IT-05-88-T
D 29254 - D 29251
26 JUNE 2009

29254
RK

UNITED
NATIONS

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: 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 BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DECISION ON MOTION ON BEHALF OF MILAN GVERO SEEKING RECONSIDERATION AND, IN THE ALTERNATIVE, CERTIFICATION

Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused
Mr. Zoran Živanović and Ms. Mira Tapušković 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 Reconsideration of the Trial Chamber's Refusal to Allow the Recall of Certain Witnesses and in the Alternative Certification of the Same", filed confidentially on 19 June 2009 ("Motion");

NOTING that Gvero seeks reconsideration from the Trial Chamber of its "Partial Decision on Gvero Motion Seeking Recall of Certain Prosecution Witnesses and the Reopening of the Case" ("Impugned Decision");

NOTING that Gvero submits that he has shown good cause for recalling four witnesses, contrary to the findings of the Trial Chamber in the Impugned Decision;[1]

NOTING that Gvero further submits that the Impugned Decision deprives him of his fair trial rights, notably by reversing the burden of proof and preventing him from responding to the Prosecution's case;[2]

NOTING that Gvero argues that the standard that the Trial Chamber imposed for permitting the recall of the four witnesses was too narrow and incorrect;[3]

NOTING that, if the motion to reconsider is denied, Gvero seeks certification to appeal the part of the Impugned Decision in regard to the request to recall witnesses;[4]

NOTING that Gvero submits that:

(1) denial of the request to recall witnesses significantly affects the fair conduct of the proceedings by depriving him of testing the veracity of the evidence adduced against him and effectively reversing the burden of proof;[5]

(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;[6]

---

1 Motion, para. 4.
2 *Ibid.*, paras. 5–8.
3 *Ibid.*, para. 9.
4 *Ibid.*, para. 14.
5 *Ibid.*, para. 17.

(3) the Impugned Decision plainly affects the outcome of the trial;[7]

(4) the Impugned Decision relates to "matters of such importance" that an immediate resolution by the Appeals Chamber may materially advance the proceedings;[8]

NOTING that the Prosecution has not yet filed a response;

NOTING that reconsideration of a decision is permitted in exceptional cases "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice"[9] and that, in the latter case, the party arguing for a reconsideration must satisfy the Trial Chamber that there are circumstances justifying reconsideration to prevent injustice;[10]

CONSIDERING that Gvero has not identified an error of reasoning, because he has not given any justification for his proposition that the standard that the Trial Chamber imposed for permitting the recall of these witnesses was too narrow and incorrect;

CONSIDERING FURTHER that circumstances justifying reconsideration to prevent injustice do not exist, given the narrow scope and implications of the admission of the Bokšanica footage, the limited nature of the evidence proposed to be recalled by Gvero in response and the current stage of the proceedings;

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";

---

6 *Ibid.*, para. 18.

7 *Ibid.*, para. 19.

8 *Ibid.*, para. 20.

9 Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes, 10 January 2008, p. 4; Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, pp. 4–5 and note 26. *See also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle", 14 June 2006, para. 2 (stating the standard of the Appeals Chamber of both ICTY and ICTR for reconsideration of interlocutory appeals decisions).

10 Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes, 10 January 2008, p. 4; Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, p. 5 and note 27. *See also Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2 (considering that for an appellant to succeed in requesting reconsideration of an Appeals Chamber decision, "he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice").

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,[11] and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;[12]

CONSIDERING that the Bokšanica Footage and the evidence proposed to be recalled by Gvero in response are of such a limited nature that the Impugned Decision is not one which significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial;

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 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;

HEREBY DENIES the 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

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

[12] *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.