



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-03-67-T
Date: 21 May 2008
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French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr Hans Holthuis

Decision of: 21 May 2008

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON PROSECUTION MOTION FOR CERTIFICATION TO
APPEAL THE DECISION OF 7 JANUARY 2008**

The Office of the Prosecutor

Mr Daryl Mundis

The Accused

Mr Vojislav Šešelj

I. INTRODUCTION

1. Trial Chamber III (“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 seized of a confidential motion filed by the Office of the Prosecutor (“Prosecution”) on 5 March 2008 (“Motion”),¹ in which the Prosecution requests certification to appeal the confidential Decision on the Prosecution's Consolidated Motion pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence (“Consolidated Motion” and “Rules”, respectively) rendered on 7 January 2008 (“Decision of 7 January 2008”).² Vojislav Šešelj (“Accused”) did not respond to the Motion within the time-limit prescribed by Rule 126 *bis* of the Rules.

II. PROCEDURAL BACKGROUND

2. By Decision of 7 January 2008, the Chamber partially ruled on the Prosecution requests for the admission into evidence of written statements of witnesses and transcripts of testimony from other cases in accordance with Rules 92 *ter* and 92 *quater* of the Rules, and stayed its ruling on the remainder of the Consolidated Motion “until the expiry of the time-limit for the Accused to respond to the Clarification” of the Consolidated Motion filed by the Prosecution on 22 October 2007.³ In that same Decision, the Chamber denied in particular the Prosecution's requests for the admission into evidence of the statements of Šefkija Smailović, on the one hand, and the transcripts of the testimony of Witness VS-036 and Milan Babić pursuant to Rule 92 *quater* of the Rules, on the other.⁴

3. The Chamber has indeed held that with respect to the deceased witnesses whose statements or transcripts of testimony directly allege the responsibility of the Accused, it could not, in the interests of justice, grant the Prosecution's request,

¹ Prosecution's Motion for Certification to Appeal Decision of 7 January 2008, confidential, 5 March 2008 (“Motion”). A public version of this motion was filed on 6 March 2008.

² Decision on the Prosecution's Consolidated Motion pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence, confidential, 7 January 2008 (“Decision of 7 January 2008”). The public version of this decision was filed on 21 February 2008.

³ Decision of 7 January 2008, paras. 6, 59; *see also* the Decision on the Prosecution's Motion for Extension of Time, 30 January 2008, p. 1.

⁴ Decision of 7 January 2008, paras. 42, 50, 52.

especially since the Accused would be deprived of the opportunity to cross-examine the witness.⁵ The Chamber therefore denied the Prosecution's request for the admission of the transcripts of testimony and statements pursuant to Rule 92 *quater* of the Rules in respect of Milan Babić and Šefkija Smailović.⁶

4. On the basis that there was no showing of relevance and due to their volume, the Chamber also denied the Prosecution's request under Rule 92 *quater* for the admission of the transcripts of the testimony of Witness VS-036 from other cases.⁷ For this witness, the Chamber nonetheless left the Prosecution the possibility of submitting a fresh "request based on 92 *quater* of the Rules for the admission of previous statements".⁸

5. In its Decision on the Prosecution's Motion for Extension of Time rendered on 30 January 2008, the Chamber partially granted the Prosecution's motion requesting certification to appeal the Decision of 7 January 2008 within seven days of the filing of the Chamber's supplementary decision on the Consolidated Motion, which was rendered on 27 February 2008.⁹

III. PROSECUTION ARGUMENTS

6. In its Motion, the Prosecution points out that it is requesting certification to appeal the Decision of 7 January 2008 only with respect to the dismissal of the evidence whose admission the Prosecution requested pursuant to Rule 92 *quater* of the Rules.¹⁰ According to the Prosecution, the Chamber refused to admit evidence that is relevant and probative on the sole ground that the Accused would be deprived of his right to cross-examine the witnesses, which would constitute a significant legal issue affecting the fairness of the proceedings.¹¹ In fact, in the view of the Prosecution, in the Decision of 7 January 2008 the Chamber "[protected] the Accused's right to cross-examination by completely rejecting any consideration of relevant evidence proffered

⁵ *Id.*, paras. 41, 49.

⁶ *Id.*, paras. 42, 50.

⁷ *Id.*, paras. 51-52.

⁸ *Id.*, para. 53.

⁹ Second Decision on the Prosecution's Consolidated Motion pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence, confidential, 27 February 2008. A public version of this decision was filed on the same day.

¹⁰ Motion, paras. 2, 14.

¹¹ *Id.*, para. 6.

by the Prosecution". The Prosecution notes that it is clear from Tribunal jurisprudence that the right of an Accused to cross-examine a witness is not absolute.¹²

7. The Prosecution further submits that in situations analogous to this case, the Trial Chambers seized of the cases of *The Prosecutor v. Milan Martić* ("Martić Case") and *The Prosecutor v. Simić et al.* ("Simić Case") granted certification of decisions that either denied the admission of transcripts of testimony of a witness whose cross-examination was not completed, or limited the cross-examination of a party, considering that such a legal issue related to the right to cross-examine witnesses would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.¹³ According to the Prosecution, the Decision of 7 January 2008 raises the same problem, namely striking a balance between the rights of a party to adduce in a trial potentially important evidence for its case (here, the Prosecution), and the Accused's right to cross-examination, an issue which significantly affects the fair and expeditious conduct of the trial.¹⁴

8. According to the Prosecution, an immediate resolution by the Appeals Chamber is justified, considering the early stage of the proceedings in this case. In fact, the Prosecution considers that an interlocutory appeal here on this issue would not cause a delay in the proceedings and, in any case, would allow for it to be settled before the presentation of the Defence case. Moreover, an immediate resolution by the Appeals Chamber could, in the view of the Prosecution, materially advance the proceedings. Indeed, if the Appeals Chamber were to overturn the Decision of 7 January 2008, it is possible that the Accused would request leave to present defence

¹² *Ibid.*, referring in particular to the Appeals Chamber Decision in the case of the *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, titled "Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić", 14 September 2006 ("*Martić* Appeals Decision"), which adjudicates the Trial Chamber's "Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence", 9 June 2006, (Case No. IT-95-11) ("*Martić* Decision").

¹³ Motion, paras. 7, 8 referring to the decision rendered on 20 June 2006 in the case of *The Prosecutor v. Milan Martić*, Case No. IT-95-11, titled "Decision on Defence Application for Certification of Appeal pursuant to Rule 73 (B) and to the decision rendered on 28 April 2003 in the case of *The Prosecutor v. Simić*, Case No. IT-95-9-T, titled "Decision on Prosecutor's Motion for Trial Chamber's Redetermination of Its Decision of 2 April 2003 Relating to Cross-Examination of Defence Rule 92 *bis* Witnesses or Alternatively Certification Under Rule 73 (B) of the Rules of Procedure and Evidence."

¹⁴ Motion, para. 9.

evidence related to the evidence that would thus be admitted into the trial record pursuant to Rule 92 *quater* of the Rules.¹⁵

9. The Prosecution further submits that the Decision of 7 January 2008 stands “in conflict” with the decision rendered in the *Martić* case concerning Milan Babić.¹⁶ Moreover, the Prosecution specifies that other applications requesting the admission of documents related to VS-036 and Milan Babić have been submitted in another case and are likely to raise the same issue.¹⁷ The Prosecution notes that certain Trial Chambers have held that whenever the decision for which certification is sought involves an unsettled legal issue, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁸

IV. APPLICABLE LAW

10. In accordance with Rule 73 (B) of the Rules, decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which 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 by the Appeals Chamber may materially advance the proceedings.

11. Consequently, certification to appeal is a matter within the discretionary power of the Chamber, which must first verify whether the two cumulative conditions set out in Rule 73 (B) of the Rules have been met in this case.¹⁹

12. Moreover, the purpose of a motion for certification is not to demonstrate that the reasoning of an impugned decision is incorrect, but to demonstrate that the

¹⁵ *Id.*, para. 11.

¹⁶ *Id.*, para. 12.

¹⁷ *Ibid.* It should be pointed out that to date, no decision has been rendered on the motion filed on 21 May 2007 in the case of *The Prosecutor v. Jovica Stanisic and Franko Simatovic* (IT-03-69-PT) concerning Witness Milan Babić.

¹⁸ Motion, para. 13; reference is made to the Decision of 16 July 2003 rendered by the Chamber seized of the case of *The Prosecutor v. Milutinovic et al.* (IT-99-37-PT) and to the Decision of 6 May 2003 rendered in the case of the *Prosecutor v. Slobodan Milošević* (IT-02-54-T).

¹⁹ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2 (“*Strugar Decision*”); *The Prosecutor v. Milan Milutinovic, Nikola Šainovic, Dragoljub Ojdanic, Nebojša Pavkovic, Vladimir Lazarevic and Sreten Lukic*, Case No. IT-05-87-T, Decision on Prosecution’s Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 *ter* List, 14 March 2007, para. 3 (“*Milutinovic Decision on Wesley Clark*”).

conditions set out in Rule 73 (B) have been met.²⁰ In any event, even if the conditions set out in Rule 73 (B) of the Rules have been met, certification remains a matter within the discretionary power of the Trial Chambers.²¹

V. DISCUSSION

A. Does the decision involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial?

13. The Chamber first notes that the Motion deals exclusively with the Chamber's refusal to admit into evidence the statements and transcripts of testimony of Šefkija Smailović and Milan Babić, in accordance with Rule 92 *quater* of the Rules.²²

14. The Chamber exercised its discretionary power in this case when it denied the request for admission of the above-mentioned evidence pursuant to Rule 92 *quater* of the Rules, since the evidence directly alleged the responsibility of the Accused. The argument that the Accused would not be in a position to cross-examine was merely a secondary argument in addition to the Chamber's principal argument relating to the interests of justice. Accordingly, in its Decision of 7 January 2008, the Chamber twice held that "it is in the interests of justice not to grant the Prosecution's request, *all the more since* the Accused would be deprived of the right to cross-examine these witnesses".²³

15. In contrast with the Prosecution's assertion, the Decision of 7 January 2008 does not therefore safeguard absolutely the Accused's right to cross-examine by completely rejecting any consideration of the relevance of evidence adduced by the Prosecution, quite the contrary. The Chamber refused to admit it precisely because, in this specific case, admitting documents which alleged the responsibility of the Accused ran contrary to the interests of justice. A careful review of the reasoning applied by the Chamber to the Prosecution's Rule 92 *ter* motions to admit statements and transcripts of testimony relating to fundamental issues on which the Chamber will have to rule, establishes that cross-examination does not constitute a fundamental

²⁰ *Milutinović* Decision on Wesley Clark, para. 4.

²¹ *Strugar* Decision, para. 2; *Milutinović* Decision on Wesley Clark, para. 3.

²² Motion, paras. 2, 14. In fact, except for in footnote 19 of the Motion, the Prosecution does not mention Witness VS-036.

²³ Decision of 7 January 2008, paras. 41, 49 (emphasis added).

element. As such, even though Rule 92 *ter* explicitly protects the right to cross-examination, the Chamber decided that the interests of justice required that these witnesses appear *viva voce*.²⁴ Clearly, the Prosecution based its Motion on an incomplete presentation of the Chamber's reasoning in connection with the denial of the request to admit evidence concerning Milan Babić and Šefkija Smailović pursuant to Rule 92 *quater* of the Rules.

16. Consequently, the Chamber considers that in this case the Decision of 7 January 2008 does not relate to "balancing the right of a party to adduce potentially important evidence in a trial (here, the Prosecution), as against the Accused's right to cross-examine."²⁵

17. As a result, the Chamber considers that the Prosecution has failed to demonstrate that the Decision of 7 January 2008 involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. For the sake of completeness, the Chamber nonetheless considers it necessary to examine whether the second condition under Rule 73 (B) of the Rules has been met in this case.

B. Could an immediate resolution by the Appeals Chamber materially advance the proceedings?

18. The Prosecution submits that the immediate resolution by the Appeals Chamber of the issue raised in the Decision of 7 January 2008 is necessary and may materially advance the proceedings considering, on the one hand, the early stage of the proceedings at present and, on the other hand, the fact that this issue will likely be raised in other cases and may stand "in conflict" with a decision of another Trial Chamber.²⁶

19. The Chamber can only note, with the Prosecution, the early stage of the proceedings. In the following paragraphs, the Chamber will examine whether an immediate referral of the matter to the Appeals Chamber could materially advance the proceedings.

²⁴ *Id.*, paras. 39, 40, 48.

²⁵ Motion, para. 9.

²⁶ *Id.*, paras. 10-13, *see also* paras. 8-9 *supra*.

20. To begin, in response to the Prosecution arguments related to the existence of an unsettled legal issue that would justify the granting of the Motion,²⁷ the Chamber notes that the Trial Chamber seized of the *Martić* case rendered its decision in respect of Witness Milan Babić under entirely different circumstances. Indeed, the issue then before the *Martić* Chamber was that of admitting the transcript of the *viva voce* testimony of this witness who had given evidence, but whose cross-examination had not been completed owing to his death. In that case it was appropriate to determine on appeal whether the *Martić* Trial Chamber had erred by accepting the testimony of this witness when confronted with an incomplete cross-examination.²⁸

21. Moreover, and with regard to the exercise of discretionary power by the Trial Chambers, the Appeals Chamber recently recalled that it is settled Tribunal jurisprudence that

Trial Chambers exercise discretion in various types of decisions for purposes of fair and expeditious management of a trial, including in relation to the admissibility of some types of evidence. In reviewing such decisions, the Appeals Chamber accords deference to the Trial Chamber in recognition of the Trial Chamber's "organic familiarity with the day-to-day conduct of the parties and particular demands of the case".²⁹

22. In this context, when reviewing an impugned decision, the Appeals Chamber considers whether the Trial Chamber has committed a "discernible error" resulting in prejudice.³⁰ In that connection,

[the] Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be: "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact, or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."³¹

²⁷ Motion, paras. 12-13.

²⁸ *Martić* Decision, para. 2; *Martić* Appeals Decision, para. 2.

²⁹ *The Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 *ter* Witness List, para. 8 ("*Milutinović* Appeals Decision") referring to the *Martić* Appeals Decision, para. 6.

³⁰ *Milutinović* Appeals Decision, para. 10, referring to *Martić* Appeals Decision, para. 7. It reads: "consequently, in reviewing the Impugned Decision, the Appeals Chamber will consider whether the Prosecution has demonstrated that the Trial Chamber has committed a 'discernable error' resulting in prejudice".

³¹ *Milutinović* Appeals Decision, para. 10, referring to the *Martić* Appeals Decision, para. 7, which cites the Appeals Chamber decision of 12 May 2006 rendered in the case of *The Prosecutor v. Milan*

23. The Chamber recalls that it is settled jurisprudence that the Trial Chambers are not bound by the decisions of other Trial Chambers, although a Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.³² Consequently, this exercise may lead the Trial Chambers to decide differently a same legal issue or, where relevant, different issues concerning a same witness, as is the case here.

24. In this case, as the Chamber recalled in its Decision of 7 January 2008, the Chamber *may*, in accordance with Rule 89 (C) of the Rules, admit any relevant evidence that it deems to have probative value. While evidence offered for admission under Rule 92 *quater* of the Rules may be considered relevant, it is up to the Chamber to determine if it is sufficiently probative to warrant its admission, considering the fact that the Chamber *may*, under Rule 89 (D) of the Rules, exclude any evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Furthermore, according to Rule 92 *quater* of the Rules, if the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this *may* be a factor against the admission of such evidence, or that part of it.

25. Therefore, the Chamber exercised its discretionary power by denying, in the interests of justice, the Prosecution motion in respect of Milan Babić and Šefkija Smailović, taking into account in particular the criteria for admissibility of evidence³³ and the fact that this evidence is from other cases, which therefore concern other Accused persons, and relates to issues as important as that of the criminal responsibility of an Accused. In the Decision of 7 January 2008 on the admission of transcripts of testimony pursuant to Rule 92 *quater* of the Rules, the Chamber did not deem it necessary to explain every step of its reasoning, and it does not deem that it is necessary, or that it is required, to set out that reasoning in greater detail here.³⁴ Accordingly, the Chamber is not satisfied that certification to appeal the Decision of 7 January 2008 would materially advance the proceedings.

Milutinović et al., Case No. IT-05-87-AR108.2, Decision on the Request of the United States of America for Review, para. 6.

³² *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 114.

³³ Decision of 7 January 2008, para. 26.

³⁴ *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 481; *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 458.

26. Finally, the Chamber wishes to point out that any reversal of the Decision of 7 January 2008 would potentially have only a very limited impact on the proceedings. In fact, as the Chamber explained in its Order Setting Out Guidelines of 15 November 2007 and recalled in its Decision of 7 January 2008,³⁵ there exists a fundamental distinction between the legal admissibility of documentary evidence and the weight which the Chamber attributes to it in light of the entire record.³⁶ The Trial Chamber will therefore have the responsibility for determining the ultimate weight to attach to these statements and transcripts of testimony, in light of the entire record.

27. In view of the foregoing, the Chamber is not satisfied by the arguments put forth by the Prosecution concerning the existence of an unsettled legal issue, and those in support of an immediate resolution of the issue by the Appeals Chamber which may materially advance the proceedings.

³⁵ Decision of 7 January 2008, para. 26.

³⁶ Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial, 15 November 2007, Annex, para. 2.

V. DISPOSITION

28. For these reasons, in accordance with Articles 20(1) and 21 of the Statute and Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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

 /signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-first day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]