



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-04-83-PT

Date: 23 August 2006

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 23 August 2006

PROSECUTOR

v.

RASIM DELIĆ

DECISION ON THE PROSECUTION MOTION FOR RECONSIDERATION

Office of the Prosecutor
Mr. Daryl Mundis
Ms. Tecla Henry-Benjamin

Counsel for the Accused
Mrs. Vasvija Vidović
Ms. Quincy Whitaker

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”);

BEING SEISED of the “Prosecution Motion for Reconsideration”, filed by the Prosecution on 21 July 2006 (“Motion”), requesting the Trial Chamber to reconsider its “Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend” (“Certification Decision”) and certify for interlocutory appeal the “Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment” (“Amendment Decision”);¹

NOTING the Amendment Decision, issued by the Trial Chamber on 30 June 2006, in which it granted in part the Prosecution motion seeking leave to amend the Indictment² and ordered the Prosecution to remove from the Consolidated Amended Indictment those amendments relating to the three new crime bases (Grabovica, Uzdol, and Bugojno), as well as the amendments relating to the new form of criminal liability pursuant to Article 7(1) of the Statute;³

NOTING the Certification Decision, issued by the Trial Chamber on 14 July 2006, in which it denied the “Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend” (“Request”) pursuant to Rule 73(B) of the Rules of Evidence and Procedure of the Tribunal (“Rules”);

NOTING that the Prosecution, in support of its request for reconsideration, argues the following:

¹ Motion, paras. 1, 12.

² *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution’s Submission of Consolidated Amended Indictment Pursuant to Trial Chamber Decision of 28 April 2006 with Annexes A, B, C, and D (Annexes C and D are Confidential), 8 May 2006.

³ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, para. 139; Corrigendum to Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 12 July 2006.

- (a) “the Trial Chamber did not give full consideration to the primary Prosecution argument about whether permitting interlocutory appeal would materially advance the proceedings, and gave improper weight to the question of the Completion Strategy”;⁴
- (b) “the Trial Chamber’s denial of Certification deprives the victims and their families of justice without providing an adequate explanation”⁵ and “[w]hile the rights of the Accused must be safeguarded, this protection for the rights of the Accused must be balanced against the search for justice for the victims”;⁶
- (c) “the Trial Chamber’s underlying Amendment Decision represents an aberration of Tribunal jurisprudence, creating an inconsistency in the law that the Appeals Chamber must address immediately”;⁷

NOTING the “Defence Response to Prosecution’s Motion for Reconsideration of Decision Refusing Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend”, filed by the Defence on 26 July 2006 (“Response”), in which it opposes the Motion and request that the Trial Chamber “restrain the Prosecution from this improper litigation and to ensure [the Accused’s] fair trial rights are respected by bringing finality to their decision on his indictment and rejecting the Prosecution Motion”;⁸

NOTING that the Defence argues, *inter alia*, that “the Prosecution does not attempt to come within any recognised parameters of a proper application for reconsideration: they have not identified any material matters which were not before the Trial Chamber in their original Application for Certification, nor any substantial factual inaccuracies upon which the Chamber proceeded to reach its decision” but “[t]hey merely repeat the arguments that have previously been rejected by the Trial Chamber”;⁹

CONSIDERING that the criteria for reconsideration have been clearly established by the Appeals Chamber ruling that “a Chamber has inherent discretionary power to reconsider a

⁴ Motion, para. 1.

⁵ *Ibid.*

⁶ *Ibid.*, para. 8.

⁷ *Ibid.*, para. 1.

⁸ Response, para. 9.

⁹ *Ibid.*, para. 4.

previous interlocutory decision in exceptional cases if ‘a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice’;¹⁰

NOTING that the Prosecution’s main argument in support of its Motion is that the Trial Chamber’s “summary [of the Prosecution arguments] overlooks one of the critical aspects of the Prosecution’s argument: that appeal at this stage would materially advance the proceedings in relation to the alternative, an appeal of this decision after a trial and Trial Chamber judgement”;¹¹

CONSIDERING that the Trial Chamber did, in fact, consider the Prosecution argument that appeal at this stage would materially advance the proceedings by its conclusion that “the Request does not adequately explain how the criteria of Rule 73(B) have been satisfied in this case; in particular, the Prosecution has not adequately demonstrated that the second prong under Rule 73(B) has been met”;¹²

CONSIDERING that there is no merit in the Prosecution argument that the Trial Chamber gave undue weight to the Completion Strategy in its Certification Decision and that it was, in fact, the Prosecution that relied upon the Completion Strategy argument in its Request;¹³

¹⁰ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, [Confidential] Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, n. 40. See further *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44-A-A, Judgement, 23 May 2006, paras. 203–204; *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en reconsidération de la Décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2; *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 December 2003, pp. 2–3. See also *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motions for Reconsideration of Severance Decision and Time Extensions, 5 July 2006, p. 4, n. 22; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, [Confidential] Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 6.

¹¹ Motion, paras. 5–6.

¹² Certification Decision, p. 3.

¹³ The Prosecution stated the following:

“Leave to appeal should be granted because it will be the only real opportunity for this issue to be reviewed. The denial of the Prosecution motion goes to the scope of the Indictment, and therefore significantly affects the outcome of the trial. Further, given the Tribunal’s completion strategy, the Prosecution cannot, for practical reasons, appeal the Amendment Decision after the conclusion of the trial, when the only available remedy for the Appeals Chamber would be impossibility, i.e., to refer the issue of Rasim Delić’s Article 7(1) liability and his liability for the crimes in Grabovica, Uzdol and Bugojno for a Trial Chamber for trial.” Request, para. 3.

CONSIDERING that the Trial Chamber can only exercise its discretionary power to reconsider a decision in exceptional cases if a clear error of reasoning has been demonstrated or if reconsideration is necessary to prevent injustice;

CONSIDERING that the Prosecution has failed to identify any exceptional circumstances warranting reconsideration and that, in fact, all that it has done is to repeat the arguments that it made on the substantive issues in its original application for leave to amend the Indictment and in the Request for Certification which have already been considered and ruled upon by the Trial Chamber in the Amendment Decision and Certification Decision, respectively;¹⁴

CONSIDERING that the Defence is correct in submitting that “it is wholly improper to seek to use a procedure for reconsideration as a second appellate route”¹⁵ and, in the Trial Chamber’s view, this is exactly what the Prosecution is doing;

Pursuant to Rules 54 and 73 the Trial Chamber hereby **DENIES** the Motion.

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



Judge Patrick Robinson
Presiding

Dated this twenty-third day of August 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁴ See e.g. para. 7 of the Request and paras. 8–9 of the Motion.

¹⁵ Response, para. 5.