

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

IT-03-69-T
D27542-D27539
31 January 2011

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Case No. IT-03-69-T
Date: 31 January 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 31 January 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SIMATOVIĆ DEFENCE REQUEST FOR
CERTIFICATION TO APPEAL (TODOROVIĆ)**

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Wayne Jordash
Mr Geert-Jan Alexander Knoops

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 5 November 2010, the Simatović Defence filed its “Request for Certification to Appeal Under Rule 73(B) Against the Decision on Prosecution Motion for Admission of Evidence of Stevan Todorović Pursuant to Rule 92*quater*” (“Motion”), in which it requests certification to appeal the Chamber’s “Decision on Prosecution Motion for Admission of Evidence of Stevan Todorović pursuant to Rule 92 *quater*”, filed on 29 October 2010 (“Impugned Decision”). In its Impugned Decision, the Trial Chamber decided to admit Todorović’s testimony in the *Milošević* case as well as a number of associated exhibits.¹

2. On 12 November 2010, the Prosecution filed its “Prosecution Response to the Simatović Request for Certification to Appeal the Decision on the Prosecution Motion for Admission of Evidence of Stevan Todorović Pursuant to Rule 92*quater*” (“Response”), requesting the Chamber to deny the Motion.

II. APPLICABLE LAW

3. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”), a Trial Chamber may grant certification of an interlocutory appeal 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 a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

III. SUBMISSIONS OF THE PARTIES

4. In relation to the first prong of Rule 73(B) of the Rules, the Simatović Defence submits that the Impugned Decision affects Simatović’s right to a fair trial, as it “prevents the Accused from examining the witness whose evidence goes to proof of the acts and conduct of the Accused Simatović”.² In arguing that the Impugned Decision affects his right to a fair trial, Simatović further asserts, *inter alia*, that: (a) the extent to which Todorović’s evidence goes to the acts and conduct of the Accused militates against its admission into evidence;³ (b) Todorović was not properly cross-examined by Slobodan Milošević, and was insufficiently cross-examined on topics relevant to the Accused Simatović;⁴ and (c) Todorović’s evidence is not corroborated by other evidence.⁵

¹ Impugned Decision, pp. 16-17.

² Motion, para. 5.

³ Motion, paras 11-15.

⁴ Motion, para. 16.

5. The Simatović Defence also submits that “the [Impugned] Decision directly affects the length and scope of the trial, given that Simatović will be compelled to challenge the contents of Todorović’s evidence by numerous other means of proof”.⁶

6. In relation to the second prong, the Simatović Defence argues that an “immediate resolution of the issue would prevent a situation in which the Appeals Chamber may order that the Accused be “retried according to law” pursuant to Rule 117(C) of the Rules, if the Appeal Chamber were to find on appeal that the admission of this evidence at this stage was erroneous”.⁷

7. In its Response, the Prosecution submits that the Simatović Defence arguments “are unpersuasive because of the extent of corroboration of the Proffered Evidence and because the fundamental question with respect to [...] [Todorović’s evidence] is not admissibility, but the weight ultimately to be given to the evidence”.⁸ According to the Prosecution, “[t]he extent of this corroborating evidence makes it highly unlikely that a review of the [...] Impugned Decision at this stage would materially advance the proceedings”.⁹ It submits that “an immediate resolution of the issues raised by the [...] Impugned Decision will not materially advance the proceedings, because the key issue – the weight ultimately to be accorded to the evidence – by its very nature cannot be resolved at this stage”.¹⁰

IV. DISCUSSION

8. The Chamber recalls that the right to cross-examination is not absolute, and may be limited in accordance with the Rules – including Rule 92 *quater*, which specifically envisages the admission of evidence without the possibility of cross-examination – and associated jurisprudence.¹¹

9. With respect to the first prong of Rule 73 (B), the Chamber considers that the issue at hand, i.e. whether the admission of Todorović’s testimony would affect the fairness of the proceedings, cannot reasonably be expected to be determined in isolation, that is, other than in the context of an assessment by the Trial Chamber of all the evidence in the case.¹² For this very reason, an

⁵ Motion, para. 17.

⁶ Motion, para. 7.

⁷ Motion, para. 9.

⁸ Response, para. 4.

⁹ Ibid.

¹⁰ Response, para. 6.

¹¹ Impugned Decision, para. 34.

¹² See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Rule 92 *quater*, (Witness KDZ198), 31 August 2009, para. 12.

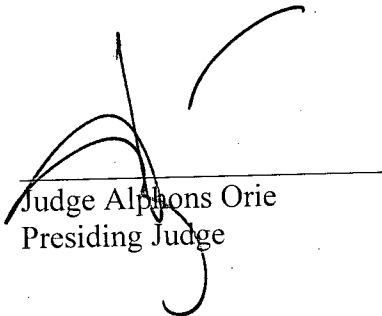
interlocutory appeal on this issue would also not materially advance the proceedings. Therefore, the request for certification fails on both prongs.

10. The Chamber further considers that, rather than materially advancing the proceedings, granting certification to appeal at the present stage of the proceeding (closely before possible submissions pursuant to Rule 98 *bis*) may cause further delays in the trial. The Appeals Chamber has held that interlocutory appeals “interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so – that is, when, in the Trial Chamber’s judgement, there is an important issue meriting immediate resolution by the Appeals Chamber”.¹³ The Defence has failed to show that, in the present instance, this is the case.

V. DISPOSITION

11. For the foregoing reasons, pursuant to Rule 73(B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this thirty-first of January 2011
At The Hague
The Netherlands

¹³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, 16 June 2006, para. 17.