



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-PT
Date: 31 August 2009
Original: English

IN THE TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 31 August 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON RULE 92 QUATER (WITNESS KDZ198)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 Accused’s “Application for Certification to Appeal Decision on Rule 92 *quater*,” filed on 24 August 2009 (“Application”), and hereby renders its decision thereon.

I. Background and Submissions

1. On 29 May 2009, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater* (“Motion”). Therein, the Prosecution sought the admission of oral testimony and related exhibits given by KDZ198 in the *Krajišnik* case, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), which provides for the admission of evidence from “unavailable persons.”¹
2. The Accused filed his “Response to Prosecution 92 *quater* Motion: Witness KDZ198” on 10 July 2009 (“Accused Response”). The Accused raised three main arguments opposing the motion: (i) Rule 92 *quater* violates his rights under Article 21(4)(e) of the Statute “to examine or have examined, the witnesses against him”; (ii) in the circumstances of this case, the cumulative effect of the Prosecution’s motions for judicial notice of adjudicated facts under Rule 94(B) and motions for the admission of evidence pursuant to Rules 92 *bis* and 92 *quater* is to shift the burden of proof from the Prosecution to the Accused, in violation of his right to a fair trial; and (iii) the evidence of KDZ198 relates to the acts and conduct of the Accused and to critical issues of the Prosecution’s case, and is “marred with inconsistencies, hesitations and contradictions.”²
3. Upon obtaining leave from the Chamber, the Prosecution filed its “Reply to the ‘Response to Prosecution 92 *quater* Motion: Witness KDZ198’” on 24 July 2009 (“Reply”), addressing the Accused’s arguments concerning the reliability of KDZ198’s evidence.³
4. On 20 August 2009, the Trial Chamber issued its “Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*” (“Decision”). In its Decision, the Chamber dismissed the Accused’s argument that the operation of Rule 92 *quater* violates his right to examine the witnesses against him under Article 21(4)(e) of the

¹ Motion, paras. 1–2.

² Accused Response, paras. 2–4.

³ See Decision on Prosecution Request for Leave to Reply: Rule 92 *quater* Motion (Witness KDZ198), 16 July 2009; and Decision on Prosecution’s Request for Reconsideration, 23 July 2009.

Statute.⁴ The Chamber also held that the admission of evidence under Rules 92 *bis* and 92 *quater*, as well as the admission of adjudicated facts, does not shift the burden of proof from the Prosecution to the Accused, in violation of his right to a fair trial.⁵ In addition, the Chamber noted that Rule 89(D), which provides that evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial, applies to Rule 92 *quater* evidence, thus protecting the Accused's fair trial rights.⁶ As a result, the Chamber granted the Motion in part.⁷

5. The Accused subsequently filed this Application. He argues that the issues raised in the Decision significantly affect the fairness of his trial and points to jurisprudence of this Tribunal to the effect that admitting evidence which cannot be tested on cross-examination qualifies for certification to appeal.⁸ The Accused further submits that these issues significantly affect the expeditiousness of the trial because they involve a large number of witnesses and adjudicated facts.⁹ In addition, the Accused argues that an immediate interlocutory decision by the Appeals Chamber would materially advance the proceedings because broad categories of evidence are at issue, which will affect the very nature of the trial itself: if the Appeals Chamber agreed with the Accused the case would have to be retried.¹⁰ Finally, the Accused submits that Rules 92 *bis*, 92 *quater*, and 94(B) are innovations of the Judges of this Tribunal, were not voted upon by the Security Council, and are foreign to most national legal systems. Therefore, the Accused argues that a "head-on challenge to the 'constitutionality' and application of these rules will materially advance not only these proceedings, but fair trial jurisprudence throughout the world."¹¹

6. On 28 August 2009, the Prosecution submitted the "Prosecution's Response to Karadžić's Application for Certification to Appeal Decision on Rule 92 *quater*" ("Prosecution Response"). It submits that the argument that Rule 92 *quater* violates the right to a fair trial under Article 21(4)(e) has been addressed and rejected by the Appeals Chamber.¹² The Prosecution further submits that the argument about the cumulative effect of admitting evidence under Rule 92 *bis*, Rule 92 *quater*, and Rule 94(B) is raised prematurely as no evidence has been admitted under Rule 92 *bis* and the acceptance of judicially noticed facts under Rule 94(B) is properly determined in the Trial

⁴ Decision, para. 8.

⁵ Decision, para. 10.

⁶ Decision, para. 8.

⁷ Decision, para. 29.

⁸ Application, para. 4.

⁹ Application, para. 5.

¹⁰ Application, para. 7.

¹¹ Application, para. 8.

¹² Prosecution Response, para. 2.

Chamber's final assessment of all the evidence presented in the case.¹³ The Prosecution also submits that evidence of unavailable persons has been consistently admitted in the Tribunal, and that the Appeals Chamber has held that the right of an accused to cross-examine witnesses is not absolute.¹⁴ According to the Prosecution, the cases cited by the Accused in which certification to appeal was granted do not suggest that all issues relating to the admission of evidence that cannot be tested by cross-examination affect the fairness of the trial and therefore qualify for certification for appeal.¹⁵

7. The Prosecution also submits that an interlocutory decision on the admission of KDZ198's evidence will not materially advance the proceedings, noting that admission of evidence is distinct from the weight a Trial Chamber gives to such evidence.¹⁶ It further submits that this issue is properly addressed after final judgement, when the admission of evidence is complete, the Trial Chamber has accorded appropriate weight to the evidence, and it has made its ultimate determination on the acceptance of judicially noticed facts.¹⁷

II. Applicable Law

8. Rule 73(B) of the Rules requires two conditions to be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.¹⁸

9. The Trial Chamber recalls 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

¹³ Prosecution Response, para. 3.

¹⁴ Prosecution Response, para. 4.

¹⁵ Prosecution Response, para. 5.

¹⁶ Prosecution Response, para. 7.

¹⁷ Prosecution Response, para. 11.

¹⁸ Decision on Accused's Application for Certification to Appeal Decision on Languages, 22 April, 2009 ("Language Decision"), para. 4, citing *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-PT, Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić's Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *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* Proceeding, 20 June 2005, para. 2; *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 ("*Halilović* Decision"), p. 1.

conditions are satisfied.”¹⁹ In addition, it should be noted that, even where both requirements of the Rule are satisfied, certification remains in the discretion of the Chamber.²⁰

III. Discussion

10. The Trial Chamber notes at the outset that the right of an accused to cross-examine the witnesses against him is not absolute.²¹ In addition, it should be noted that the decisions the Accused cites in support of his argument that admitting evidence which cannot be tested on cross examination qualifies for certification to appeal were factually fundamentally different from the circumstances of this case.²² In *Martić*, a witness died in the middle of being cross-examined and the issue was whether there had been sufficient cross-examination to admit the rest of his testimony.²³ The *Prlić* and *Popović* cases involved co-accused persons who had made statements that could not be subject to cross-examination by their fellow accused.²⁴ Unlike the evidence in those cases, the evidence of KDZ198 has been fully cross-examined by an accused with a common interest to the Accused.²⁵

11. The Chamber also adds that it is unclear at this stage of the proceedings exactly what evidence will be admitted under Rules 92 *bis* and 92 *quater*, and which adjudicated facts will ultimately be accepted. More importantly, it is also unknown what weight the Trial Chamber will ascribe to such evidence and, in particular, the evidence of KDZ198, and how that evidence will be assessed in the overall context of the case. Thus, an assessment of the impact of the Decision on the Accused’s right to a fair trial can only be made following the issuance of the judgement.

12. For that reason, the Chamber is of the view that neither prong of the Rule 73(B) test has been met by the Accused. Whether the admission of evidence of persons who are unavailable for cross-examination, combined with a large number of judicially accepted facts, *would* affect the

¹⁹ Language Decision, para. 5, citing *Halilović* Decision, p. 1.

²⁰ Language Decision, para. 5, citing *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, p. 1.

²¹ Decision, para. 8, citing *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, filed on 14 September 2006, para. 12.

²² Application, note 3.

²³ *Prosecutor v. Martić*, Case no. IT-95-11-T, Decision on Defence Application for Certification to Appeal Pursuant to Rule 73(B), filed on 20 June 2006, para. 2.

²⁴ See *Prosecutor v. Prlić et al.*, No. IT-04-74-T, Decision on Request for Reconsideration and Certification to Appeal the Decision for Admission of the Statement of Jadranko Prlic, filed on 10 October 2007, para. 2; *Prosecutor v. Popović et al.*, Case no. IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, filed 25 October 2007, para. 2.

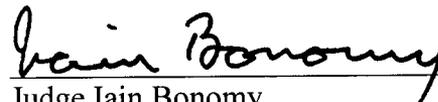
²⁵ Decision, para. 14.

fairness of the trial or the outcome of the case can only be determined in light of the weight given to that evidence in the overall context of the assessment of all the evidence in the case, including *viva voce* evidence. Therefore, it cannot be argued that a resolution of this issue would materially advance the proceedings when this matter can only be resolved by the Appeals Chamber once it has an indication of the weight given to this evidence by the Trial Chamber.

IV. Disposition

13. Accordingly, the Trial Chamber, pursuant to Rule 73(B) of the Rules, hereby **DENIES** the Application.

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


Judge Iain Bonomy
Presiding

Dated this thirty-first day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]