



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
17 FEBRUARY 2011
D 28302 - D 28299

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Case No. IT-03-69-T
Date: 17 February 2011
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 17 February 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

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

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 23 December 2010, the Simatović Defence filed its “Defence Request for Certification to Appeal Under Rule 73(B) Against the Decision on Prosecution Motion for Admission of Evidence of Milan Babić Pursuant to Rule 92 *quater*” (“Motion”), in which it requests certification to appeal the Chamber’s “Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić pursuant to Rule 92 *quater*”, filed on 16 December 2010 (“Impugned Decision”). In its Impugned Decision, the Trial Chamber decided to admit portions of transcript of the testimony of Milan Babić (“Babić”) in the *Milošević* case, the *Krajišnik* case and the *Martić* case, the accompanying DVDs containing audiovisuals of Babić’s testimony as well as the Death Certificate of Babić.¹

2. On 6 January 2011, the Prosecution filed its “Prosecution Response to Defence Request for Certification to Appeal Under Rule 73(B) Against the Decision on Prosecution Motion for Admission of Evidence of Milan Babić 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 the 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 the accused Franko Simatović’s (“Accused”) right to a fair trial, as it “prevents the Accused from examining the witness whose statement goes to proof acts and conduct of the Accused Simatović”.² In arguing that the Impugned Decision affects his right to a fair trial, Simatović further asserts that Babić’s evidence, going to the acts and conduct of the Accused, has

¹ Impugned Decision, para. 50.

² Motion, pp. 4-5.

not been corroborated by other evidence adduced at trial.³ Furthermore, it submits Babić was not cross-examined on topics relevant to the Accused.⁴

5. The Simatović Defence also submits that the Impugned Decision “directly affects the length and scope of the trial, considering that Simatović will be forced to attempt to challenge the content of Babić’s evidence with numerous other means of evidence”.⁵

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), if the Appeal Chamber were to find on appeal that the admission of this evidence at this stage was erroneous”.⁶

7. In its Response, the Prosecution submits that the Impugned Decision “does not affect Simatović’s right to challenge elements in the Indictment or disprove the Prosecution’s theory on his individual criminal responsibility. [...] The Accused has been and will continue to be afforded ample opportunity to cross-examine other witnesses whose evidence corroborates Babić’s evidence, and likewise to challenge corroborating documentary evidence.”⁷ It recalls that the “Accused will not be convicted for any element of the Indictment [...] that is supported exclusively by Babić’s 92 *quater* evidence”.⁸ Further, if the Accused is subsequently convicted based on a body of evidence including Babić’s evidence, a retrial would only be necessary “in the unlikely event that Babić’s evidence and all corroborating evidence were deemed inadmissible.”⁹ Lastly, the Prosecution submits that an interlocutory appeal on the admission of Babić’s evidence would not materially advance the proceedings as “there is not yet any indication what weight the Chamber will give this evidence, and, in turn, what impact the evidence will have on the fairness of the proceedings or the outcome of the trial”.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

³ Motion, p. 5.

⁴ Motion, p. 6.

⁵ Motion, p. 3.

⁶ Ibid.

⁷ Response, para. 5.

⁸ Ibid.

⁹ Response, para. 8.

¹⁰ Response, para. 9.

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, namely, whether the admission of Babić'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 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 (soon 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 Orié
Presiding Judge

Dated this seventeenth day of February 2011
At The Hague
The Netherlands

¹¹ Impugned Decision, para. 25.

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.

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.