

**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-05-87/1-T
Date: 23 April 2010
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking

Decision: 23 April 2010

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTION FOR
RECONSIDERATION OR CERTIFICATION TO APPEAL
REGARDING PROPOSED EXPERT MR ALEKSANDAR
PAVIĆ**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. This decision of Trial Chamber II (“Chamber”) of the International Criminal 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 in respect of “Vlastimir Đorđević’s Motion for Reconsideration or Certification to Appeal Regarding Proposed Expert Mr Aleksandar Pavić” filed by Counsel for Vlastimir Đorđević (“Defence”) on 31 March 2010 (“Motion”).

I. BACKGROUND

2. On 16 November 2009, the Defence filed “Vlastimir Đorđević’s Submissions Pursuant to Rule 65ter(G)” indicating the Defence’s intention to call three expert witnesses.¹ On 18 January 2010, the Defence disclosed in BCS the three expert reports of Radomir Milašinović, Zoran Stanković and Aleksandar Pavić and the English translation of the expert reports of Radomir Milašinović and Zoran Stanković.² The English translation of Aleksandar Pavić’s expert report was provided to the Prosecution and the Chamber on 12 February 2010.³ On 22 February 2010, the Prosecution filed the “Prosecution’s Notice RE Defence expert Witnesses Radomir Milašinović, Aleksandar Pavić and Zoran Stanković” (“Notice”).⁴ The Prosecution objected *inter alia* that Aleksandar Pavić was not qualified as an expert. The Defence did not file a response to the Prosecution Notice.

3. On 24 March 2010, the Chamber issued the “Decision on Prosecution’s Notice Re Defence Expert Witnesses Radomir Milašinović, Aleksandar Pavić and Zoran Stanković” (“Decision”). The Chamber was not persuaded that Aleksandar Pavić should be accepted as an expert and by the Decision denied the admission of his report.⁵

¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Submission Pursuant to Rule 65ter (G)”, 16 November 2009, (“Rule 65ter Submission – 16 November 2009”), Confidential Annex A, p 52.

² *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Notice of Filing of Expert Report Pursuant to ICTY Rule 94bis – Mr Radomir Milašinović”, 18 January 2010; “Vlastimir Đorđević’s Notice of Filing of Expert Report Pursuant to ICTY Rule 94bis – Dr Zoran Stanković”, 18 January 2010; “Vlastimir Đorđević’s Notice of Filing of Expert Report Pursuant to ICTY Rule 94bis – Mr Aleksandar Pavić”, 18 January 2010 (“Pavić filing”).

³ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Notice of Filing of Translation of Expert Report – Mr Aleksandar Pavić”, 12 February 2010.

⁴ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Notice Re Defence Expert Witnesses Radomir Milašinović, Aleksandar Pavić and Zoran Stanković”, 22 February 2010 (“Notice”).

⁵ In the Decision, the Chamber held that the Defence had not established that Aleksandar Pavić possessed any “specialised knowledge, skill or training” that could assist the Chamber in determining any issue in dispute (Decision, para 18).

4. On 31 March 2010, the Defence filed the present Motion. In this Motion, the Defence requests that the Chamber, on the basis of newly provided information, reconsider the qualifications of Aleksandar Pavić as an expert on at least political matters contained in the Indictment, though no longer on historical matters. In the alternative, if the Chamber denies the request for reconsideration, the Defence seeks certification to appeal against the Chamber's Decision regarding Aleksandar Pavić.⁶

5. The Prosecution filed the "Prosecution Response to Defence Motion for Reconsideration or Certification to Appeal Regarding Proposed Expert Mr Aleksandar Pavić" on 14 April 2010 ("Response"). In this Response, the Prosecution contended that the Defence Motion should be denied in its entirety because the Defence had failed to meet the legal standard required for reconsideration of the Decision and for certification for an appeal.

II. REQUEST FOR RECONSIDERATION OF THE DECISION

1. Applicable law

6. A Trial Chamber has a discretion to reconsider a decision where the previous decision was erroneous or where there are particular circumstances justifying its reconsideration in order to prevent injustice.⁷ The change in circumstances can include the development of new facts or new arguments.⁸ The Trial Chamber must be satisfied that there is a legitimate basis for the reconsideration of its initial decision and the party seeking reconsideration bears the onus of demonstrating that there are special circumstances warranting such reconsideration.⁹

2. Submissions

7. The Defence submits that having regard to the further information it now provides as to Aleksandar Pavić's publications and commentaries, and further clarification of his experience, the

⁶ Motion, para 11.

⁷ *Prosecutor v. Galić*, Case No. IT-98-29-AR73, "Decision on Application by Prosecution for Leave to Appeal", 14 December 2001, at para 13 ("*Galić* 2001 Decision"); *Prosecutor v. Mucić*, Case No. IT-96-21-Abis, "Judgement on Sentence Appeal", 8 April 2003, at para 49 ("*Mucić* Judgement on Sentence Appeal"); *Prosecutor v. Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, page 2 ("*Galić* 2004 Decision"); *Prosecutor v. Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobre Aleksovski and Decision *proprio motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy", 17 May 2005, para 7 ("*Milošević* Decision"); *Prosecutor v. Delić*, Case No. IT-04-83-PT, "Decision on Prosecution Motion for Reconsideration", 23 August 2006, p 5 ("*Delić* Decision").

⁸ *Galić* 2004 Decision, page 2 (citation omitted); *Galić* 2001 Decision, para 13; *Milosević* Decision, para 7; *Mucić* Judgement on Sentence Appeal, para 49.

⁹ *Mucić* Judgement on Sentence Appeal, para 49; *Galić* Decision 2004, p 2.

Chamber may now consider the credentials of Aleksandar Pavić to be sufficient to allow him to testify as an expert at least with respect to the political situation in Kosovo and Metohija during the period relevant to the Indictment.¹⁰ It is the position of the Defence that the testimony of the witness could be “construed in a tailored manner to excise any lack of historical expertise and focus only on his political expertise as a backdrop to the Indictment”.¹¹ Hence, it appears that the Defence is no longer seeking to advance the witness as an expert on historical matters as originally proposed, and advances further information to support its request for the witness to be accepted as an expert on the political situation in Kosovo and Metohija relevant to the Indictment.

8. In the Motion, the Defence provided the following details, in addition to the information contained in the *curriculum vitae*, as evidence of the proposed witness’s credentials to be called as an expert pursuant to Rule 94*bis* of the Rules of Procedure and Evidence (“Rules”):

- The names of what are described as “well-respected Serbian and foreign publications” to which Aleksandar Pavić is said to have contributed articles, commentaries and analyses;¹²
- The names of publications and TV stations for which the witness has provided commentaries;¹³
- The titles and web addresses of articles relating to Kosovo and Metohija written by Mr Pavić.¹⁴

It is the position of the Defence that Aleksandar Pavić’s writing, of the above mentioned material, stems from his studies in political history at the University of California and that his historical knowledge is “tangentially linked to discussing matters of a political nature, lending context to his studies”.¹⁵ Further, the Defence submits that the sources cited in the report are only the most relevant.¹⁶

9. In response, the Prosecution submits that the Defence has failed to demonstrate a clear error of reasoning in the Decision or to show any circumstances justifying reconsideration to prevent an injustice.¹⁷ It is contended that the Chamber, in exercising its discretion, did not deny the Defence the right to call an expert witness on the topics, but held that Aleksandar Pavić was not shown to be

¹⁰ Motion, para 4.

¹¹ Motion, para 4.

¹² Motion, para 5.

¹³ Motion, para 6.

¹⁴ Motion, para 7.

¹⁵ Motion, para 8.

¹⁶ Motion, para 8.

¹⁷ Response, para 9.

an expert on the subject-matters in the proffered report.¹⁸ It is the submission of the Prosecution that the Defence has failed to show, or even to attempt to show, that new circumstances have arisen that would render the Decision unfair.¹⁹ The Prosecution submits that the Defence has not demonstrated why the supplementary material amounts to new facts or circumstance meriting reconsideration when the arguments and information contained therein could and should have been submitted either with Pavić's *curriculum vitae* and the proposed report or, at the very least, in response to the Prosecution Notice challenging the qualifications of the proposed witness.²⁰ The Prosecution submits that the Motion is "untimely and improper" given that the Defence did not respond to the Prosecution Notice and provide this additional information at the appropriate stage of proceedings.²¹

10. Furthermore, the Prosecution objects that the Defence justification for its motion for the reconsideration of the Decision on the grounds that it is both irrelevant and unsupported.²² The Prosecution proffers the following arguments in support of this:

- While the Defence concedes that evidence of "scholarly articles" and other publications are relevant to qualifying a witness as an expert, no evidence has been provided of any "scholarly articles" authored and published by Aleksandar Pavić.²³ The Prosecution draws attention to the 23 documents listed in paragraph 7 of the Motion that are internet publications, none of which appears to have been published in scholarly journals, publications or to have been peer-reviewed prior to publication.²⁴ Furthermore, the Prosecution submits that it has only been able to gain access by virtue of the references provided to 10 out of 23 articles and these 10 articles relate, it submits, to events subsequent to the Indictment period. They are therefore of no sufficient relevance to support Mr Pavić's qualifications as an expert with respect to political matters relevant to the Indictment;²⁵
- In paragraph 5 of the Motion, the Defence has only provided the repository of what are said to be the "numerous articles, commentaries and analyses in various well-respected Serbian and foreign publications" without specific references to or details of any material he authored;²⁶

¹⁸ Response, para 10.

¹⁹ Response, para 11.

²⁰ Response, para 11.

²¹ Response, para 12.

²² Response, para 13.

²³ Response, para 13.

²⁴ Response, para 16.

²⁵ Response, paras 17-18.

²⁶ Response, para 14.

- In paragraph 6 of the Motion, the Defence merely asserts Aleksandar Pavić is an expert media commentator on current and political events but does not provide any details of the content and nature of the media commentaries relied on; the number and type of Mr Pavić's commentaries, or how each can support his expertise regarding political matters relevant to the Indictment.²⁷

3. Discussion

11. The Chamber may 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.²⁸ In seeking reconsideration, the Defence has not identified any clear error of reasoning in the Decision that would warrant reconsideration by the Chamber and none is apparent. The Chamber recalls that the Decision that Aleksandar Pavić lacked the "requisite expertise to be considered an expert on historical and political matters related to Kosovo or the former Yugoslavia"²⁹ was based on an analysis of his "former and present positions and professional experience through reference to the witness's *curriculum vitae* as well as the witness's articles, other publications" and other pertinent information provided about the witness.³⁰ This finding was made on the basis of all the information that had been disclosed to the Chamber by the Parties at that time. No attempt is made to justify or explain the failure to provide, at an appropriate time, the additional material now relied upon.³¹

12. Further, in disclosing additional information and details of articles, commentaries and analyses authored by Aleksandar Pavić, the Defence suggests that this additional material warrants reconsideration of the Decision to prevent an injustice. However, in the view of the Chamber, even if this material had been available to the Chamber at the time of the Decision, it still would not have considered Aleksandar Pavić to be qualified as an expert. The reasons of the Chamber for this are as follows.

13. First, the Chamber is of the view that the material listed by the Defence in the Motion is not of any persuasive force to an evaluation of the expert status of Aleksandar Pavić. In particular, the new information does not constitute evidence of scholarly articles, or other appropriate publications, which might justify a finding of expertise for relevant purposes. Therefore, it has not

²⁷ Response, para 19.

²⁸ See supra, para 6.

²⁹ Decision, para 21.

³⁰ Decision, paras 6, 20-21.

³¹ The Chamber notes that the onus is on the Defence to provide evidence as to the expertise of the proposed witness at the time of filing of the Motion, *Prosecutor v. Galić*, Case No. IT-98-29-T, "Decision on the Expert Witness Statements Submitted by the Defence", 27 January 2003, p 3.

been shown that an injustice would be suffered by the refusal of the Chamber to reconsider the Decision. Moreover, in the Motion, the Defence suggests that Mr Pavić has published “numerous Balkan-related articles, commentaries and analyses in various well-respected Serbian and foreign publications”, that he has been asked to give commentaries as an expert on current events in publications, and that he is a frequent political commentator and analyst on Serbian television stations.³² No specific details of, or references to, these articles have been provided, nor have any specific details as to the title, date, content or subject matter of any of the articles, commentaries or appearances.³³ Moreover, specifically in relation to paragraph 7, the titles of these articles indicate that they were written outside the temporal scope of the Indictment and relate to more recent, and current, discussions about the political situation in Kosovo and Serbia. The Chamber is not satisfied that what is now provided can demonstrate that Mr Pavić is an expert on political (or historical) affairs relevant to the Indictment. Therefore, the Defence suggestion in all these respects cannot be assessed by the Chamber and is not substantiated.

14. Further, the absence of demonstrated expertise by reference in particular to scholarly articles or publications authored by Aleksandar Pavić was only one of the reasons that led to the finding of the Chamber that he had not been shown to be an expert on the issues discussed in his report. The Decision drew attention to the absence of academic training or of professional experience related to events in the geographical area of the former Yugoslavia which were the subject of comment in the report, in particular to the period relevant to the Indictment. Further, the Chamber was conscious of the absence of detailed submissions in support of the view that the proposed witness had been sufficiently equipped with the “knowledge, skill or training” to testify as an expert on the issues contained in his proposed report.³⁴ In the absence of further and persuasive material in support of the finding of appropriate expertise, there is no basis offered which would warrant reconsideration of these matters.

15. Therefore, the Chamber is not satisfied that the additional information is indicative of “specialised knowledge, skill or training” possessed by the witness that could assist the Chamber in determining issues raised in the Indictment. There is no merit in the submission that the newly disclosed material justifies the reconsideration of its Decision. In particular the circumstances do

³² See Motion, paras 5-6.

³³ The Chamber recalls in its Decision, that in determining that Aleksandar Pavić lacked the requisite qualifications to be considered an expert, attention was drawn to the fact that no detailed information was provided as to the title, date or subject of the publications of which the Defence claimed he was the author, nor how these publications in anyway supported the view that he was could be qualified as an expert (Decision, para 20). The Chamber finds the Motion analogous and that the new information, specifically that provided in paragraphs 5 and 6, is without an acceptable degree of specificity or explanation as to why this material warrants reconsideration of the expertise of Aleksandar Pavić as either an historical or political expert on issues relevant to the Indictment.

³⁴ Decision, paras 20-21.

not justify a reconsideration of the Decision to prevent injustice. The Defence has not demonstrated that there are special circumstances warranting reconsideration of the Decision.

III. CERTIFICATION TO APPEAL

1. Applicable law

16. Rule 73 of the Rules governs the exercise of the Trial Chamber's discretion to grant certification to appeal against a decision of the Trial Chamber. Pursuant to Rule 73(B) of the Rules, a Trial Chamber may grant such 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 of the Appeals Chamber may materially advance the proceedings". The effect of Rule 73(B) of the Rules is to preclude certification unless the conditions set out in the Rule are satisfied, but even where these conditions have been satisfied, certification remains in the discretion of the Trial Chamber.³⁵ A request for certification is not a further opportunity for a party to inform the Trial Chamber that it disagrees with the decision that has been made.³⁶ It is not concerned with whether a decision was correctly reasoned or not; which is a matter for appeal, whether interlocutory or after the final judgement has been rendered.³⁷

2. Submissions

17. In the Motion, the Defence asserts that both criteria for certification under Rule 73(B) of the Rules have been met for the following reasons. First, it is submitted that the decision to deny the expert status of Aleksandar Pavić significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. It is submitted that the Decision violates the right of the Accused to "put on a complete and effective defence".³⁸ It is the position of the Defence that it is a necessity for this witness to be called as his evidence will be in contrast to the Prosecution witnesses information on political matters related to the Indictment and, therefore, allowing this

³⁵ *Prosecutor v. Strugar*, Case No. IT-01-42-T, "Decision on defence Motion for Certification", 17 June 2004, para 2.

³⁶ *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 Proceedings", 20 June 2005 para 3 ("*Milošević* Certification Decision").

³⁷ *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 Proceedings, 20 June 2005 para 4; *Prosecutor v. Čermak and Markač*; *Prosecutor v. Gotovina*, Case No: IT-03-73-PT; IT-01-45-PT, "Decision on Defence Application for Certification to Appeal Decision on the Prosecution's Consolidated Indictment and for Joinder", 14 August 2006, para 10; *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, "Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision", 14 June 2007, para 4.

³⁸ Motion, para 14.

witness to testify as an expert will certainly impact on the outcome of the trial.³⁹ Secondly, the Defence submits that this is an issue that requires immediate resolution by the Appeals Chamber because if during the appeal process it is found that the Trial Chamber erroneously excluded this evidence, a re-trial under Rule 117(C) of the Rules would be required.

18. In response, the Prosecution argues that the Defence has not advanced any basis upon which the Chamber could conclude that the legal standard for certification has been met and that only general and unsupported statements were proffered.⁴⁰ In relation to the first requirement of Rule 73(B), the Prosecution submits that the Defence only makes assertions as to how the Decision affects the fair and expeditious conduct of the proceedings or the outcome.⁴¹ Moreover, the Prosecution contends that in the one instance where a specific argument is made, that is, to contrast Prosecution witness evidence, this does not satisfy the first requirement because the Decision does not preclude the Defence from leading evidence related to the political situation relevant to the Indictment through another witness.⁴² With regard to the second requirement, it is the position of the Prosecution that the Defence does not, with sufficient clarity and precision, specify why the issue at stake is one for immediate resolution to advance the proceedings.⁴³ It is contended that the Defence claim that if the Appeals Chamber was to find that the evidence of Aleksandar Pavić had been erroneously excluded this would require a re-trial under Rule 117(C) of the Rules is purely speculative.⁴⁴

3. Discussion

19. The Decision of the Chamber was that Aleksandar Pavić should not be called to testify as an expert witness and that his report should be denied admission. The Decision did not preclude the Defence from leading evidence of another expert witness qualified to testify on the same subject matter or a fact witness who has relevant knowledge. On this basis, it is the view of the Chamber that the Decision does not involve an issue that would either “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.

20. Neither does the submission of the Defence in support of the contention that “an immediate resolution by the Appeals Chamber may materially advance the proceedings” have persuasive force. While the nature of the subject matter of the proposed evidence may have some relevance to issues in the case, it is not central or critical to the offences charged in the Indictment. The decision to

³⁹ Motion, para 14.

⁴⁰ Response, para 24.

⁴¹ Response, para 25.

⁴² Response, para 26.

⁴³ Response, para 27.

⁴⁴ Response, para 27.

refer the Motion, therefore, is not one for which in the opinion of the Chamber an immediate resolution of the Appeals Chamber might materially advance the proceedings.

21. The requirements of Rule 73(B) of the Rules must all be satisfied before certification may be granted. For these briefly stated reasons none of the requirements are satisfied. The Defence request for certification is denied.

IV. DISPOSITION

22. For the foregoing reasons the Chamber:

- (1) **DENIES** the Defence request for reconsideration of the expert status of Aleksandar Pavić; and
- (2) **DENIES** the Defence request for certification to appeal against the Decision in regards to the expert status of Aleksandar Pavić pursuant to Rule 73(B) of the Rules.

Dated this twenty-third day of April 2010
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]