



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-05-88-PT
Date: 26 June 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 26 June 2006

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ
MILORAD TRBIĆ**

**DECISION ON REQUEST FOR CERTIFICATION TO APPEAL
DECISION ON MOTIONS CHALLENGING THE INDICTMENT
PURSUANT TO RULE 72 OF THE RULES**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Zoran Živanović for Vujadin Popović
John Ostojic and Christopher Meek for Ljubiša Beara
Jelena Nikolić and Stéphane Bourgon for Drago Nikolić
Alexander Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Peter Haynes and Đorđe Sarapa for Vinko Pandurević
Stéphane Piletta-Zanin for Milorad Trbić

TRIAL CHAMBER II 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”);

BEING SEISED OF the “Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules” (“Motion”), filed on 7 June 2006; and the “Defence Motion on Behalf of Vinko Pandurević Seeking Certification of the Trial Chamber’s Decision on Motions Challenging the Indictment Pursuant to Rule 72”, filed on 8 June 2006, joining the Motion;

NOTING the “Prosecution’s Response to Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules” (“Response”), filed on 9 June 2006;

NOTING the “Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules” (“Impugned Decision”), filed on 31 May 2006;

NOTING that the Defence is seeking certification to appeal just one issue dealt with in the Impugned Decision, that is, in the context of pleading the accused’s participation in a JCE, whether JCE requires that the physical perpetrator have an agreement with the accused who is charged as a participant in the JCE, and thus whether the physical perpetrator has to be a participant in the JCE himself;

NOTING that in the Impugned Decision the Trial Chamber held that the question of whether JCE requires that the physical perpetrator have an agreement with the accused who is charged as a JCE participant does not raise the issue of the Tribunal’s jurisdiction over the activities of a JCE, but instead relates to the contours of JCE responsibility, and whether the physical perpetrator must be a participant in the JCE is therefore an issue to be determined at trial;¹

NOTING the Defence’s argument that, whether or not this question raises the issue of the Tribunal’s jurisdiction over the activities of a JCE or instead relates to the contours of JCE responsibility, it remains a legal determination which must be made at this stage of the proceedings;²

NOTING the Defence’s submission that the Impugned Decision raises an issue that would substantially affect the fair and expeditious conduct of the proceedings in that: (i) it will have a

¹ Impugned Decision, para. 21.

² Motion, para. 7.

impact on the ability of the Accused to be informed of the nature and cause of the charges against them by not knowing the law which applies to the charges against them; (ii) it will have a significant impact on the ability of the Accused to adequately prepare for trial and to present their respective defence cases;³ and, in particular, (iii) unless this issue is addressed at this stage of the proceedings, the trial will proceed on the basis of uncertain law, thus affecting the fair conduct of the proceedings and infringing on the right of the Accused to a fair trial,⁴ and consequently affecting the outcome of the trial;⁵

NOTING the Defence's further contention that an immediate resolution of the issue will materially advance the proceedings, namely, unless this issue is adjudicated at this time before the Appeals Chamber, it is (i) very likely that it will result in the filing of further related motions before or during trial that could have negative consequences on the conduct of the proceedings; and (ii) a possibility exists for an appeal on the merits on the same issue at the end of the trial, that could lead to a new trial if the Appeals Chamber was to confirm that the trial proceeded on the basis of uncertain law;

NOTING the Prosecution's submission that, although there is no requirement under the jurisprudence of the Tribunal to determine this question at the pre-trial stage, but that it may instead be determined at trial based upon the evidence presented,⁶ it is the Prosecution's position that it would be in the interests of all parties to have the issue resolved at the pre-trial stage;⁷

NOTING the Prosecution's further submission that certainty on this issue can only contribute to a more efficient and expeditious trial because, should this issue not be resolved before trial, the Prosecution will be obliged to take a far broader approach to the evidence it will introduce regarding physical perpetrators, which could result "in a surplusage of testimonial and documentary evidence being introduced at trial";⁸

NOTING that Rule 73(B) of the Rules of Procedure and Evidence ("Rules") requires that two criteria be satisfied before the Trial Chamber may certify a decision for interlocutory appeal: (i) that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) that an immediate resolution of the issue may, in the opinion of the Trial Chamber, materially advance the proceedings;

³ Motion, para. 9.

⁴ Motion, para. 10.

⁵ Motion, para. 11.

⁶ Response, para. 3.

⁷ Response, para. 4.

⁸ Response, para. 4.

CONSIDERING that as the precise factual setting of each case may well have a material bearing on the question of whether the physical perpetrator must be a participant in the JCE, as held in the Impugned Decision,⁹ this issue is one that ought to be determined in light of the evidence presented in each case;

CONSIDERING therefore that the interests of justice are better served where the issue is resolved in the context of all the potentially relevant evidence;

CONSIDERING that the issue is not, at this stage of the proceedings, one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;

CONSIDERING that the Defence failed to demonstrate that the first criterion for certification has been satisfied, and that the Trial Chamber does not therefore see the need to consider whether the second criterion has been met;

PURSUANT to Article 21 of the Statute and Rule 73 of the Rules,

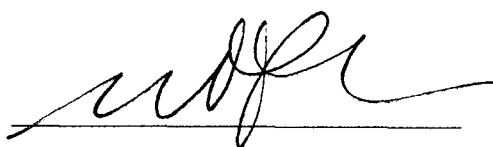
HEREBY DENIES the Motion.

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

Dated this twenty-sixth day of June 2006

At The Hague

The Netherlands



Carmel Agius
Presiding

[Seal of the Tribunal]

⁹ Impugned Decision, para. 21 (“[I]n the present case it will have to be determined at trial whether, under the JCE doctrine, crimes committed by non-participants in the alleged JCEs can be attributed to the Accused charged with participation in those JCEs.”).