



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

IT-05-88-T
D29249 - D29246
26 JUNE 2009

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Case No.: IT-05-88-T

Date: 26 June 2009

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. John Hocking

Decision of: 26 June 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON GVERO MOTION SEEKING CERTIFICATION TO
APPEAL THE DECISION ON THE DEFENCE MOTION SEEKING A
VARIATION OF THE TRIAL CHAMBER'S ORDER**

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. Predrag Nikolić 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. Simon Davis 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 “Motion on Behalf of Milan Gvero Seeking Certification to Appeal the Decision on the Defence Motion Seeking a Variation of the Trial Chamber’s Order”, filed publicly on 12 June 2009 (“Certification Motion”);

NOTING that Gvero seeks certification from the Trial Chamber for interlocutory appeal of its “Decision on Motion on Behalf of Milan Gvero Seeking a Variation of the Trial Chamber’s Order”, issued on 11 June 2009 (“Impugned Decision”), pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”);¹

NOTING that Gvero submits that:

- (1) derogation from the proper procedure for the presentation of evidence set out in Rule 85, particularly following the Prosecution re-opening, is an issue that significantly affects the fair conduct of the proceedings;²
- (2) resolution of the matter by the Appeals Chamber may save time with respect to the entirety of the proceedings against Gvero before the Tribunal as it may avoid any possibility of a re-trial;³
- (3) the Impugned Decision plainly affects the outcome of the trial;⁴
- (4) the Impugned Decision relates to “matters of such importance” that an immediate resolution by the Appeals Chamber may materially advance the proceedings;⁵

NOTING the “Prosecution Response to Motion on Behalf of Milan Gvero Seeking Certification to Appeal the Decision on the Defence Motion Seeking a Variation of the Trial Chamber’s Order”, filed confidentially on 15 June 2009 (“Prosecution Response”), requesting the Trial Chamber to dismiss the Certification Motion because it does not satisfy the test for certification pursuant to Rule 73(B);⁶

¹ Certification Motion, paras. 1, 10.

² *Ibid.*, paras. 5-6.

³ *Ibid.*, para. 7.

⁴ *Ibid.*, para. 8.

⁵ *Ibid.*, para. 9.

⁶ Response, paras. 1, 7.

NOTING that the Prosecution submits that:

- (1) by attaching an *ex parte* annex containing the names of witnesses Gvero proposes to call in reopening to the “Motion on behalf of Milan Gvero Seeking the Recall of Certain Prosecution Witnesses and the Re-Opening of Milan Gvero’s Case” filed on 12 June 2009 (“12 June Motion”), the concerns underlying the Certification Motion are abated;⁷
- (2) unless and until the Trial Chamber either rejects the *ex parte* annex and/or orders its disclosure inter partes in advance of Gvero’s cross-examination of any witnesses to be recalled, the premise underlying the Certification Motion is premature;⁸

NOTING the “Partial Decision on Gvero Motion Seeking the Recall of Certain Prosecution Witnesses and the Re-Opening of the Case”, issued on 15 June, in which the Trial Chamber ordered, *inter alia*, that the Registry lift the *ex parte* nature of the Annex of the 12 June Motion, while keeping it confidential;

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,⁹ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;¹⁰

CONSIDERING that the Impugned Decision is of limited procedural scope;

CONSIDERING that, in the opinion of the Trial Chamber, the submissions put forward by Gvero fail to take into consideration the late stage of the trial proceedings;

CONSIDERING, consequently, that at this late stage of the proceedings the Trial Chamber is not satisfied that the Impugned Decision involves an issue that would significantly affect the fair and

⁷ *Ibid.*, para. 5.

⁸ *Ibid.*, para. 6.

⁹ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

¹⁰ *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.

expeditious conduct of the proceedings or the outcome of the trial, or for which an immediate resolution by the Appeals Chamber would materially advance the proceedings;

PURSUANT TO Rule 73(B) of the Rules,

HEREBY DENIES the Certification Motion.

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



Carmel Agius
Presiding

Dated this twenty-sixth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]