



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: 20 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: 20 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 ON PROSECUTION MOTION FOR
JUDICIAL NOTICE OF ADJUDICATED FACTS**

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 two motions: the first is the “Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Popović Motion”), filed on 2 October 2006 by the Defence counsel for Vujadin Popović (“Popović Defence”), pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules), and the second is the “Motion on behalf of Drago Nikolić Joining the Popović Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Nikolić Motion”), filed on 3 October 2006 by the Defence counsel for Drago Nikolić (“Nikolić Defence”), pursuant to Articles 20 and 21 of the Statute of the Tribunal (“Statute”) and Rules 73(B) and 94 of the Rules (collectively, “Motions”);

NOTING that Popović and Nikolić Defence request the Trial Chamber to grant certification to appeal the “Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts With Annex” (“Impugned Decision”) rendered on 26 September 2006 solely with respect to facts 505-513¹ (“Facts”);²

NOTING that Popović and Nikolić Defence (i) question the accuracy of these Facts;³ (ii) submit that the Facts do not fulfil the admissibility requirements identified by the Trial Chamber in the Impugned Decision;⁴ and (iii) submit that taking judicial notice of the Facts does not serve the interests of justice and infringes upon the rights of the accused pursuant to Article 21 of the Statute;⁵

NOTING that Nikolić Defence further submits that taking judicial notice of the Facts affects the outcome of the trial and that an immediate resolution by the Appeals Chamber may materially advance the proceedings,⁶ and that Popović Defence also submits that in the *Krstić* case these Facts “were used to corroborate the Genocide conviction both by Trial Chamber and Appeal Chamber”;⁷

NOTING the “Prosecution’s Response to “Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Response”), filed on 16 October 2006;

¹ The facts are listed in the Annex of the Impugned Decision.

² Popović Motion, para. 3; Nikolić Motion, paras 1, 3.

³ Popović Motion, paras 9-15, 21-22; Nikolić Motion, para. 2(a).

⁴ Popović Motion, paras 6, 19-24; Nikolić Motion, para. 2(b).

⁵ Popović Motion, paras 7-8, 16-18; Nikolić Motion, para. 2(c).

NOTING that the Prosecution objects to Popović Motion⁸ because it (i) fails to satisfy the legal standard for certification required by Rule 73(B);⁹ (ii) attempt to introduce new factual and legal submissions which go to the substance of the Impugned Decision and which the Popović Defence had failed to make at the appropriate time;¹⁰ (iii) fail to demonstrate that the Trial Chamber “either misinterpreted the applicable law or made errors in evaluation of the facts”;¹¹

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 certification remains in the discretion of the Trial Chamber,¹² and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;¹³

RECALLING that according to the jurisprudence of this Tribunal, when a Trial Chamber judicially notices an adjudicated fact, that fact is admitted into evidence, and like all rebuttable evidence, remains subject to challenge by the non-moving party during the course of trial.¹⁴ However, as the Appeals Chamber in *Karemera* clarified, “judicial notice under Rule 94(B) does not shift the ultimate burden of persuasion, but only the initial burden of production”;¹⁵

REITERATING this Trial Chamber’s clarification in the Impugned Decision that in future relevant deliberations, and particularly in those relating to the final judgement, it retains the

⁶ Nikolić Motion, para. 2(c).

⁷ Popović Motion, para. 10.

⁸ Response, paras 3, 18.

⁹ Response, paras 4, 7-9.

¹⁰ Response, paras 5, 10-14.

¹¹ Response, paras 6, 16-17.

¹² *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

¹³ *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.

¹⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4; *Prosecutor v. Karemera, Ngirumpatse, and Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (“*Karemera et al.* Appeal Decision”), para. 42; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, p. 10; Impugned Decision, paras 20-21.

¹⁵ *Karemera et al.* Appeal Decision, *supra* note 14, para. 49; Impugned Decision, para. 21.

obligation to assess the weight of the facts of which it took judicial notice, taking into consideration the evidence in the case in its entirety;¹⁶

CONSIDERING that it is the Prosecution that must prove by evidence led at trial, and beyond any reasonable doubt, every element of a crime charged in the indictment against Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević, filed on 4 August 2006 (“Indictment”), if the accused are to be convicted;

CONSIDERING that the Motions of the Popović and Nikolić Defence do not raise an issue that would “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”, particularly because none of the Facts tends to establish the crimes alleged in the Indictment or to incriminate the accused in respect of these crimes;

CONSIDERING FURTHER that the second of the two cumulative criteria provided for in Rule 73(B) of the Rules is also unfulfilled;

FOR THE FOREGOING REASONS

PURSUANT TO Rule 73(B) of the Rules;

HEREBY DENIES the Request for Certification.

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



Carmel Agius
Presiding Judge

Dated this twentieth day of October 2006,

At The Hague

The Netherlands

[Seal of the Tribunal]

¹⁶ Impugned Decision, para. 21.