

**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: 3 September 2014
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 3 September 2014

PROSECUTOR

v.

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

PUBLIC

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

The Office of the Prosecutor:

Ms. Barbara Goy

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 “Expedited Fourth Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex” filed publicly with a confidential annex by Drago Nikolić (“Nikolić”) on 25 November 2013 (“Motion”), in which he seeks the admission, as additional evidence on appeal, of a statement given by Witness PW-101 to his Defence team during a meeting on 22 November 2013 (“22 November 2013 Statement”);¹

NOTING the “Prosecution Response to Drago Nikolić’s Expedited Fourth Rule 115 Motion” filed by the Office of the Prosecutor (“Prosecution”) on 2 December 2013 (“Response”), in which it opposes the Motion;²

NOTING the “Reply to Prosecution Response to Drago Nikolić’s Expedited Fourth Rule 115 Motion” filed by Nikolić on 12 December 2013 (“Reply”);

NOTING that, in the 22 November 2013 Statement, Witness PW-101 appears to recant his testimony given at trial on 22-23 February 2007 in this case with respect to the fact that he saw Nikolić at the Orahovac execution site on 14 July 1995;³

NOTING that, on 19 November 2013, the Appeals Chamber, Judge William H. Sekule dissenting, denied the admission of notes compiled by an investigator for the Prosecution during a meeting with Witness PW-101 on 30 July 2013 (“Investigator Notes”), in which the witness appeared to recant the same testimony;⁴

NOTING that Nikolić states that there is a distinction between the 22 November 2013 Statement and the Investigator Notes as the latter reflects nothing more than an investigator’s hearsay recollection of what Witness PW-101 communicated to the Prosecution, and it is not evident whether this was intended to be a recantation of the witness’s prior testimony, while the 22 November 2013 Statement is a deliberate and knowing recantation by the witness;⁵

¹ Motion, paras 1-2, 14, 35, p. 8 (Relief Sought), Annex. On 26 November 2013, Nikolić filed a corrigendum correcting the composition of the Bench in this appeal. See *Corrigendum* to Expedited Fourth Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex, 26 November 2013.

² Response, paras 1, 9.

³ Motion, paras 2, 4, 22, Annex.

⁴ Decision on Drago Nikolić’s First Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 19 November 2013 (“Decision of 19 November 2013”), pp. 1-2, 5.

⁵ Reply, paras 3, 8-9, 11-12, 19. See also Motion, para. 3.

NOTING the Prosecution's submissions that, not only is the substance of the 22 November 2013 Statement unable to render Nikolić's verdict unsafe, but it is also essentially identical to the Investigator Notes,⁶ and that the Motion is frivolous and abusive;⁷

CONSIDERING that the information contained in the 22 November 2013 Statement and the Investigator Notes is very similar insofar as it contains the same purported recantation by Witness PW-101;⁸

CONSIDERING that the Appeals Chamber has already: (1) addressed and dismissed Nikolić's arguments that without Witness PW-101's evidence placing him at the Orahovac execution site in the evening of 14 July 1995, his convictions and sentence were unsafe; and (2) found that the purported recantation could not have had an impact on the verdict;⁹

FINDING that by again requesting the admission as additional evidence on appeal of the same information – albeit through a different source – Nikolić is, in effect, seeking a reconsideration of the Decision of 19 November 2013, and therefore attempts to circumvent the appellate proceedings;¹⁰

FOR THE FOREGOING REASONS

HEREBY DISMISSES the Motion in its entirety.

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



Judge Patrick Robinson
Presiding Judge

⁶ Response, paras 1-2, 5, 7.

⁷ Response, paras 3, 8-9.

⁸ See Motion, Annex; Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex, 19 September 2013 (public with a confidential annex) ("Nikolić's First Rule 115 Motion"), Annex. The Appeals Chamber notes that in its Decision of 19 November 2013 the Investigator Notes were found to be: (1) neither available at trial nor discoverable through the exercise of due diligence; and (2) relevant and credible, for the purposes of Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules"). See Decision of 19 November 2013, pp. 2-3.

⁹ Decision of 19 November 2013, pp. 4-5. The Appeals Chamber recalls that, pursuant to Rule 115 of the Rules, where the tendered evidence was neither available at trial nor discoverable through the exercise of due diligence, the applicant must demonstrate that it *could* have had an impact on the verdict; in other words, the evidence must be such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe. See Decision on Drago Nikolić's Second Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 June 2014 (confidential), paras 10, 12 and references cited therein.

¹⁰ See *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Motion for Temporary Provisional Release, 15 December 2011 (confidential), p. 3; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 8.

Dated this third day of September 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]


Judge William H. Sekule appends a separate opinion.

SEPARATE OPINION OF JUDGE WILLIAM H. SEKULE

1. In the Decision of 19 November 2013 concerning Witness PW-101's apparent recantation of sworn testimony that was the sole basis for an adverse finding against Nikolić, I expressed my view that the interests of justice would have been better served had the relevant documents been admitted into evidence.¹ My view on this matter remains unchanged.

2. I agree, however, that the present Motion be dismissed. As noted in today's Decision, the Motion presents documentation concerning Witness PW-101's apparent recantation that is quite similar to that previously provided by Nikolić. Notwithstanding my view on Nikolić's original application, I consider that his attempt to re-litigate this issue under the guise of a new application for the admission of additional evidence is without merit.

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



Judge William H. Sekule

Dated this third day of September 2014,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

¹ Decision of 19 November 2013, Dissenting Opinion of Judge William H. Sekule, paras 1, 7.