



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: 11 June 2007

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: 11 June 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON JOINT BEARA AND NIKOLIĆ REQUEST FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S DECISION
DENYING RECONSIDERATION OF TWO DECISIONS
RELATED TO WITNESS PW-108**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon 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”);

BEING SEISED OF the “Joint Defence Request on Behalf of Ljubiša Beara and Drago Nikolić for Certification of the Trial Chamber’s Decision on Defence Motion Seeking Reconsideration of two Trial Chamber Decisions Related to Witness PW-108” (“Joint Certification Request”), filed confidentially on 4 June 2007 by counsel for the Accused Beara and Nikolić (“Joint Defence”), in which the two Accused seek (1) certification to appeal the confidential “Trial Chamber’s Decision on Defence Motions Seeking Reconsideration of Two Trial Chamber’s Decisions Related to Witness PW-108” of 1 June 2007 (“Impugned Decision”), and (2) a delay of the testimony of PW-108—at present scheduled to commence on 15 June 2007—until the Joint Certification Request is adjudicated;¹

RECALLING that the Impugned Decision denied motions filed by counsel for the Accused Beara, Nikolić and Popović seeking reconsideration of two earlier decisions by the Trial Chamber, the first decision adding witness PW-108 to the Prosecution’s witness list, and the second one granting a Prosecution request to delay disclosure to the Defence of the identity and other sensitive information concerning PW-108 until 30 days before PW-108 testifies;²

RECALLING that the Trial Chamber in the Impugned Decision also rejected a related request by the Defence to adjourn trial proceedings for a minimum of 45 days in order to give the Defence time to prepare for the cross-examination of PW-108 and another 10 witnesses to whom PW-108’s evidence purportedly relates;³

NOTING that the Joint Defence alleges eight errors contained in the Impugned Decision, and contends that these errors involve important issues significantly affecting the fair and expeditious conduct of the proceedings and may significantly alter the outcome of trial⁴ because PW-108 and 10 other witnesses would give evidence “without the Joint Defence having sufficient time to conduct the necessary investigations [...] and to adequately prepare for [their] cross-examination”,⁵

¹ Joint Certification Request, para. 29.

² Impugned Decision, para. 2.

³ Impugned Decision, para. 26.

⁴ Joint Certification Request, paras. 15–20.

⁵ Joint Certification Request, paras. 16, 18.

this having—in the opinion of the Defence—the potential of “harming, significantly and materially the case for the defence of Drago Nikolić and Ljubiša Beara”⁶;

NOTING that the Joint Defence also argues that the Trial Chamber’s alleged abuse of discretion⁷ and the “specific and serious violation of the rights of the Accused to a fair trial”⁸ “raise such a degree of uncertainty related to the Impugned Decision that an immediate resolution of the matter by the Appeals Chamber will beyond any doubt materially advance the proceedings”;⁹

NOTING the “Prosecution’s Response to ‘Joint Defence Request on Behalf of Ljubiša Beara and Drago Nikolić for Certification of the Trial Chamber’s Decision on Defence Motion Seeking Reconsideration of two Trial Chamber Decisions Related to Witness PW-108’” (“Response”), filed confidentially on 6 June 2007, in which the Prosecution opposes the Joint Defence Request on the grounds that it (1) fails to establish any prejudice to the Joint Defence if the testimony of PW-108 and 10 other designated witnesses is heard as currently envisaged;¹⁰ (2) does not substantiate in which way the preparation for the testimony of these witnesses is adversely affected by the Impugned Decision;¹¹ (3) falls short of explaining where the “uncertainty” in the Impugned Decision lies, other than a general complaint that the Joint Defence arguments have not been addressed in their preferred manner¹²;

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, in the opinion of the Trial Chamber, 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; that even where both requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber; and that certification is not concerned with whether the decision was correctly reasoned or not;¹³

⁶ Joint Certification Request, para. 19.

⁷ Joint Certification Request, para. 25.

⁸ Joint Certification Request, para. 24.

⁹ Joint Certification Request, para. 26.

¹⁰ Response, para. 8.

¹¹ Response, para. 9.

¹² Response, paras. 12, 14.

¹³ See Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3.

RECALLING that the Trial Chamber found in the Impugned Decision that the anticipated testimony of PW-108 does not contain “new allegations” against or increase “the level of criminal liability” of the Accused, and as a result, the Trial Chamber did not share the view that this evidence is of a “highly prejudicial nature” for the Accused which would necessitate extensive preparation and a re-assessment of the Joint Defence’s strategy, as contended by the Joint Defence;¹⁴

RECALLING that the Trial Chamber has stated that “[a]ny prejudice which may have occurred due to the fact that the Defence has not been able to fully cross-examine previous witnesses can be remedied by recalling those witnesses, upon a separate request by the Defence demonstrating good cause”,¹⁵

CONSIDERING that the submissions of the Joint Defence *prima facie* appear to raise an issue that would significantly affect the fair and expeditious conduct of the proceedings, although not necessarily have an impact on the outcome of the trial;

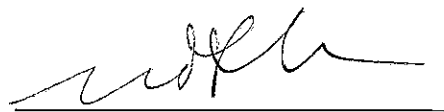
CONSIDERING, however, that there is no “uncertainty” in the Impugned Decision the immediate resolution of which by the Appeals Chamber would materially advance the proceedings;

FINDING, therefore, that the pre-requisites of Rule 73(B) have not been fully satisfied;

PURSUANT TO Rules 54, 73(B), 89, and 126 *bis* of the Rules

HEREBY DENIES the Joint Certification Request in its entirety.

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



Carmel Agius
Presiding

Dated this eleventh day of June 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁴ Impugned Decision, para. 23.

¹⁵ Impugned Decision, para. 24.