



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-05-88-T  
Date: 19 October 2006  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 19 October 2006

**PROSECUTOR**  
v.  
**VUJADIN POPOVIĆ**  
**LJUBIŠA BEARA**  
**DRAGO NIKOLIĆ**  
**LJUBOMIR BOROVČANIN**  
**RADIVOJE MILETIĆ**  
**MILAN GVERO**  
**VINKO PANDUREVIĆ**

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO  
APPEAL DECISION ADMITTING WRITTEN EVIDENCE  
PURSUANT TO RULE 92 *BIS***

**The Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović  
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović for Radivoje Miletić  
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero  
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

**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 for Certification to Appeal Decision on Prosecution Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis” (“Motion”), filed partly *confidentially* on 19 September 2006, in which the Accused Miletić and Gvero (“Accused”) seek certification or reconsideration of the Trial Chamber’s “Decision on Prosecution’s *Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis*” (“Decision”), issued on 12 September 2006;

**NOTING** the “Prosecution’s Response to Defence Motion for Certification to Appeal Decision on Prosecution Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis” (“Response”), filed on 3 October 2006, in which the Prosecution submits the Motion should be denied as it fails to demonstrate that the Trial Chamber misinterpreted the applicable law or made errors in evaluation of the facts;

**RECALLING** that in the Decision, the Trial Chamber admitted the written evidence of Witnesses 23, 28, 52, 58 and 63 without cross-examination pursuant to Rule 92 bis(D),<sup>1</sup> and admitted the written evidence of Witnesses 24 and 26 with cross-examination limited to issues of “forcible transfer”, pursuant to Rule 92 bis(D);<sup>2</sup>

**NOTING** that in the Motion the Accused request certification pursuant to Rule 73(B) “to appeal the Decision solely on the limited issue of cross-examination”, or, in the alternative, “invite the Trial Chamber to reconsider its Decision and allow the cross-examination of the relevant witnesses”;<sup>3</sup>

**NOTING** that, pursuant to Rule 73(B), “[d]ecisions 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 [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

**NOTING** that Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that even where both requirements of Rule 73(B) are satisfied

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<sup>1</sup> Decision, p. 37.

<sup>2</sup> Decision, para. 68, p. 37–38.

<sup>3</sup> Motion, paras. 3–4.

certification remains in the discretion of the Trial Chamber,<sup>4</sup> and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;<sup>5</sup>

**NOTING** that in the Motion the Accused focus largely on the correctness of the Decision rather than analyzing whether the requirements of Rule 73(B) are met, and that the Accused submit the Trial Chamber did not correctly interpret the applicable law and erroneously interpreted facts, namely:

- a) The Trial Chamber erroneously required the Accused to provide specific reasons justifying cross-examination “which resulted in a violation of Article 21.4.e of the Statute”;<sup>6</sup>
- b) The Trial Chamber failed to appreciate that the challenged witnesses “gave evidence in relation to critical elements of the Prosecution case, namely to live and important issues which are in dispute between the parties”;<sup>7</sup>
- c) The Trial Chamber failed to appreciate contradictions in the testimony of the witnesses as well as the unique nature of the testimony of some of the witnesses;<sup>8</sup>
- d) The Trial Chamber erred by failing to consider that the evidence of Witness 23 contains portions that are hearsay which relate directly to paragraphs 31.1.a and b of the Indictment;<sup>9</sup>
- e) The Trial Chamber erred by failing to consider that the evidence of Witnesses 23 and 24 “are contradictory with each other and in some respects with the facts described in paragraph 31.1.a and b of the Indictment”;<sup>10</sup>
- f) The Trial Chamber erred in limiting the cross-examination of Witnesses 24 and 26 to the issue of forcible transfer in that “the statements of these witnesses are relevant to opportunistic killings as well” and “[a]s far as the Defence is aware witness 26 is the only witness to have testified about the killing described in paragraph 31.1.d of the

<sup>4</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

<sup>5</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005, para. 4.

<sup>6</sup> Motion, paras. 8–13.

<sup>7</sup> Motion, para. 14.

<sup>8</sup> Motion, para. 15.

<sup>9</sup> Motion, para. 17.

<sup>10</sup> Motion, para. 16.

Indictment, whilst the testimony of witness 24 is somewhat contradictory to the testimony of witness 23 in respect of paragraphs 31.1.a and b of the Indictment”;<sup>11</sup>

- g) The Trial Chamber erred by failing to consider that Witness 28 “is the only DutchBat witness who attests to events in Bratunac”;<sup>12</sup>
- h) The Trial Chamber erred by failing to consider that the evidence of Witness 58 “is in contradiction to the statements of all other witnesses relating to the departure of Moslems from Srebrenica to Potočari”;<sup>13</sup>
- i) The Trial Chamber erred by failing to consider that Witness 63 was not cross-examined in the earlier testimony, as the Defence in that case chose not to ask any questions;<sup>14</sup>
- j) The Trial Chamber erred by admitting the written evidence of Witness 52 in that the Accused does not have “access to the full testimony of this witness as the admitted transcript of this witness’s testimony contains a redacted portion”;<sup>15</sup>

**RECALLING** that Rule 92 *bis* grants a Trial Chamber discretion whether to order a witness, whose written evidence is deemed admissible, to appear in court for cross-examination, and that in the Decision, the Trial Chamber recognized that the appropriate considerations in that regard include “the overriding obligation to ensure the accused a fair trial under Articles 20 and 21 of the Statute; whether the evidence in question relates to a critical element of the Prosecution’s case, or to a ‘live and important issue between the parties, as opposed to a peripheral or marginally relevant issue’; the cumulative nature of the evidence; whether the evidence is ‘crime-base’ evidence or whether it relates to the acts and conduct of subordinates for which the accused is allegedly responsible; the proximity of the accused to the acts and conduct described in the evidence; and whether the cross-examination of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings”;<sup>16</sup>

**RECALLING** that in the Decision, the Trial Chamber assessed the nature of the written evidence of each of the seven witnesses now at issue in the Motion, and, in light of the submissions of the parties and with full regard for the obligation to ensure the Accused a fair trial, considered specifically whether cross-examination should be required;

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<sup>11</sup> Motion, para. 21.

<sup>12</sup> Motion, para. 16.

<sup>13</sup> Motion, para. 18.

<sup>14</sup> Motion, para. 19.

<sup>15</sup> Motion, para. 20.

<sup>16</sup> Decision, para. 16 (citations omitted).

**CONSIDERING** the submissions of the Accused, and the nature of the written evidence, and that the Accused have not demonstrated that the evidence of Witnesses 23, 28, 52, 63 and 68 is such that its admission into evidence without cross-examination “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;<sup>17</sup>

**CONSIDERING** the submissions of the Accused, and the nature of the written evidence, and that the Accused have not demonstrated that the evidence of Witnesses 24 and 26 is such that its admission into evidence with limited cross-examination “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;<sup>18</sup>

**CONSIDERING** therefore that the cumulative requirements of Rule 73(B) have not been satisfied;

**RECALLING** that a Trial Chamber has inherent discretionary power to reconsider a previous decision in exceptional cases “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice”,<sup>19</sup> and that a party urging reconsideration must satisfy the Trial Chamber of particular circumstances justifying reconsideration in order to avoid injustice, which particular circumstances may include new facts or new arguments;<sup>20</sup>

**CONSIDERING** that the Trial Chamber is not persuaded that the Accused have identified any clear error in the Decision, but that, in light of aspects of this case now clearly identified as live and important issues between the parties, the Trial Chamber is persuaded that certain of the submissions of the Accused highlight an area of concern to the Trial Chamber, specifically with regard to the evidence of Witnesses 23, 24 and 26 as it relates to the opportunistic killings alleged at paragraph 31.1 of the Indictment;

**CONSIDERING** therefore that, as to whether Witness 23 should be required to appear for cross-examination at trial, and as to whether the scope of cross-examination of Witnesses 24 and 26

<sup>17</sup> Rule 73(B).

<sup>18</sup> Rule 73(B).

<sup>19</sup> *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en reconsidération de la Décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli Appeal Judgement*”), para. 203). *Accord Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, [Confidential] Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25 n. 40 (quoting the language of paragraph 203 of the *Kajelijeli Appeal Judgement* as definitively articulating the appropriate language for reconsideration of interlocutory decisions); *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, [Confidential] Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 6.

<sup>20</sup> *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2 (“[F]or the Appellant to succeed in its Request for reconsideration, he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice ... such particular circumstances include new facts or new arguments.”).

should be limited to the issue of “forcible transfer”, the Accused have demonstrated particular circumstances justifying reconsideration in order to avoid injustice;

**CONSIDERING** that the Trial Chamber is not persuaded that the Accused have demonstrated particular circumstances justifying reconsideration of whether Witnesses 28, 52, 63 and 68 should be required to appear for cross-examination;

**FOR THE FOREGOING REASONS,**

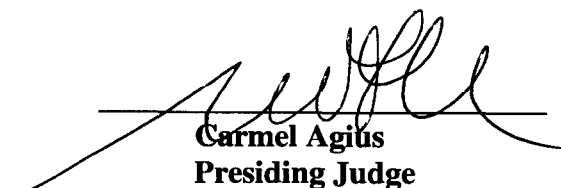
**PURSUANT TO** Rules 54, 73(B) and 92 *bis* of the Rules,

**HEREBY DENIES** certification to appeal the Decision pursuant to Rule 73(B),

**RECONSIDERS** the Decision, in part, and **ORDERS** that:

- a) The written evidence of Witness 23 is admitted provided the witness appears for cross-examination at trial;
- b) The scope of cross-examination of Witnesses 24 and 26 shall not be limited;
- c) In all other respects, the Motion is denied.

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



**Carmel Agius**  
**Presiding Judge**

Dated this nineteenth day of October 2006,  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**