

**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-A  
Date: 19 November 2013  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge William H. Sekule  
Judge Fausto Pocar  
Judge Arlette Ramaroson  
Judge Mandiaye Niang

**Registrar:** Mr. John Hocking

**Decision of:** 19 November 2013

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
RADIVOJE MILETIĆ  
VINKO PANDUREVIĆ**

***PUBLIC***

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**DECISION ON DRAGO NIKOLIĆ'S FIRST MOTION FOR  
ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL  
PURSUANT TO RULE 115 OF THE RULES**

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**The Office of the Prosecutor:**

Mr. Peter Kremer QC

**Counsel for the Accused:**

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović  
Mr. John Ostojić for Mr. Ljubiša Beara  
**Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić**  
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić  
Mr. Peter Haynes QC and Mr. Simon Davis for Mr. Vinko Pandurević

**THE APPEALS 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 (“Appeals Chamber” and “Tribunal”, respectively);

**BEING SEISED OF** the “Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex” filed publicly with confidential annex by Drago Nikolić (“Nikolić”) on 19 September 2013 (“Motion”), in which he seeks the admission, as additional evidence on appeal, of notes compiled by an investigator in the Office of the Prosecutor (“Prosecution”) during a meeting with Witness PW-101 on 30 July 2013 (“Investigator Notes”);<sup>1</sup>

**NOTING** the “Prosecution Response to Drago Nikolić’s First Rule 115 Motion” filed publicly with confidential annex by the Prosecution on 21 October 2013 (“Response”), in which it opposes the Motion;<sup>2</sup>

**NOTING** the “Reply to Prosecution Response to Drago Nikolić’s First Rule 115 Motion” filed by Nikolić on 4 November 2013 (“Reply”);

**RECALLING** that, pursuant to Rule 115(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), a party may submit a request to present additional evidence on appeal no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay;<sup>3</sup>

**NOTING** that the 30-day time limit prescribed under Rule 115 of the Rules in this case expired on 1 June 2011;<sup>4</sup>

**NOTING** Nikolić’s submission that the Investigator Notes were “communicated” to him for the first time on 2 September 2013 and that the Motion was filed at the earliest opportunity;<sup>5</sup>

**FINDING** that good cause for the late filing has been demonstrated on the basis that Nikolić was unable to comply with the time limit set out in Rule 115(A) of the Rules as the Investigator Notes were disclosed to him by the Prosecution after the expiration of the 30-day time limit and that

<sup>1</sup> Motion, paras 1-2, 20, p. 6. See also Motion, Annex.

<sup>2</sup> Response, para. 1. See Response, para. 15.

<sup>3</sup> See also, *e.g.*, Decision on Radivoje Miletić’s First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013 (“Decision of 15 April 2013”), para. 5 and references cited therein.

<sup>4</sup> Decision of 15 April 2013, para. 28 and references cited therein. Nikolić filed his original brief in reply on 2 May 2011. See Brief in Reply on Behalf of Drago Nikolić, 2 May 2011 (confidential).

<sup>5</sup> Motion, para. 13. The Prosecution does not dispute that the Investigator Notes were “previously unavailable to Nikolić”. See Response, para. 3.

Nikolić filed his Motion as soon as possible after he became aware of the existence of the Investigator Notes, *i.e.* 17 days after they were disclosed to him;<sup>6</sup>

**RECALLING** that, in order for additional evidence to be admissible on appeal pursuant to Rule 115 of the Rules, the applicant must first demonstrate that the tendered evidence was not available to him at trial in any form, or discoverable through the exercise of due diligence;<sup>7</sup>

**CONSIDERING** that the Investigator Notes are dated 30 July 2013, were disclosed to Nikolić on 2 September 2013,<sup>8</sup> and that the Prosecution does not dispute that they were not previously available to Nikolić;<sup>9</sup>

**FINDING**, therefore, that the Investigator Notes were neither available at trial nor discoverable through the exercise of due diligence;

**RECALLING** that the applicant must also show that the tendered evidence is both relevant to a material issue and credible;<sup>10</sup>

**NOTING** that Nikolić submits that the Investigator Notes are highly relevant to a material issue as they show that Witness PW-101 recanted his testimony given at trial on 22-23 February 2007 in the *Popović et al.* case, specifically with respect to the fact that he saw Nikolić at a field in Orahovac where prisoners were being executed on 14 July 1995 at around 8:30 p.m.;<sup>11</sup>

**CONSIDERING** that Trial Chamber II of the Tribunal (“Trial Chamber”) found that it was satisfied that Nikolić was “personally present at the execution site” in Orahovac and that “Nikolić [...] gave directions to the soldiers at the execution site” (“Contested Finding”);<sup>12</sup>

**NOTING** Nikolić’s nineteenth ground of appeal in which he submits, *inter alia*, that had Witness PW-101’s credibility been properly assessed, no reasonable trial chamber could have accepted his testimony and adopted the Contested Finding;<sup>13</sup>

<sup>6</sup> See, *e.g.*, Decision of 15 April 2013, paras 28-29 and references cited therein.

<sup>7</sup> See, *e.g.*, Decision of 15 April 2013, para. 6 and references cited therein.

<sup>8</sup> See *supra*, p. 1. Nikolić submits that the contents of the Investigator Notes, *i.e.* Witness PW-101’s recantation, were not discoverable at trial. See Motion, paras 3, 10-13.

<sup>9</sup> Response, para. 3.

<sup>10</sup> See, *e.g.*, Decision of 15 April 2013, para. 7 and references cited therein.

<sup>11</sup> Motion, paras 2, 14-15.

<sup>12</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”), paras 1362, 1364. See also Motion, para. 21.

<sup>13</sup> Appellant’s Brief on Behalf of Drago Nikolić, 3 August 2011 (public redacted version), paras 316, 338. See also Motion, para. 4.

**FINDING**, therefore, that the Investigator Notes are relevant to the question of Nikolić's individual criminal responsibility for crimes committed in Orahovac on 14 July 1995 and that their credibility is not contested;<sup>14</sup>

**RECALLING** that the applicant must further demonstrate that the tendered evidence *could* have had an impact on the verdict such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe;<sup>15</sup>

**NOTING** Nikolić's submission that Witness PW-101's evidence is the "sole direct evidence" upon which the Contested Finding is based and that the Investigator Notes demonstrate that his conviction, pursuant to the first category of joint criminal enterprise on the basis of his purported contribution to events in Orahovac, is wholly unsafe;<sup>16</sup>

**NOTING** the Prosecution's submission that the Contested Finding relies on more than Witness PW-101's testimony, and that other evidence demonstrates that the Contested Finding would stand in the absence of Witness PW-101's testimony ("Other Evidence");<sup>17</sup>

**NOTING** the Prosecution's submission that the Other Evidence indicates, *inter alia*, Nikolić's involvement in organising the detention of prisoners at Grbavci School on 13-14 July 1995,<sup>18</sup> the fact that he bribed soldiers to continue helping with the executions,<sup>19</sup> and that on 14 July 1995 he was seen driving from the school towards the execution site that was approximately one kilometre away;<sup>20</sup>

**NOTING** the Prosecution's further argument that even if Witness PW-101's evidence impacted the Contested Finding, the admission of the Investigator Notes could not render the verdict unsafe as his convictions for genocide, murder as a violation of the laws or customs of war, and extermination and persecution as crimes against humanity were based on a wide range of other evidence;<sup>21</sup>

**NOTING** Nikolić's submission in reply that the purpose of Rule 115 of the Rules is "to admit additional evidence not available at trial, which could have been a decisive factor in reaching the

<sup>14</sup> See Motion, paras 16-19; Response, para. 3.

<sup>15</sup> See, *e.g.*, Decision of 15 April 2013, para. 8.

<sup>16</sup> Motion, paras 4, 14, 21-25; Reply, paras 7-20.

<sup>17</sup> Response, paras 4-7.

<sup>18</sup> Response, para. 5, referring to Trial Judgement, paras 471, 1345, 1350-1351, 1358, 1361-1365, 1390-1391, 1409.

<sup>19</sup> Response, para. 5, referring to Trial Judgement, para. 1361.

<sup>20</sup> Response, paras 5-6, referring to Trial Judgement, paras 482, 486, 1362, fn. 4420.

<sup>21</sup> Response, paras 8-11.

decision at trial and not solely on the determination of the guilt or innocence of an accused for any specific count”;<sup>22</sup>

**CONSIDERING** that the Trial Chamber, in concluding that Nikolić “significantly contributed to the common purpose of the JCE to Murder”, and ultimately that he was “a participant in the JCE to Murder”,<sup>23</sup> in addition to the Contested Finding, relied on a number of previous findings concerning Nikolić’s contributions to the common purpose, including that:

- (i) during the evening of 13 July 1995, Nikolić made preparations for detaining the prisoners at Orahovac, and was at Orahovac giving directions to the Zvornik Brigade Military Police he had previously ordered to go there;
- (ii) on the morning of 14 July 1995, Beara, Popović and Nikolić met at the Standard Barracks to organise and coordinate the killing operation and that, after the meeting, Nikolić travelled to the Vidikovac Hotel at Divić, where he awaited the Bosnian Muslim prisoners arriving on buses from Bratunac;
- (iii) for much of the day on 14 July 1995, Nikolić was present at the Grbavci School in Orahovac;
- (iv) on 14 July 1995, Nikolić spoke with Slavko Perić, Assistant Commander for Intelligence and Security of the 1<sup>st</sup> Battalion of the Zvornik Brigade and told him to go to the Kula School to “avoid any problems with surrounding citizenry”; and
- (v) on 15 July 1995, Nikolić, working closely with Beara and Popović, was involved in organising the detention and execution of prisoners at the Ročević School;<sup>24</sup>

**CONSIDERING FURTHER** that the Investigator Notes, if considered in the context of the evidence presented at trial, could not show that Nikolić’s convictions and sentence for genocide, murder as a violation of the laws or customs of war, and extermination and persecution as crimes against humanity were unsafe as it is not demonstrated that a realistic possibility exists that the Trial Chamber’s verdict might have been different;<sup>25</sup>

<sup>22</sup> Reply, para. 16. See also Reply, para. 17.

<sup>23</sup> Trial Judgement, para. 1392.

<sup>24</sup> Trial Judgement, paras 1359, 1390-1392.

<sup>25</sup> Cf. Decision of 15 April 2013, para. 8.

**FINDING**, therefore, Judge William H. Sekule dissenting, that if the Investigator Notes, or its contents, had been available at trial, they could not have had an impact on the verdict, and therefore that the requirements for the admission of additional evidence on appeal have not been satisfied;

**EMPHASISING** that the findings in this Decision pertain strictly to the admissibility of the proposed evidence and not to the merits of the appeals filed by the parties;

**HEREBY DISMISSES** the Motion in its entirety, Judge William H. Sekule dissenting.

Judge William H. Sekule appends a dissenting opinion.

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



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Judge Patrick Robinson  
Presiding

Dated this nineteenth day of November 2013,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]

## DISSENTING OPINION OF JUDGE WILLIAM H. SEKULE

1. Between 800 and 2,500 Bosnian Muslim men were executed in a field in Orahovac on 14 July 1995, according to the Trial Chamber.<sup>1</sup> The Trial Chamber, relying exclusively on the sworn testimony of Witness PW-101, found that Nikolić was present at, and directed, these executions.<sup>2</sup>
2. The Trial Chamber explicitly considered Nikolić's presence and directions at this execution site in finding that Nikolić participated in the "JCE to Murder" with the requisite *mens rea*.<sup>3</sup> It also referred to this finding in assessing Nikolić's knowledge of the genocidal plan,<sup>4</sup> as well as his knowledge that his acts formed part of a widespread or systematic attack directed against a civilian population and that the victims were not taking an active part in the hostilities at the time of the execution.<sup>5</sup> Consequently, the Trial Chamber convicted Nikolić of aiding and abetting genocide, and for extermination and persecution as crimes against humanity and murder as a violation of the laws or customs of war.<sup>6</sup> The Trial Chamber apparently took this finding into account when it sentenced Nikolić to 35 years of imprisonment.<sup>7</sup>
3. The Defence seeks to admit, as additional evidence on appeal, what appears to be a recantation by Witness PW-101 that he saw Nikolić at the field in Orahovac as the executions were taking place.<sup>8</sup> There is no dispute that this proposed evidence is relevant, *prima facie* credible, and was previously unavailable to Nikolić.<sup>9</sup>
4. The Majority reasons that Witness PW-101's alleged recantation could not show that Nikolić's convictions and sentence were unsafe, "as it is not demonstrated that a realistic possibility exists that the Trial Chamber's verdict might have been different".<sup>10</sup> The Majority, therefore, dismisses the Defence Motion in its entirety.

<sup>1</sup> Trial Judgement, para. 1105, referring to Trial Judgement, paras. 476-492.

<sup>2</sup> Trial Judgement, para. 1111 and fns 3628-3632, referring to Trial Judgement, paras 487-488. See also Trial Judgement, paras 1362, 1364 and fns 4421-4422. The Trial Chamber also relied on Witness PW-101's evidence in relation to Popović's presence and role during these executions. See, e.g., Trial Judgement, paras 487-488, 1111.

<sup>3</sup> Trial Judgement, paras 1390-1392.

<sup>4</sup> Trial Judgement, paras 1404-1405 and fn. 4514, referring to Trial Judgement, paras 486-488. See also Trial Judgement, paras 1407, 1409.

<sup>5</sup> Trial Judgement, paras 1417-1420.

<sup>6</sup> Trial Judgement, paras 1415, 1420-1423, 1428, 2106, Disposition.

<sup>7</sup> See Trial Judgement, para. 2171 and fn. 6278, referring to Trial Judgement, paras 1397-1415. See also Trial Judgement, fn. 6277 and Disposition.

<sup>8</sup> Motion, Annex (Witness PW-101, in an interview with the Prosecution on 30 July 2013, stated in part that: "This is not correct about Drago Nikolić. I know him, and the thing is I knew him well. He was not there at the killing site. Maybe others did see him there, but I did not see him there. [...] I was forced to say that. I did not say that. [...] No, I never said that, it is a mistake [...] I don't care, the stenographer is wrong. [...] I don't care. I did not say that.").

<sup>9</sup> Response, para. 3.

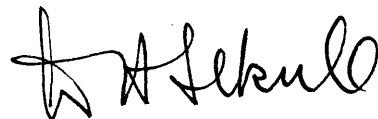
<sup>10</sup> Decision, p. 4.

5. I disagree, respectfully, with the Majority in this instance.

6. I agree that the admission of this document could not, by itself, result in a reversal of Nikolić's convictions for genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war. Nevertheless, its admission *could* have had an impact on the verdict in the sense that it could have potentially limited the precise scope of Nikolić's contribution to the common purpose of the joint criminal enterprise, and hence on the gravity of his conduct. It could also, therefore, have had an impact upon his sentence.

7. A witness's recantation of his or her testimony can have serious implications.<sup>11</sup> In the particular circumstances of this case, where Witness PW-101 appears to have directly recanted his evidence on a material aspect relied upon by the Trial Chamber in reaching its verdict and sentence, I consider that the interests of justice would have been better served had the documents been admitted into evidence. I also would have preferred to have admitted into evidence the rebuttal documents tendered by the Prosecution,<sup>12</sup> so that this matter could be fully ventilated and addressed at the appropriate time.

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



Judge William H. Sekule

Done this nineteenth day of November 2013,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]

<sup>11</sup> *Rukundo* Appeal Judgement, para. 134.

<sup>12</sup> Response, Annexes A-E.