



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-08-91-T
Date: 20 October 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 20 October 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ & STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING MIĆO STANIŠIĆ'S MOTION
FOR CERTIFICATION TO APPEAL THE ORAL
DECISION ACCEPTING CHRISTIAN NIELSEN AS AN
EXPERT AND REQUEST FOR A STAY OF
PROCEEDINGS**

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

I. BACKGROUND

1. Trial Chamber II ("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 "Motion for certification of the decision regarding Prosecution witness Christian Nielsen and request for a stay of proceedings", filed on 9 September 2009 ("Motion") by the Defence of Mićo Stanišić ("Defence"). The Defence is seeking certification to appeal the Trial Chamber's ruling of 4 September 2009, by which the Trial Chamber accepts Christian Nielsen as an expert ("Oral Decision").¹ The Defence also requests a stay of proceedings until the Appeals Chamber has determined the matter. On 17 September 2009, the Prosecution responded orally to the Motion ("Response").²

2. On 29 February 2008, prior to the joinder of the cases of both Accused,³ the Prosecution provided notice of disclosure of, *inter alia*, Christian Nielsen's expert report in the case against Mićo Stanišić ("Prosecution Rule 94 *bis* Notice").⁴ On 11 April 2008, pursuant to Rule 94 *bis*(B), the Defence responded, stating that it wishes to cross-examine all the Prosecution expert witnesses. However, the Defence did not state that it challenges their qualifications as experts ("Stanišić Rule 94 *bis* Notice").⁵

II. APPLICABLE LAW

3. Pursuant to Rule 73(B), a Trial Chamber may certify a decision for interlocutory appeal if the decision involves an issue that (1) would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (2) for which, in the Trial Chamber's opinion, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The

¹ Pre-trial conference, 4 Sep 2009, T. 120-121.

² Hearing, 17 Sep 2009, T. 494, 497-501.

³ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT and *Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution's motion for joinder and for leave to consolidate and amend indictments, 23 Sep 2008.

⁴ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution notice of disclosure of expert witness statements under Rule 94*bis*, 29 Feb 2008. After the joinder, the Prosecution requested that prior submissions apply to Stojan Župljanin, Prosecution's notice and request regarding Rule 92*bis*, 92*ter*, 92*quater* evidence, 19 Nov 2008 and Prosecution's amended notice and request regarding Rule 92*bis*, 92*ter*, 92*quater* evidence, 10 Dec 2008.

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Defence's Rule 94 *bis* notice, 11 Apr 2008. On 17 August 2009, the Prosecution filed a supplemental motion to clarify the mode of testimony of the experts and sought leave to supplement and substitute some expert reports and prior testimonies, Prosecution's supplemental motion for admission of evidence pursuant to Rules 94*bis*, 92*bis* and 92*ter*, with *confidential* annexes, 17 Aug 2009 ("Supplemental Motion"). Even though the Supplemental Motion does not seek to introduce any changes in the evidence of Christian Nielsen as submitted in the Prosecution Rule 94 *bis* Notice, the Defence used this opportunity to, on 31 August 2009, respond to the Supplemental Motion and make supplemental submissions challenging the qualification of, among others, Christian Nielsen as an expert and objected to him being heard as a witness pursuant to Rule 94 *bis*, Mr. Mićo Stanišić's supplemental filing in response to the Prosecution's filing on proposed experts and response to the Prosecution's supplemental motion for admission of the evidence of experts pursuant to rules 94*bis*, 92*bis* and 92*ter*, with *confidential* annexes, 31 Aug 2009.

requirements are cumulative and the Trial Chamber recalls that “even where both requirements of the Rule are satisfied, certification remains in the discretion of the Chamber”.⁶

III. SUBMISSIONS

4. Regarding the first requirement of Rule 73(B), the Defence submits that “the Pre-Trial Chamber committed a serious legal error which will significantly affect the fair and expeditious conduct of the proceedings” and that “[its] decision directly conflicts with the fundamental and inalienable rights of the Accused.”⁷

5. The Defence argues that “the issue of whether a person designated by a party as an expert witness has the necessary qualifications, expertise, and objective neutrality to provide opinion evidence to the Trial Chamber as an ‘expert’ is a crucial issue and significantly affects the fair and expeditious conduct of trial proceedings.”⁸ It is argued that this “legal issue is of the utmost significance to warrant certification” and that a “trial cannot proceed when the sacrosanct and fundamental elements of procedural fairness are at stake.”⁹

6. Regarding the second requirement of Rule 73(B), the Defence submits that “if after the final judgement, the Trial Chamber is found to have erred on this point, the whole judgement would be open to challenge.”¹⁰ The Defence argues that the challenge of “the qualifications, expertise and bias of Mr. Nielsen at this stage will avoid any future complication and delay in the case and will therefore materially advance the proceedings.”¹¹ Finally, the Defence states that the Motion “does disclose a ground which not only might succeed [in appeal], but is likely to do so.”¹²

7. The Prosecution submits that the Defence meets neither of the two prongs of Rule 73(B).¹³ It argues that allowing Christian Nielsen to testify as an expert would not have an impact on the evidence in the case because “any concerns regarding Mr. Nielsen [...] can be addressed in deciding what weight to give his evidence at the end of the case, and [...] that's the best way to address it”.¹⁴ The Prosecution further suggests that, even if the Motion would be considered to meet

⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s application for certification to appeal decision on motions for extension of time: Rule 92bis and response schedule, 8 Jul 2009, para. 11.

⁷ Motion, para. 6.

⁸ Motion, para. 7.

⁹ Motion, para. 7.

¹⁰ Motion, para. 10.

¹¹ Motion, paras 10-11.

¹² Motion, para. 12.

¹³ Hearing, 17 Sep 2009, T. 497

¹⁴ Hearing, 17 Sep 2009, T. 498.

the requirements of Rule 73(B), the Trial Chamber should exercise its discretion to deny the Motion.¹⁵

IV. DISCUSSION

8. In relation to the first requirement of Rule 73(B), the Trial Chamber cannot discern any argument in the Motion as to why the Oral Decision will affect the fair and expeditious conduct of the proceedings.

9. Nevertheless, the Trial Chamber considers that the Oral Decision does not affect the fair and expeditious conduct of the proceedings because the Trial Chamber, in the exercise of its discretionary power to weigh the evidence adduced, will consider at the appropriate time the weight to be attributed to expert evidence. Equally, issues that relate to the independence and impartiality of experts concern the weight to be given to the evidence in light of the trial record as a whole.¹⁶ Thus, by holding, *prima facie*, that a witness may be qualified as an expert, the Trial Chamber does not bind itself with regard to the weight to be assigned to the evidence of such a witness.

10. In relation to the second requirement of Rule 73(B), the Defence does not submit any clear explanation to support its assertion that a decision on the matter by the Appeals Chamber will “avoid any future complication and delay”. Since the Trial Chamber will only weigh the evidence at the final stage of the proceedings, the Oral Decision does not concern an issue for which the immediate resolution of the Appeals Chamber may materially advance the proceedings.

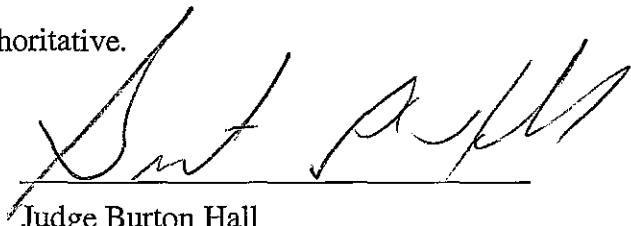
¹⁵ *Ibid.*

¹⁶ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s submission of statement of expert witness Ewan Brown, 3 Jun 2003, pp. 4-5.

V. DISPOSITION

14. For the foregoing reasons and pursuant to Rule 73(B), the Trial Chamber **DENIES** the Motion.

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



Judge Burton Hall
Presiding

Dated this twentieth day of October 2009

At The Hague

The Netherlands

[Seal of the Tribunal]