, but also bear directly on the consideration of numerous items of related

¹ Impugned Decision, para. 31.

² Impugned Decision, paras. 17, 22, 25, 31.

³ Impugned Decision, para. 22.

⁴ Request, paras. 1, 9.

⁵ Request, para. 1.

evidence and the Accused's Srebrenica-related defence case.⁶ According to the Prosecution, these excluded portions will have an impact on the Chamber's interpretation of "related" evidence and thereby significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.⁷ It adds that the exclusion of the evidence also affects the Chamber's ability to consider the Accused's claim that there was no plan to take Srebrenica.⁸

5. The Prosecution further submits that the "related" evidence affected by the exclusion of portions of the Witness's evidence is so extensive and so significant to the Srebrenica component of the case, that an immediate resolution of this issue by the Appeals Chamber at this stage of the case would materially advance the proceedings.⁹ It adds that, if the issue is not determined by the Appeals Chamber at this stage and the Impugned Decision is later overturned on appeal, the Appeals Chamber may not simply be able to consider the excluded evidence but that the entire body of related evidence may need to be reconsidered.¹⁰

6. The Prosecution also provides the Chamber with reasons why the Request should be distinguished from the Chamber's prior decisions to deny certification to appeal in relation to its Rule 92 *quater* decisions regarding Milan Babić and Miroslav Deronjić.¹¹

7. On 19 January 2012, the Accused filed the "Response to Prosecution Motion for Certification to Appeal: Lazić 92 *quater* [sic] Decision" ("Response") opposing the Request by stating that the refusal to admit portions of the statements of a deceased witness does not meet the criteria for certification to appeal.¹² The Accused adds that Trial Chambers have frequently held that decisions concerning the admission of evidence rarely meet the test for certification to appeal, and claims that such established approach avoids expending resources on issues which may not be central to the final judgement and may therefore never have to be decided.¹³

8. The Accused further submits that the Chamber may decide that there is ample other evidence of the Accused's approval of the Srebrenica 1995 operation, in which case the issue being raised by the Prosecution would not have any significant effect on the fairness of the

⁶ Request, para. 2.

⁷ Request, para. 3. The Prosecution provides a number of examples on how the excluded portions of the Witness's evidence serves to contextualise other evidence in the case.

⁸ Request, para. 4.

⁹ Request, para. 5.

¹⁰ Request, paras. 5, 6.

¹¹ Request, paras. 7, 8, referring to Decision on Prosecution Motion for Reconsideration, Alternatively for Certification, of the Decision Concerning the Evidence of Miroslav Deronjić, 20 April 2010 ("Deronjić Certification Decision") and Decision on Prosecution Request for Reconsideration and/or Certification of Parts of the "Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *Quater*", 3 June 2010 ("Babić Certification Decision").

¹² Response, paras. 1, 2, 6, 7.

trial.¹⁴ Similarly, the Accused claims that if the Chamber were to decide that there was insufficient evidence of the Accused's approval of the Srebrenica 1995 operation and that such a fact was central to his acquittal, the Appeals Chamber could review the Impugned Decision and potentially overturn the judgement in the event that the Impugned Decision would change the outcome.¹⁵ Accordingly, the issue pertaining to the admission of the Witness's testimony is not one which significantly affects the fairness or expeditiousness of the trial, or its outcome, nor would an immediate decision by the Appeals Chamber materially advance the proceedings.¹⁶

II. Applicable Law

9. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁷ Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the said 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".

10. A request for certification is "not concerned with whether a decision was correctly reasoned or not".¹⁸ Furthermore, it has previously been held that "even when an important point of law is raised [...], the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied".¹⁹

III. Discussion

11. The Prosecution requests certification to appeal the Chamber's decision to deny the admission of the portions of Milenko Lazić's prior testimony relating to an alleged meeting on

¹³ Response, para. 3.

¹⁴ Response, para. 4.

¹⁵ Response, para. 4.

¹⁶ Response, para. 5.

¹⁷ See Rule 72(B), 73(C) of the Rules.

¹⁸ *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. Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92 quater Motion, 19 May 2008, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion for Certification of Rule 98 bis Decision, 15 April 2008, para. 8; *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.

¹⁹ *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 January 2005, p. 1.

28 June 1995 between the Accused and Radislav Krstić at the Drina Corps headquarters in connection with the taking over of Srebrenica, and the related documents discussed therein.

12. With regard to the first prong of Rule 73(B), the Prosecution claims that the exclusion of portions of the Witness's evidence will have an impact on the Chamber's ability to interpret and contextualise other important "related" evidence of the Prosecution's case, which will consequently affect the fair conduct of the proceedings and the outcome of the trial.²⁰ The Chamber has consistently taken the approach that the question of admission of evidence is a highly discretionary exercise that is undertaken by Trial Chambers based on the particular circumstances of the case and the specific items that are tendered.²¹ It will not depart from this approach here. Thus, despite the relevance of the excluded portions of the Witness's evidence, the Chamber considers it premature to assume at this point that such exclusion is so extensive and significant that it would have an impact on the Chamber's consideration of other "related" evidence in the case. Having specifically reviewed the totality of the documents referred to in the Request as examples which the Prosecution claims would be left out of context without the excluded portions of the Witness's evidence,²² the Chamber is not convinced that this would indeed be the case.

13. Furthermore, as the Chamber has stated on many occasions, a conviction cannot be based on uncorroborated evidence admitted pursuant to Rule 92 *quater*.²³ Thus, even if the excluded portions of the Witness's evidence had been admitted, the Prosecution would have to corroborate them with additional evidence in order to sustain a conviction. The Chamber considered this when balancing the Prosecution's right to present relevant evidence against the right of the Accused to cross-examine a witness on evidence which goes directly to his acts and conduct during the Indictment period and which relates to allegations in the Indictment.

14. The Chamber did not deem it necessary to explain in the Impugned Decision every step of its reasoning and does not consider that it is necessary to do so herein either. It suffices to say that, at this point, in the Chamber's view, the excluded evidence is not necessary to have a full picture of the Srebrenica component of the Prosecution's case. Consequently, the Prosecution's alleged disadvantage suffered from the exclusion of evidence does not constitute an issue that

²⁰ Request, paras. 3, 4.

²¹ See Babić Certification Decision, para. 15.

²² Request, para. 3. See P838; P1415, p. 86; P3044; and documents with Rule 65 *ter* numbers 02606, 01977, 15583, and 15584.

²³ See, *inter alia*, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits pursuant to Rule 92 *quater*, 30 November 2009, para. 16; Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) pursuant to Rule 92 *quater*, 13 April 2010, para. 30; Deronjić Certification Decision, para. 14.

would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

15. For the foregoing reasons, the Chamber finds that the elements of the first prong of the test for certification have not been met. Nonetheless, for the sake of completeness, the Chamber considers it necessary to determine whether the second prong of the certification test has been met in the present case.

16. Despite the Prosecution's efforts to try to distinguish this Request from previous ones,²⁴ the Chamber is still not satisfied that a resolution by the Appeals Chamber at this point of a purely-evidentiary issue would materially advance the proceedings. The Chamber reminds the Prosecution that in the event the Accused is acquitted of the charges to which the portions of the Witness's evidence relate, it would maintain the opportunity to submit before the Appeals Chamber that, had it not been for the exclusion of this evidence, convictions would have been entered.²⁵ The Chamber is, therefore, not satisfied that the second limb of the test for certification is met.

IV. Disposition

17. Accordingly, the Chamber, pursuant to Rule 54 and 73(C) of the Rules, hereby **DENIES** the Request.

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



Judge O-Gon Kwon
Presiding

Dated this third day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ See Request, para. 7, referring to Deronjić Certification Decision and Babić Certification Decision.

²⁵ See *Siméon Nchamihigo v. Prosecutor*, Case No. ICTR-2001-63-A, Decision on Siméon Nchamihigo's Second Motion for Leave to Present Additional Evidence on Appeal, 28 September 2009, paras. 10–14.