



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: 27 May 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: 27 May 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIOVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON POPOVIĆ'S MOTION FOR CERTIFICATION OF
DECISION ON THE MOTION TO REOPEN THE PROSECUTION CASE**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć 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. Christopher Gosnell 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 “Vujadin Popović’s Request for Certification to Appeal the Trial Chamber’s Decision on the Motion to Reopen the Prosecution Case”, filed on 16 May 2008 (“Motion”), in which Popović seeks certification to appeal the Trial Chamber’s “Decision on Motion to Reopen the Prosecution Case”, issued on 9 May 2008 (“Impugned Decision”);

NOTING the “Prosecution Response to Vujadin Popović’s Request for Certification to Appeal the Trial Chamber’s Decision on the Motion to Reopen the Prosecution Case”, filed on 23 May 2008 (“Response”);

NOTING that in the Motion, Popović submits that:

- a. the Impugned Decision violates his right to be informed promptly and in detail of the charges against him enshrined in Article 21(4)(a) of the Statute, in that he must “start a completely new investigation about a crime scene which has been mentioned for the first time only after the closing of the Prosecution’s case-in-chief”;¹
- b. the Impugned Decision will “cause an undue delay, thus violating Article 21(4)(c) of the Statute”;²
- c. the Impugned Decision affects his right to a fair trial and, thus, “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that therefore the first of the two conditions prescribed under Rule 73(B) is satisfied”;³ and
- d. the re-opening of the Prosecution’s case could “create irreparable prejudice” and that an immediate resolution by the Appeals Chamber “could avoid repercussions whose consequences will be impossible to eliminate at a later stage of the proceedings”, such that a ruling by the Appeals Chamber at this stage will materially advance the proceedings, as required under the second condition prescribed under Rule 73(B);⁴

NOTING that in its Response, the Prosecution argues that:

¹ Motion, para. 10.

² *Ibid.*, para. 11.

³ *Ibid.*, paras. 12–13.

⁴ *Ibid.*, para. 14.

- a. none of the arguments presented in the Motion satisfy the requirements of Rule 73(B);⁵
- b. the Impugned Decision does not violate Popović's right to be informed promptly and in detail of the charges against him because the Impugned Decision does not "expand the charges against Popović", and because Popović has acknowledged that the evidence of executions at Bišina "does not aggravate the nature of the charges against him";⁶
- c. the Impugned Decision does not violate Popović's right to have adequate time and facilities to prepare his defence and, in fact, "expressly acknowledges and provides for such extra time";⁷
- d. there is no basis for Popović's claim that the Impugned Decision will cause undue delay;⁸ and
- e. none of the issues raised in the Motion provide a basis for Popović's "vague and unsubstantiated claim of 'irreparable prejudice'", and Popović has not demonstrated any reason why an immediate resolution by the Appeals Chamber may materially advance the proceedings;⁹

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,¹⁰ and that certification is not concerned with whether the decision was correctly reasoned or not;¹¹

⁵ Response, para. 4.

⁶ *Ibid.*, paras. 5–6.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, paras. 12–13.

¹⁰ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

¹¹ 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.

CONSIDERING that the Appeals Chamber has stated that in deciding whether to permit a reopening of the Prosecution's case, the Trial Chamber's discretion should be exercised "by reference to the probative value of the evidence and the *fairness to the accused*",¹² and that the Trial Chamber expressly considered whether permitting the Prosecution to reopen its case at this time would be unfair to the accused in this case¹³ and, therefore, that the issue involved in the Impugned Decision affects the fair and expeditious conduct of the proceedings;

CONSIDERING that the Impugned Decision will necessarily lengthen the trial—albeit minimally in the Trial Chamber's estimation—and that Popović has alleged that he must now conduct a lengthy investigation, and that both this additional trial time and further investigation might be unnecessary should the Appeals Chamber reverse the Impugned Decision and, therefore, that an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING, therefore, that both requirements of Rule 73(B) have been satisfied;

PURSUANT TO Rules 54 and 73(B),

HEREBY GRANTS the Motion.

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



 Judge O-Gon Kwon

Dated this twenty-seventh day of May 2008
 At The Hague
 The Netherlands

[Seal of the Tribunal]

¹² Impugned Decision, para. 25 (citing *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 283) (emphasis supplied).

¹³ *Ibid.*, paras. 34–39.