



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: 21 October 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: 21 October 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON BOROVCANIN'S REQUEST FOR CERTIFICATION OF
DECISION ON BOROVCANIN'S MOTION FOR ADMISSION OF
WRITTEN EVIDENCE PURSUANT TO RULE 92 *bis***

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. 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 “Request for Certification of Decision on Borovčanin’s Motion for Admission of Written Evidence pursuant to Rule 92 *bis*”, filed on 29 September 2008 (“Motion”);

NOTING the “Decision on Borovčanin’s Motion for Admission of Written Evidence pursuant to Rule 92 *bis*”, issued by the Trial Chamber on 22 September 2008, in which the Trial Chamber admitted the transcripts of Witness 4DW-5 and Witness 4DW-13 pursuant to the requirements of Rule 92 *ter* (“Impugned Decision”);¹

NOTING the “Borovčanin Defence Notice of Withdrawal of Witness 4DW-005,” filed on 16 October 2008, in which Borovčanin withdraws the present request for certification to the extent that it pertains to Witness 4DW-5;²

NOTING that Borovčanin requests the Trial Chamber to grant certification of the Impugned Decision on the following grounds:

1. the Impugned Decision involves an issue that will significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, because (a) the Prosecution is “arguably permitted under Rule 90(H)(ii) and (iii) to pursue lines of inquiry that go far beyond the content of the examination-in-chief, admitted in the form of the Rule 92 *ter* statement”;³ (b) this “arguably allows the Prosecution to attempt to inquire into any matters of interest that may be within the witnesses’ knowledge”;⁴ (c) that this grants the Prosecution a “substantial advantage” and “an opportunity to elicit evidence from two new witnesses who would not otherwise be so available”;⁵ and (d) that in light of the Impugned Decision, the Borovčanin Defence has only two options, either to “withdraw the witnesses and lose the specific evidence of material concern, or risk inquiries by the Prosecution into unknown areas that go beyond the scope of the tendered testimony”;⁶ and
2. an immediate resolution by the Appeals Chamber will materially advance the proceedings, because (a) “failure to grant certification will mean that the trial may hear more (or

¹ Decision on Borovčanin’s Motion for Admission of Written Evidence pursuant to Rule 92 *bis*, 22 September 2008.

² Borovčanin Defence Notice of Withdrawal of Witness 4DW-005, 16 October 2008.

³ Motion, para. 5.

⁴ *Ibid.*

⁵ *Ibid.*, para. 6.

⁶ *Ibid.*, para. 7.

alternatively, less) evidence that [sic] it should have”;⁷ and (b) that the “potential damage is significant and irreparable” on any final appeal;⁸

NOTING the “Prosecution Response to Request for Certification of Decision on Borovčanin’s Motion for Admission of Written Evidence pursuant to Rule 92 *bis*”, filed confidentially on 6 October 2008 (“Response”), in which the Prosecution objects to the Motion, arguing that the Motion fails to satisfy the requirements of Rule 73(B),⁹ because:

1. the Motion “simply conjectures that the Trial Chambers may not properly regulate cross examination pursuant to Rule 90(H), and that this ‘arguably’ could be unfair to the Defence”;¹⁰
2. such “sheer speculation concerning evidentiary matters [...] lies outside the scope of the Impugned Decision”;¹¹
3. even if the “scope of cross-examination could be properly considered integral to the Impugned Decision, the Motion fails to identify any reasonable grounds upon which the Trial Chamber’s ability appropriately to exercise its discretion in accordance with Rule 90(H) may be challenged in advance of any rulings”;¹² and
4. therefore, that “nothing in the Motion establishes that the Impugned Decision has any appreciable impact upon either, the fairness of the proceedings or upon the outcome of the Trial”;¹³

NOTING that, although the Motion relies on Rule 72(B)(ii), the Trial Chamber will consider the Motion under Rule 73(B), which governs whether the Trial Chamber may grant certification of the Impugned Decision;

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, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

⁷ *Ibid.*, para. 8.

⁸ *Ibid.*, paras. 8-9.

⁹ Response, para. 8.

¹⁰ *Ibid.*, para. 6.

¹¹ *Ibid.*

¹² *Ibid.*

NOTING 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,¹⁴ and that certification is not concerned with whether the decision was correctly reasoned or not;¹⁵

CONSIDERING that the issue involved in the Impugned Decision is whether or not to allow the Prosecution to cross-examine Witness 4DW-13, and that nothing in the Impugned Decision addresses the potential scope of cross-examination under Rule 90(H)(ii) and (iii);

CONSIDERING therefore that the Trial Chamber is neither satisfied that the issue as such would significantly affect the fair and expeditious conduct of these proceedings or the outcome of this trial, nor that an immediate resolution by the Appeals Chamber would materially advance the proceedings;

PURSUANT TO Rule 73(B),

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding

Dated this twenty-first day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ *Ibid.*, para. 9.

¹⁴ Decision on Motion Seeking Certification of the Decision on Joint Defence Motion and Supplementary Motion to Strike the Testimony of Witness PW-168, 11 March 2008, p. 4; Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 and Request for Variation of the Time-Limits, 12 July 2007, p.4.

¹⁵ Decision on Motion Seeking Certification of the Decision on Joint Defence Motion and Supplementary Motion to Strike the Testimony of Witness PW-168, 11 March 2008, p. 4; Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 And Request for Variation of the Time-Limits, 12 July 2007, p. 4; Decision on Defence Motion for Certification to Appeal Admitting PW-104 Interview Statements, 25 April 2007, p. 1.