



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: 9 July 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: 9 July 2007

PROSECUTOR

v.

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

PUBLIC

**REASONS FOR ORAL DECISION DENYING CERTIFICATION OF
ORAL DECISION CONCERNING THE POSTPONEMENT OF THE
TESTIMONY OF WITNESS 128**

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”);

NOTING the oral decision by the Trial Chamber on 19 June 2007 (“Impugned Decision”),¹ which denied the oral motion of 19 June 2007 by Counsel for Popović,² joined by Counsel for Beara and Nikolić,³ (“collectively “Defence”) requesting the postponement of the testimony of witness 128 (Srećko Aćimović);

NOTING that the Impugned Decision held:

At issue is [...] whether the testimony of [witness 128]⁴ should be postponed in the light of new information provided by him during his proofing session on Sunday of this week, a few days before his scheduled testimony. Because of the objection of counsel for the Defence of Mr. Nikolić, the Trial Chamber has decided not to have regard to the relevant document sheet, which purportedly describes the new information provided. It is almost inevitable, and this will, we feel we need to drive home, that in the course of a trial, especially a lengthy one like this one, a witness may disclose new information in some instances, even in the course of his or her testimony. This, in and of itself, however does not justify postponement of that testimony. Additional investigations may of course become necessary, may take place, and further questions may well be justified as a result of new information gathered. However, these can be addressed by recalling the witness at a later date, while still allowing his or her direct examination and cross-examination to proceed as scheduled. We believe this to be the proper course of action in relation to [witness 128]⁵ and we therefore are denying the motion for postponement with the understanding that any of the Defence teams can make an application later on to recall this particular witness, if this becomes necessary. We would, however, like to highlight one further issue. The Trial Chamber is concerned by the time being lost on submissions as to whether prior statements and proofing notes should be available to it, in particular instances. More disquieting is the belief that some of you have indicated you have that whether the Trial Chamber has access or not to such documents depends on your consent or permission. All this arises because, differently from other Trial Chambers, this Chamber has taken a somewhat unique position not to receive such material generally. We are, however, actively considering what steps would be best to take in the interests of justice which would also avoid unnecessary consumption of time in proceedings.⁶

BEING SEISED OF the “Urgent Joint Defence Request for certification of the Trial Chamber’s Oral Decision Concerning the Postponement of the Testimony of Witness 128” filed confidentially on 20 June 2007 by Counsel for Drago Nikolić (“Motion”), requesting (1) certification of the Impugned Decision and (2) the postponement of the testimony of witness 128;⁷

¹ T. 12909 (19 June 2007).

² T. 12840-12841 (19 June 2007).

³ T. 12841-12842 (19 June 2007).

⁴ T. 12927 (20 June 2007), the reference to witness PW-128 was corrected to witness 128.

⁵ *Ibid.*

⁶ T. 12909 (19 June 2007).

⁷ Motion, para. 26.

RECALLING that the Trial Chamber denied the Motion and held:

[i]t is an oral decision. Reasons will follow in a written decision. Our decision having considered the Joint defence motion and the oral reply of the Prosecution is to dismiss the motion and to proceed therefore with the testimony of witness 128;⁸

NOTING that the Defence submits that the Trial Chamber erred in law by holding that “because of the objection of counsel for the Defence of Mr. Nikolić, the Trial Chamber has decided not to have regard to the relevant document sheet, which purportedly describes the new information provided”⁹ and that this holding “implies that the Trial Chamber adjudicated”¹⁰ on the Motion (1) “solely on the basis of the information provided to the Trial Chamber by the Prosecution concerning the new information provided by Witness 128”¹¹ or (2) “without considering any of the relevant and necessary information offered by the Parties”;¹²

NOTING that the Defence submits that the Trial Chamber erred by not hearing the Defence arguments concerning the new information provided by Witness 128 and its impact on the preparation of the case for the Defence¹³ and that the Impugned Decision did not address the oral motion of 18 June 2007 concerning the alleged violation of Rule 43 of the Rules of Procedure and Evidence (“Rules”) by the Prosecution when conducting an interview with witness 128, who during part of the interview was considered a suspect;¹⁴

NOTING that the Defence argues further that the Impugned Decision significantly affects: (1) the fair conduct of the proceedings since the Defence is required to proceed with cross-examination of Witness 128 despite the fact that its inability to do so results from new information which came to light partly in the evening of 17 June 2007 and on 18 June 2007 and (2) the expeditious conduct of the proceedings due to the substantial likelihood that the cross-examination will be longer and that a further motion requesting the witness to be recalled for further cross-examination may be submitted;¹⁵

⁸ T. 12927 (20 June 2007).

⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, para. 15

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 16.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, paras. 20-21.

NOTING the oral response by the Prosecution on 20 June 2007 (“Response”), whereby the Prosecution requests the Trial Chamber to deny the Motion as it fails to satisfy Rule 73(B) of the Rules;¹⁶

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;¹⁷ and that certification is not concerned with whether the decision was correctly reasoned or not;¹⁸

CONSIDERING that with regard to the submission that the Impugned Decision did not address the oral motion of 18 June 2007 alleging a violation of Rule 43 of the Rules by the Prosecution, the Trial Chamber made it clear in the course of the debate that it is an issue between witness 128 and the Prosecution;

CONSIDERING that the original purported evidence of the witness was disclosed to the Defence well in advance;

CONSIDERING that, in relation to any new additional information from the witness, the Trial Chamber has put in place an adequate safeguard in providing for a possible recalling of the witness if the need for this arises and there is a specific request;

CONSIDERING that the Trial Chamber also does not accept the Defence submission that the possibility of longer cross-examination by some counsel or the requirement for an additional motion if the witness is to be recalled are factors that are sufficient to significantly affect the expeditious conduct of the proceedings;

¹⁶ T. 12911-12912 (20 June 2007)

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

FINDING therefore that 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 and an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings;

PURSUANT TO Rules 54 and 73 (B) of the Rules,

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding

Dated this ninth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ See Decision on Joint Defence Motion for Certification to Appeal Rule 65ter Oral Decision, 22 June 2007; *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.