



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-T

Date: 30 August 2006

Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve

Registrar: Mr. Hans Holthuis

Decision of: 30 August 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION DENYING PROSECUTION'S REQUEST FOR CERTIFICATION OF
RULE 73 *BIS* ISSUE FOR APPEAL**

Office of the Prosecutor

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Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

Background

1. On 11 July 2006, the Trial Chamber issued its “Decision on Application of Rule 73 *bis*” (the “Decision”). The Decision confirmed the Chamber’s oral ruling, made at the Pre-Trial Conference, to utilise Rule 73 *bis*(D) of the Rules of Procedure and Evidence (the “Rules”) to “fix a number of crime sites or incidents” regarding which the Prosecution may lead evidence at trial. In the Decision, the Chamber prohibited the Prosecution from presenting evidence concerning the three crime sites of Račak, Padalište and Dubrava Prison.¹

2. In the “Prosecution’s Request for Certification of Appeal”, filed on 17 July 2006 (the “Request”), the Prosecution asks the Trial Chamber to certify the Decision for interlocutory appeal to the Appeals Chamber.² The Accused do not oppose the Request.³

Applicable law

3. “Rule 73 . . . governs the exercise of the Chamber’s discretion to grant certification for an interlocutory appeal.”⁴ Rule 73(B) provides that a Trial Chamber “may grant [] certification if the [impugned] 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.”⁵ The “effect of Rule 73(B) is to preclude certification unless its conditions are satisfied, but, in a case where they are satisfied, certification remains in the discretion of the Trial Chamber.”⁶

4. A proper request for certification is “not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal.”⁷ Although matters of obvious

¹ See Decision on Application of Rule 73 *bis*, 11 July 2006 (the “Decision”), para. 13(a).

² See Prosecution’s Request for Certification of Appeal, 17 July 2006 (the “Request”). The Prosecution has not filed a “motion to vary” the Decision pursuant to Rule 73 *bis*(F) of the Rules of Procedure and Evidence (the “Rules”).

³ See General Ojdanić’s Consolidated Response to Prosecution Applications for Certification to Appeal, 25 July 2006, para. 4; Submission by Mr. Milutinović to Join General Ojdanić’s Consolidated Response to Prosecution Applications for Certification to Appeal, 27 July 2006; Pavković Joinder in Ojdanić Response to Prosecution Application for Certification to Appeal, 28 July 2006; Sreten Lukić’s Joinder in Co-Accused Ojdanić’s Consolidated Response to Prosecution Applications for Certification to Appeal, 1 August 2006, para. 3 (filed one day late).

⁴ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 (“*Strugar Decision*”), para. 2.

⁵ Rule 73(B).

⁶ *Strugar Decision*, para. 2.

⁷ *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. 4. See also *ibid.*, para. 3 (A “request for certification is not a further opportunity for the Prosecution to inform the Trial Chamber that it disagrees with a

importance might commend themselves for certification, “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”.⁸

5. The Prosecution argues for certification on two alternate grounds: Rule 73(B) and the Trial Chamber’s “inherent power to grant certification”.⁹ Rule 73(B) obviously applies to the request at hand, but the Prosecution cites no authority which supports the existence of an “inherent power” to certify.¹⁰ The relevant case law indicates that Rule 73(B) is the exclusive basis for certifying an issue for discretionary appeal,¹¹ and the Prosecution elsewhere in its Request appears to agree: “Satisfaction of the preconditions for certification set out in Rule 73(B) is the only test for whether a motion to appeal should be certified.”¹² Accordingly, the Trial Chamber will confine its analysis to the requirements of Rule 73(B).

Submissions

6. With respect to the first prong of Rule 73(B), whether the Decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,”¹³ the Prosecution states that the Decision has rendered it “unable to put before the Trial Chamber evidence of central importance to proving the counts in the Indictment.”¹⁴ The Prosecution maintains that “Rule 73bis (D) merely enables the Trial Chamber to set *the number* of crime sites, not to determine in respect of *which* particular crime sites evidence is to be presented. That determination can only properly be made by the Prosecution”.¹⁵ The Prosecution thus submits

decision it has made”). (quoting *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, p. 5).

⁸ *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. See also *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend, 14 July 2006, p. 1.

⁹ Request, para. 6.

¹⁰ The Prosecution cites cases which refer only to the Appeals Chamber’s power to review possible errors of law on its own initiative. See Request, para. 24 (citing *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 1031 (“[T]here are situations where the Appeals Chamber may raise questions *proprio motu* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.”) (quoting *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 6)).

¹¹ See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel’s Assignment of Mr Orsat Miljenić as *Pro Bono* Co-Counsel for the Accused Petković, 23 June 2006, p. 3 (“Rule 73(B) of the Rules states that a Trial Chamber can only certify an interlocutory appeal after having ascertained that two conditions are met”); *Halilović Decision*, p. 1 (“Rule 73(B) requires [that] two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal”); *Strugar Decision*, para. 2 (“Rule 73 of the Rules of Procedure and Evidence governs the exercise of the Chamber’s discretion to grant certification for an interlocutory appeal.”).

¹² Request, para. 11.

¹³ Rule 73(B).

¹⁴ Request, para. 12.

¹⁵ *Ibid.*, para. 18 (emphasis in original).

that the “Decision goes to the heart of the proceedings, namely the presentation of evidence and the selection of the particular evidence the Prosecution wishes to present”.¹⁶ The Prosecution asserts that the “interests of justice and fairness demand that the Prosecution determine the crime sites”,¹⁷ and that the Prosecution “needs to know if it will be precluded from presenting evidence on the three (3) crime sites”.¹⁸ Stated simply, choosing which evidence to lead at trial is the Prosecution’s job, and “[n]ot allowing the Prosecution to decide and present its case at trial would deny the Prosecution a fair trial.”¹⁹ With regard to whether the matter at issue significantly affects the “expeditious conduct of the proceedings”,²⁰ the Prosecution states only that “expediency does not justify usurping the Prosecutor’s power.”²¹

7. Concerning whether the Decision involves an issue that will seriously impact “the outcome of the trial”,²² the Prosecution submits that the issue here “will significantly affect . . . the presentation of evidence and the ensuing outcome of the trial because the Trial Chamber’s decision has left the Prosecution unable to put before the Trial Chamber evidence of central importance”.²³

8. With respect to Rule 73(B)’s second prong, whether “an immediate resolution by the Appeals Chamber may materially advance the proceedings”,²⁴ the Prosecution asserts that an appellate decision “will enable the Prosecution to prepare its case and to select the evidence to prove the crimes alleged in the Indictment.”²⁵ “In order to fulfil its duty and prepare the presentation of its case,” says the Prosecution, it “needs to be able to decide *which* evidence it will lead and how it will present its case”.²⁶ The Prosecution also submits, however, that it will “proceed on the basis of the Trial Chamber’s order as it presently stands, even if certification is granted”,²⁷ and indicates that, even if the issue is certified and the Decision is reversed, the Prosecution might ultimately decline to offer evidence on the three crime sites.²⁸

9. Besides the Prosecution’s arguments regarding the requirements of Rule 73(B), it submits that the “Decision raises important legal issues relating to the division of powers of the different organs of the Tribunal”,²⁹ and that it “is therefore in the interest of the development of the

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 19.

¹⁸ *Ibid.*, para. 4.

¹⁹ *Ibid.*, para. 18.

²⁰ Rule 73(B).

²¹ Request, para. 19.

²² Rule 73(B).

²³ Request, para. 12.

²⁴ Rule 73(B).

²⁵ Request, para. 22.

²⁶ *Ibid.*, para. 21 (emphasis in original).

²⁷ *Ibid.*, para. 7.

²⁸ *See ibid.* (“If the appeal is granted, the Prosecution can indicate at that time whether it will proceed differently or maintain the status quo.”).

²⁹ *Ibid.*, para. 5.

jurisprudence of the International Tribunal . . . that a final determination on these legal issues be made by the Appeals Chamber at the earliest opportunity.”³⁰ That may be, but this argument does nothing to advance a request for certification³¹ and, consequently, will not be addressed.

Discussion

10. The Prosecution vigorously maintains that it has the prerogative to select the crime sites regarding which evidence may be offered at trial and that Rule 73 *bis*(D), which the Trial Chamber employed in the Decision, empowers a Chamber to fix only the number of such sites.³² The Prosecution accordingly submits that, through the Decision, the Trial Chamber has exercised authority which belongs solely to the Office of the Prosecutor, thereby “deny[ing] the Prosecution a fair trial.”³³ Although use of the word “fairness” in the context of a criminal trial might commonly refer to fairness for an accused, the Prosecution undoubtedly is entitled to a fair opportunity to present its case. The Statute of the Tribunal obligates each Trial Chamber to “ensure that a trial is fair and expeditious . . . , with full respect for the rights of the accused”,³⁴ and does not provide that only an accused is entitled to be treated equitably.³⁵

11. The Prosecution’s complaint in this case, however, asserts unfairness more as a matter of principle than of fact. Most of the Prosecution’s arguments on this point mistakenly concern the merits of the Decision rather than the requirements of Rule 73(B).³⁶ The Prosecution does not explain how, and thus has not shown, that the Chamber’s action will significantly affect the fair and expeditious conduct of these proceedings³⁷ or the outcome of this particular trial. The Prosecution

³⁰ *Ibid.*

³¹ *See supra* note 8 and accompanying text.

³² *See Request*, paras. 2 (“Rule 73**bis**(D) does not grant the Trial Chamber the power to decide on *which specific* crime sites evidence may be presented. This power rests with the Prosecutor.”) (emphasis in original), 15 (“While the Trial Chamber has the right ‘to fix a number of crime sites’, the Trial Chamber erred in the interpretation and application of the Rule by selecting the specific crime sites.”), 18 (“Rule 73**bis**(D) *merely* enables the Trial Chamber to set *the number* of crime sites, not to determine in respect of *which* particular crime sites evidence is to be presented. That determination can only properly be made by the Prosecution because the Prosecution is in the best position to do so. The Prosecution investigates the alleged crimes, collects the evidence of them, drafts the indictment and obtains confirmation, and prosecutes the Indictment.”) (emphasis in original).

³³ *Ibid.*, para. 18.

³⁴ Statute of the Tribunal, art. 20(1).

³⁵ *Cf. Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Defence Application for Certification to Appeal Against Trial Chamber’s Decision of 16 June 2006, 23 June 2006, para. 6, in which the matter at issue went more to the integrity of the proceedings than to unfairness to the accused: The “issue raised by the Defence is whether the Accused is being tried by a validly constituted and independent bench. Should the Appeals Chamber find that the Chamber erred on the law . . . , this would have a significant impact on the fair and expeditious conduct of the proceedings.”

³⁶ *Cf. Halilović Decision*, pp. 1-2 (The “Application concentrates on the Prosecution’s potential grounds of appeal, and does not adequately explain how the criteria of Rule 73(B) have been met in this case”).

³⁷ With regard to the “expeditious conduct” of the trial, the Prosecution states only that “expediency does not justify usurping the Prosecutor’s power”. *Request*, para. 19. This statement impliedly concedes that the Decision, by removing three crime sites from the evidence which the Prosecution may offer, could expedite the proceedings. This is not itself a reason to deny certification, however, as the plain language of Rule 73(B) does not state that only rulings which slow a trial down can be certified for interlocutory appeal. Indeed, there are many conceivable rulings that could accelerate proceedings while being grossly unfair either to an accused or the prosecution, such that

asserts in the Request that the “Decision has left [it] unable to put before the Trial Chamber evidence of central importance to proving the counts in the Indictment”,³⁸ but its other submissions³⁹ and the progress of the trial to date undermine this contention.⁴⁰ Similarly, the Prosecution states that it “needs to know if it will be precluded from presenting evidence on the three (3) crime sites”,⁴¹ but again does not explain how this current lack of certainty will seriously affect the trial’s fairness, expedition or outcome.⁴² As the Chamber noted at the Pre-Trial Conference and in the Decision, “there is a possibility that evidence in respect of these three crime sites or incidents may eventually be permitted pursuant to Rule 73 bis(F), depending on how the case develops”.⁴³ In addition to the glaring absence of any legal citation which supports the Prosecution’s argument,⁴⁴ there is no factual indication at this time that excluding the three crime sites does or will seriously impact the fair and expeditious conduct, or outcome, of the proceedings. The Chamber therefore finds that the Prosecution has not satisfied the first prong of Rule 73(B).

12. Assuming, for the sake of argument, that the Prosecution had satisfied the first requirement, the Trial Chamber would still deny the Request because the Prosecution has not shown, as the second prong of Rule 73(B) requires, that “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁴⁵ First, as already noted, there is no indication to date that the Decision has had any effect on the Prosecution’s ability to present its case. Second, the Prosecution’s statements – that it will proceed normally on the basis of the Decision and might not lead evidence on the three crime sites even if successful on appeal – strongly suggest that there is no pressing need for the Appeals Chamber to address the Prosecution’s concerns now. Third, the Prosecution is free to “file a motion to vary the decision as to the number of crime sites”⁴⁶ at some

immediate appellate review would be appropriate, always assuming that a colourable argument to that effect is presented.

³⁸ Request, para. 12.

³⁹ At the Pre-Trial Conference, the Prosecution stated that, “[o]f the 11 killing sites, three – Racak, Padaliste, and Dubrava prison – do not have a related municipality site alleging deportations.” Transcript of Pre-Trial Conference, T. 367 (7 July 2006). In his opening statement at the beginning of trial, counsel for the Prosecution stated that the “purpose of this joint criminal enterprise, this JCE, was to manipulate or modify the ethnic balance in Kosovo in order to maintain and continue Serbian control over the province of Kosovo.” T. 415 (10 July 2006). As the Trial Chamber noted in the Decision, the “Prosecution’s case is fundamentally one alleging ethnic manipulation or modification of Kosovo’s population through deportation, forcible transfer, and associated acts of persecution, including murder, of Kosovo Albanians.” Decision, para. 7. Accordingly, the Trial Chamber stands by its opinion that “none of the three sites is located in the 13 municipalities the Prosecution identified as the locus of its case”. Decision, para. 11.

⁴⁰ The Trial Chamber has thus far received a great deal of evidence relating to alleged acts of deportation, murder and property destruction spanning a large swathe of Kosovo.

⁴¹ Request, para. 4.

⁴² Cf. *Halilović* Decision, p. 2 (“[T]here is no explanation of how the issue involved in the Decision would ‘significantly affect the fair and expeditious conduct of the proceedings’, or indeed, affect it at all”).

⁴³ Decision, para. 12.

⁴⁴ The Prosecution does not cite a single case, statute or rule which supports its contention that the Decision involves an issue that will significantly affect the fair and expeditious conduct, or outcome, of trial. See Request, paras. 12-19.

⁴⁵ Rule 73(B).

⁴⁶ Rule 73 bis(F).

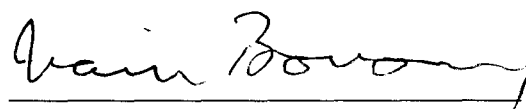
appropriate time in the future. The Trial Chamber therefore finds that any advance of the proceedings attributable to interlocutory appeal would be immaterial.

Disposition

13. For the reasons above, the Prosecution has failed to satisfy the requirements of Rule 73(B). The Trial Chamber accordingly **DENIES** the Request.

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

Dated this thirtieth day of August 2006
At The Hague,
The Netherlands.



Judge Iain Bonomy
Presiding

[Seal of the Tribunal]