



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: 6 February 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: 6 February 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON DEFENCE MOTION FOR REMOVAL FROM EVIDENCE
OF MOMIR NIKOLIĆ'S STATEMENT OF FACTS**

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. Miodrag Stojanović 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”), is seised of the “Popović Submission for the Removal of Momir Nikolić’s Statement of Facts and Acceptance of Responsibility from Evidence”, filed on 30 November 2007 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. Momir Nikolić’s Statement of Facts and Acceptance of Responsibility (“Statement of Facts”)¹ was admitted into evidence at the trial hearing of 27 September 2006 after having been used with a witness by the Borovčanin Defence.² At that time, Momir Nikolić was listed as a witness on the Prosecution 65 *ter* witness list³ and scheduled to testify at a later stage of the Prosecution case. On 2 November 2007, the Prosecution announced the withdrawal of Momir Nikolić from its witness list. The Prosecution submitted that Momir Nikolić has become adverse to

¹ Ex. 4D00016. See also *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003, Annex B.

² T. 2244–2246 (27 September 2006).

“JUDGE AGIUS: [...] The other document is the statement of facts and acceptance of responsibility by -- in the case of Momir Nikolic. And it's given 65 ter number 4D00016 [...] Any objections?”

MR. McCLOSKEY: [...] the statement of Momir Nikolic, as long as that's coming in in full, I have no objection. I don't think the whole thing was mentioned, but I think if it's going to be mentioned, it should come in in full. We saw a good part of it, I mean one whole page on the screen, but --

JUDGE AGIUS: Mr. Lazarevic or -- yes.

MR. STOJANOVIC: Good afternoon, Your Honour. Since it was I who examined the previous witness, let me just give an explanation. At this stage we favour the proposal to introduce a part of the statement of Mr. Momir Nikolic, the part that we used in view of the standards you set at the beginning of the trial and since this statement I suppose will also be covered during the direct testimony of this witness [...]

JUDGE AGIUS: Yes.

MR. McCLOSKEY: He's correct in that we -- as you know, Mr. Nikolic -- Mr. Momir Nikolic is on our witness list. We would at that time be submitting -- that's an important document, that -- it's a statement of facts pursuant to a plea agreement. I -- I have no objection of course it going in now, but I don't think we should see pieces of it. I think that might give the wrong impression. It's a very important document. It's coming in anyway, I would think, though I don't know if you want to go that far at this point [...]

JUDGE AGIUS: All right. I think that the best way to go about this is to admit the entire statement of facts and acceptance of responsibility for the time being, and then we see later, depending on whether the Prosecution eventually makes use or decides to make use of the entire document or not. But there's no point in having a piece -- a part of it which we would need to consider within the entire context of the statement itself. So -- otherwise, there are no objections?

MR. McCLOSKEY: No, Mr. President [...]

MR. BOURGON: Just concerning the statement of the acceptance of responsibility that the Chamber just decided to admit, Mr. President, I believe it is important to know that this must be admitted on the record not for the truth of its content, but basically as simply a document that will be used with some witnesses. But I would object to the admission of -- that this document be admitted for the truth of its contents. Thank you, Mr. President.

JUDGE AGIUS: Yes, Mr. McCloskey, I don't need -- we need any further positions on this matter.

MR. CLOSKEY: I would ask that it be provided -- that it be accepted for whatever value the Judges saw to it and we stay away from these old outdated common law --

JUDGE AGIUS: We'll look at it as we go along and we'll decide what weight to give to it, if at all.”

³ Prosecution’s Filing of Pre-trial Brief pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter* (E) (v) [sic], *Confidential* Annex A.

the Prosecution case and that he made statements during the proofing session which the Prosecution does not find credible.⁴

2. On 30 November 2007, Popović filed the Motion to remove the Statements of Facts from the trial record. Miletić, Beara and Nikolić joined the Motion and made further submissions on 3, 4 and 7 December 2007, respectively.⁵ On 10 December 2007, Borovčanin filed a response to the submissions in the Motion and the Miletić Joinder.⁶ Popović filed a Reply to the Borovčanin Response on 13 December 2007.⁷ The Prosecution filed a consolidated response on 14 December 2007.⁸

II. SUBMISSIONS OF THE PARTIES

A. Motion and Joinder Requests

3. In the Motion, Popović requests that the Statement of Facts be removed from the record in its entirety.⁹ He submits that the Statement of Facts “was offered into evidence in part, having been used by the Borovčanin Defence during the cross-examination of Witness Boering” and that the Trial Chamber admitted it “in its entirety” based on the assumption that Momir Nikolić would later testify in the Prosecution case.¹⁰

4. Popović further submits that following the withdrawal of Momir Nikolić as a Prosecution witness there is “no evidentiary foundation for the admission of this exhibit”¹¹ because Momir Nikolić cannot attest to the accuracy of the assertions contained in the Statement of Facts. Thus, it is

⁴ T. 17398 (2 November 2007). “And from that proofing session it has arisen that Momir Nikolić has become adverse to the Prosecution’s case. He made statements at that proofing session that we don’t believe are credible and in reviewing his overall situation we have decided on balance to withdraw him as a witness.”

⁵ General Miletić’s Application of Joinder to the Submission of Vujadin Popović for the removal of Momir Nikolić’s Statement of Facts, 3 December 2007 (French original), 5 December 2007 (English translation), (“Miletić Joinder”); Notification of Joinder on behalf of Ljubisa Beara to the Popović and Miletić Submissions for the Removal of Momir Nikolić’s Statement of Facts and Acceptances of Responsibility from Evidence, 4 December 2007 (“Beara Joinder”); Motion on behalf of Drago Nikolić Joining the Popović Submission for the Removal of Momir Nikolić’s Statement of Facts and Acceptances of Responsibility from Evidence, 7 December 2007 (“Nikolić Joinder”).

⁶ Borovčanin Defence Response to “Popović Submission for the Removal of Momir Nikolić’s Statement of Facts and Acceptance of Responsibility from Evidence” and “Requête du General Miletić portant l’Association a la Requête de Vujadin Popović aux Fins d’Exclusion du Dossier de l’Exposé des Faits de Momir Nikolić”, 10 December 2007 (“Borovčanin Response”).

⁷ Popović Reply to Borovčanin Defence Response to “Popović Submission for the Removal of Momir Nikolić’s Statement of Facts and Acceptance of Responsibility from Evidence” and “Requête du General Miletić portant l’Association a la Requête de Vujadin Popović aux Fins d’Exclusion du Dossier de l’Exposé des Faits de Momir Nikolić”, 13 December 2007 (“Popović Reply”).

⁸ Prosecution’s Consolidated Response to Popović, Miletić, Beara, Nikolić and Borovčanin Defence Submissions Concerning Momir Nikolić’s Statement of Facts, 14 December 2007 (“Prosecution Consolidated Response”).

⁹ Motion, para. 11.

¹⁰ Motion, para. 3.

¹¹ Motion, para. 5.

submitted that as such, the Statement of Facts cannot be considered for the truth of its contents and cannot be used in assessing the credibility of other witnesses.¹²

5. Popović finally argues that (1) if the Statement of Facts remains in evidence for the truth of its contents, “the Accused will be left without the opportunity to cross-examine the witnesses against him”; (2) as Momir Nikolić will not appear as a Prosecution witness the Defence is denied the opportunity to cross-examine him on the Statement of Facts; and (3) that “this will invariably affect the weight attributed to the statement, as the Trial Chamber will not be in a position to assess such weight in light of all the relevant circumstances.”¹³ According to Popović, the fairness of this trial can therefore only be preserved by removing the Statement of Facts from the record.¹⁴

6. Miletić fully joins Popović’s submissions. He adds that when the Prosecution informed the Trial Chamber of its decision to withdraw Momir Nikolić, the Prosecution also expressed doubts as to Momir Nikolić’s credibility.¹⁵ In this context, Miletić submits that in the case *The Prosecutor v. Momir Nikolić* the credibility and statements of Momir Nikolić were questioned by the Trial Chamber and that his lack of credibility was confirmed by the Appeals Chamber.¹⁶ Miletić argues that since Momir Nikolić is no longer a witness in the present case, the Defence cannot test his credibility and the Trial Chamber will not be able to properly assess the veracity of his Statement of Facts.¹⁷ Miletić concludes that “considering the doubts weighing against the credibility of Momir Nikolić expressed by the Chambers that heard him and by the Prosecution in the present case [...] the probative value of [his] Statement of Facts is far inferior to the need to ensure a fair trial and [...] should be removed from the case file pursuant to Rule 89(D) of the Rules.”¹⁸

7. Beara joins the submissions made by Popović and Miletić. He refers to the ruling of the Trial Chamber when the Statement of Facts was admitted, namely “that the best way to go about this is to admit the entire [Statement of Facts] for the time being, and then we see later, depending of whether the Prosecution eventually makes use or decides to make use of the entire document or not.”¹⁹ Beara submits that as Momir Nikolić is not going to be a Prosecution witness and the

¹² Motion, para. 6.

¹³ Motion, para. 9.

¹⁴ Motion, para. 10.

¹⁵ Miletić Joinder, para. 3 (referring to T. 17398 (2 November 2007)).

¹⁶ Miletić Joinder, para. 4.

¹⁷ Miletić Joinder, para. 5.

¹⁸ Miletić Joinder, para. 8.

¹⁹ Beara Joinder, para. 5 (referring to T. 2245 (27 September 2006)).

Prosecution will therefore not make use of the entire Statement of Facts, it should be removed from the record.²⁰

8. Nikolić joins the Motion and the Miletić Joinder in part. He agrees with Popović and Miletić that the Statement of Facts cannot be considered for the truth of its contents, but submits that it should remain in the record for impeachment purposes with regard to the witnesses it was used with during cross-examination.²¹ Nikolić seeks to exclude the Statement of Facts from the trial record as evidence going to the truth of its contents.

B. Borovčanin Response

9. Borovčanin opposes the Motion and the Miletić Joinder and requests that they “be dismissed insofar as they seek exclusion from the record of those parts of the Statement of facts which were used by the Borovčanin Defence during cross-examinations thus far.”²² As it concerns “the other parts of the Statement of Facts” Borovčanin does not object to them being excluded from the record, or, “in the alternative, for the entire Statement of Facts remaining in the record, provided only those parts used by the parties are relied upon by the Trial Chamber.”²³

10. Borovčanin submits that the issue raised by Popović and Miletić rather goes to the weight of the evidence and not to its admissibility.²⁴ He argues that the testimony of Momir Nikolić was not a prerequisite for the admission of the Statement of Facts.²⁵ He further submits that, although Momir Nikolić is withdrawn from the Prosecution Witness list, he still may be called as a witness by the Defence or the Trial Chamber and a request for removal therefore not only lacks merit but is also premature.²⁶ It is Borovčanin’s understanding of the Trial Chamber’s ruling that, while the entire Statement of Facts was admitted, only those parts used by the parties will be relied upon by the Trial Chamber.²⁷

11. As to Miletić’s reference to remarks made by the Prosecution supporting his argument concerning Momir Nikolić’s credibility, Borovčanin argues that the Prosecution’s remarks only relate to statements made by Momir Nikolić during the proofing session, and not to the Statement of Facts.²⁸ Furthermore, Borovčanin cites the Appeals Chamber’s finding in *The Prosecutor v. Momir*

²⁰ Beara Joinder, para. 6.

²¹ Nikolić Joinder, para. 7.

²² Borovčanin Response, para. 14.

²³ Borovčanin Response, para. 15.

²⁴ Borovčanin Response, para. 6.

²⁵ Borovčanin Response, para. 7.

²⁶ Borovčanin Response, para. 9.

²⁷ Borovčanin Response, para. 11.

²⁸ Borovčanin Response, para. 13.

Nikolić, stating that any false confessions made by Momir Nikolić before his guilty plea were cured when he went back to the Prosecution on his own initiative and corrected his Statement of Facts.²⁹

C. Popović Reply

12. Popović seeks leave to reply to the Borovčanin Response pursuant to Rule 126 *bis* of the Rules of Procedure and Evidence. The Trial Chamber hereby grants leave to file the Reply and considers the arguments submitted therein.

13. Popović submits that the Trial Chamber's preference to have whole statements in evidence, even when it will only rely on those parts used with a witness, cannot justify retaining the whole Statement of Facts in evidence "where the primary basis for its admission has failed to eventuate".³⁰ According to Popović, there is no evidentiary basis upon which the Statement of Facts can remain in evidence other than Momir Nikolić being called as Prosecution witness.³¹

D. Prosecution Consolidated Response

14. The Prosecution submits that the Motion and the Joinder Requests should be dismissed and the Statement of Facts should remain on the record "for all purposes, with its evidentiary weight to be determined by the Trial Chamber."³² The Prosecution argues that as the Statement of Facts has been used by the Defence during the cross-examination of several witnesses it would not be in the interests of justice for the Trial Chamber "to reverse its decision on admissibility", or to limit the admission to the sections used which can only properly be understood in the context of the entire document.³³

15. The Prosecution further submits that the Statement of Facts was not admitted based on Momir Nikolić being called as a Prosecution witness.³⁴ It argues that the Trial Chamber's "reservation that it would 'see later, depending on whether the Prosecution eventually makes use or decides to make use of the entire document or not' did not concern the admissibility of the document or part of it, but the weight that the Trial Chamber would attribute to the entire [document]."³⁵ The Prosecution submits that this understanding of the Trial Chamber's ruling is

²⁹ Borovčanin Response, para. 13.

³⁰ Popović Reply, para. 10.

³¹ Popović Reply, para. 12.

³² Prosecution Consolidated Response, para. 2.

³³ Prosecution Consolidated Response, para. 2.

³⁴ Prosecution Consolidated Response, para. 5.

³⁵ Prosecution Consolidated Response, para. 6

supported by the Trial Chamber's noting that 'there's no point in having a piece – a part of it which we would need to consider within the entire context of the statement itself'.³⁶

16. The Prosecution argues that the Trial Chamber's consideration of the evidence adduced on cross-examination is assisted by the admission of the entire Statement of Facts, in particular with regard to the circumstances of Momir Nikolić's guilty plea. "Indeed, the circumstances of Momir Nikolić's plea provide a further basis for the Trial Chamber to admit the document pursuant to Rule 89(C) of the Rules [...] as they indicate that a degree of reliability may be attached to the Nikolić Statement of Facts insofar as it was accepted by both the Trial Chamber and the Appeal Chamber as a sufficient factual basis for the Judgement of conviction."³⁷ The Prosecution submits that, therefore, any submissions concerning Momir Nikolić's credibility as a witness are completely irrelevant in relation to the admissibility of the Statement of Facts.³⁸

17. Finally, the Prosecution argues that the Accused are not prejudiced by the Prosecution's decision not to call Momir Nikolić since the Defence can call him as a witness and should his testimony differ from the Statement of Facts, be entitled to cross-examine him to test his credibility and the credibility of the Statement of Facts.³⁹

III. DISCUSSION

18. The Statement of Facts was admitted on 27 September 2006 following its use by the Borovčanin Defence during cross-examination of Pieter Boering.⁴⁰ While the Borovčanin Defence only tendered that part of the Statement of Facts that had been used with the witness, the Prosecution submitted that it did not object so long as the whole document was admitted. The Prosecution stated:

Mr. Momir Nikolić is on our witness list. We would at that time be submitting [...] I have no objection of course it going in now, but I don't think we should see pieces of it. I think that might give the wrong impression. It's a very important document. It's coming in anyway, I would think, though I don't know if you want to go that far at this point.⁴¹

³⁶ Prosecution Consolidated Response, para. 6 (referring to T. 2245 (27 September 2006)).

³⁷ Prosecution Consolidated Response, para. 7.

³⁸ Prosecution Consolidated Response, para. 8.

³⁹ Prosecution Consolidated Response, para. 10.

⁴⁰ T. 2151–2154 (25 September 2006) (witness Pieter Boering).

⁴¹ T. 2245 (27 September 2006).

19. Following the Prosecution submissions the Trial Chamber admitted the whole Statement of Facts for the purpose of having the entire document in front of it in order to consider in context the parts that were used with the witness when assessing his testimony.⁴²

20. The Trial Chamber did not admit the Statement of Facts for the truth of its contents or as a substitute for Momir Nikolić's appearance as a Prosecution witness giving evidence before the Trial Chamber. The Prosecution decided not to call Momir Nikolić despite his availability. Consequently, the Prosecution cannot attempt to rely on the Statement of Facts in order to introduce his evidence thereby preventing the Defence from cross-examining the witness and testing the evidence.

21. Since its admission into evidence, parts of the Statement of Facts have been used by the Borovčanin and the Nikolić Defence during cross-examination of several other Prosecution witnesses.⁴³ The fact that Momir Nikolić was not called as a Prosecution witness does not affect the admissibility of the Statement of Facts for the purpose of considering the parts of it that were used by the Defence to challenge the testimony of these witnesses. Of course, the ultimate weight to be accorded the Statement of Facts in considering the evidence of these witnesses will depend greatly on whether Momir Nikolić ultimately testifies in this case.

22. The Trial Chamber reiterates its position that the entire Statement of Facts is necessary to place the parts that have been put to the witnesses in context. The Statement of Facts shall therefore remain in evidence, but for the sole purpose of assessing the testimony of the Prosecution witnesses with whom parts of the Statement of Facts were used.

⁴² T. 2245 (27 September 2006). "JUDGE AGIUS: All right. I think that the best way to go about this is to admit the entire statement of facts and acceptance of responsibility for the time being, and then we see later, depending on whether the Prosecution eventually makes use or decides to make use of the entire document or not. But there's no point in having a piece -- a part of it which we would need to consider within the entire context of the statement itself."

⁴³ T. 3892–3893 (9 November 2006) (witness PW-138); T. 17044 (29 October 2007) (witness PW-168); T. 18042–18044 (21 November 2007) (witness Mile Janjić).

IV. DISPOSITION

For these reasons, pursuant to Rules 54, 89(C), 126 *bis* of the Rules, the Trial Chamber hereby **GRANTS** leave to file the reply and **DENIES** the Motion.

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



Carmel Agius
Presiding

Dated this sixth day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]