



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: 3 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: 3 June 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON POPOVIĆ REQUEST FOR CERTIFICATION TO APPEAL
THE DECISION ON THE PROSECUTION SECOND MOTION TO
REOPEN ITS 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. 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 “Vujadin Popović’s Request for Certification to Appeal the Trial Chamber Decision on Prosecution Second Motion to Reopen its Case and/or Admit Evidence in Rebuttal,” filed confidentially, filed confidentially on 15 May 2009 (“Motion”);

NOTING that Popović seeks certification from the Trial Chamber for interlocutory appeal of its “Decision on Prosecution’s Second Motion to Reopen its Case and/or Admit Evidence in Rebuttal”, rendered on 8 May 2009 (“Impugned Decision”), pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) limitedly to appeal the admission of the Živanović Footage;

NOTING that Popović submits that the admission of the Živanović Footage and its transcript is prejudicial to him as he is prevented from cross-examining Živanović on the statements he made in that video, as well as from putting his case to him as Rule 90(H) provides, thus depriving Popović of his right to challenge the author of the statements made in the Živanović Footage;¹

NOTING that Popović argues that this involves an issue that could affect the fairness of the trial;²

NOTING that Popović submits further that an immediate resolution by the Appeals Chamber is necessary so that the parties know what evidence should be considered in their final briefs and closing arguments, and this may materially advance the proceedings;³

NOTING the “Consolidated Response of the Pandurević Defence to the Motions of Vujadin Popović and Milan Gvero Seeking Certification to Appeal the Trial Chamber’s Decision on the Prosecution’s Second Motion to Reopen its Case,” filed confidentially on 19 May 2009 (“Pandurević Response”), not opposing the Motion;

NOTING the “Prosecution Response to Vujadin Popović’s Request for Certification to appeal the Trial Chamber’s Decision on the Prosecution Second Motion to Reopen its Case and/or Admit Evidence in Rebuttal,” filed confidentially on 27 May 2009 (“Prosecution Response”), requesting the Trial Chamber to dismiss the Motion because it argues the merits of the Impugned Decision and does not satisfy the test for certification as set forth in Rule 73(B);

¹ Motion, paras. 10–13.

² *Ibid.*, para. 13.

³ *Ibid.*, para. 14.

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,⁴ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;⁵

CONSIDERING that the decision to permit reopening to allow, *inter alia*, the admission of the Živanović Footage is of a limited nature and not one which significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial;

CONSIDERING FURTHER that the Trial Chamber is not satisfied that, at this late stage of the proceedings, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

PURSUANT TO Rule 73(B) of the Rules,

HEREBY DENIES the Motion, and

ORDERS the lifting of the confidentiality of the Motion, the Pandurević Response and the Prosecution Response.

⁴ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

⁵ *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.

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



O-gon Kwon
Judge

Dated this third day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]