



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-T

Date: 11 March 2008

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: 11 March 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION OF
DECISION ADDING EIGHTEEN WITNESSES TO PROSECUTION'S
WITNESS LIST AND ADMITTING THEIR WRITTEN STATEMENTS
PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušević 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 and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS 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”);

BEING SEISED OF the “Joint Defence Motion Seeking Certification of the Trial Chamber’s Decision on Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit their Written Statements Pursuant to Rule 92 *bis*”, filed confidentially on 5 February 2008 (“Motion”), in which all seven Accused seek certification to appeal the Trial Chamber’s “Decision on Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit Their Written Statements Pursuant to Rule 92 *bis*”, issued on 29 January 2008 (“Impugned Decision”);

NOTING the Prosecution’s “Response to Joint Defence Motion Seeking Certification of the Trial Chamber’s Decision on Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit Their Written Statements Pursuant to Rule 92 *bis*”, filed confidentially on 18 February 2008 (“Response”), and the “Joint Defence Motion Seeking Leave to Reply and Reply to Prosecution [Response]”, filed confidentially on 21 February 2008 (“Reply”);

NOTING that in the Motion, the Defence challenge the Impugned Decision on the grounds that:

- a. the Trial Chamber did not explain what “good faith” the Prosecution demonstrated for requesting to add witnesses to its Rule 65 *ter* List “only a month before the closing of its case”;¹
- b. the Impugned Decision prohibits the Defence from challenging the evidence admitted in the eighteen written statements (“statements”) which “constitutes an incorrect interpretation of governing law which interferes substantially with the rights of the Accused to a fair trial”;²
- c. the Trial Chamber’s interpretation of the formal requirements of Rule 92 *bis*(B) “constitutes an incorrect interpretation of governing law which obstructs the rights of the Accused to a fair trial”;³
- d. admitting the statements without cross-examination denied the Accused “the right of confrontation [sic] the witnesses against them and effective assistance of counsel, in violation of the Article 21.2 and 21.4(e)”;⁴

¹ Motion, para. 8.

² *Ibid.*, para. 12.

³ *Ibid.*, para. 17.

- e. the Trial Chamber's interpretation of Rule 92 *bis*(B) is "too broad, permitting the Prosecution in effect to introduce statements which fail to fulfil the requirements of said rule, while paying lip service to the spirit and intent of Rule 92 *bis*(B)";⁵
- f. as a result of the Impugned Decision, the Defence "will be forced to either recall witnesses, or call additional witnesses in the Defence Case";⁶ and
- g. should the Defence arguments be accepted by the Appeals Chamber after trial, this will "likely result in the invalidation of any findings in the Trial Chamber Judgement based on the evidence introduced through these eighteen witness statements";⁷

NOTING that in its Response, the Prosecution argues that:

- a. the Motion mainly focuses on the merits of the Impugned Decision, and the Defence have failed to meet either requirement of Rule 73(B);⁸
- b. the Defence's assertion of unfairness as to the timing of the Prosecution's motion granted in the Impugned Decision "fails to address how the [Impugned] Decision affects the fair and expeditious conduct of the proceedings or the outcome of the trial";⁹
- c. the Defence have been on notice since 2006 that the Prosecution would seek the admission of the statements without cross-examination and the Defence had "ample opportunity to review the statements, and, in respect of their contents, they could have cross-examined trial witnesses";¹⁰
- d. the evidence admitted in the Impugned Decision "is cumulative[,] concerns the crime base[,] and does not go to the acts or conduct of the Accused", and the evidence is neither prejudicial nor can it be determinative of the outcome of the trial;¹¹ and
- e. as the statements do not concern the acts or conduct of any Accused, the Defence assertion that a final appeal would likely result in the invalidation of findings based on the statements "is at best wishful";¹²

⁴ *Ibid.*, para. 21.

⁵ *Ibid.*, para. 22.

⁶ *Ibid.*, para. 23.

⁷ *Ibid.*, para. 24.

⁸ Response, para. 5.

⁹ *Ibid.*, para. 7.

¹⁰ *Ibid.*, para. 7.

¹¹ *Ibid.*, para. 8

NOTING that in its Reply, the Defence submits that the Motion demonstrates that both requirements of Rule 73(B) are met, arguing *inter alia*, that:

- a. “any incorrect interpretation of governing law infringes on the rights of the Accused to a fair trial”;¹³
- b. the Prosecution’s argument that the Defence could have cross-examined trial witnesses regarding the evidence in the statements is “contrary to common sense” because the statements were not in the record, the witnesses were not on the Prosecution witness list, and “the Defence is not and cannot be obliged to contest the evidence that the Prosecution has never bothered to place on its 65 *ter* list”;¹⁴ and
- c. crime base evidence “is equally as important as the evidence concerning acts and conduct of the Accused”;¹⁵

CONSIDERING 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”;

CONSIDERING that Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, that even where both requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber,¹⁶ and that certification is not concerned with whether the decision was correctly reasoned or not;¹⁷

CONSIDERING that in the Impugned Decision, the Trial Chamber found that “the statements concern primarily the impact of crimes upon victims and relate to factors to be taken into account in determining sentencing”¹⁸, and that “to the extent the statements deal with the crime base they are

¹² *Ibid.*, para. 11.

¹³ Reply, para. 11.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, para. 16.

¹⁶ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

¹⁷ See Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3; Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007, p. 3; *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.

¹⁸ Impugned Decision, p. 5.

cumulative to evidence already admitted”¹⁹, and that nothing in the statements “goes to the acts or conduct of any of the Accused”,²⁰

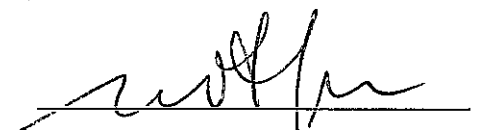
CONSIDERING that the Trial Chamber is not satisfied, given the nature and subject matter of the admitted statements, that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate resolution by the Appeals Chamber might materially advance these proceedings;

CONSIDERING, therefore, that neither of the requirements of Rule 73(B) has been satisfied;

PURSUANT TO Rules 54, 73(B) and 126 *bis*,

HEREBY GRANTS leave to file the Reply and **DENIES** the Motion.

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



Carmel Agius
Presiding

Dated this eleventh day of March 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ *Ibid.*, p. 6.

²⁰ *Ibid.*