



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: 12 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: 12 July 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLIĆ REQUEST FOR CERTIFICATION
TO APPEAL ORAL DECISION ON PW-165 AND REQUEST
FOR VARIATION OF THE TIME-LIMITS**

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 “Request on Behalf of Drago Nikolić for Certification of the Trial Chamber’s Oral Ruling Regarding the Conduct of the Prosecution When Proofing Witness PW-165 and Request for Variation of the Time-Limits”, filed by Drago Nikolić on 15 April 2007 (“Certification Request”), in which Nikolić seeks certification to appeal an oral decision of the Trial Chamber rendered on 4 April 2007 (“Impugned Decision”) and requests that the Trial Chamber recognise as valid the Certification Request which was filed after the expiration of time prescribed by Rule 73 (C) of the Rules of the Procedure and Evidence of the Tribunal (“Rules”);¹

NOTING that during the testimony of witness PW-165 on 3 and 4 April 2007, the Trial Chamber sat pursuant to Rule 15 *bis*;²

RECALLING that during the testimony of PW-165 on 3 April 2007, Nikolić objected to a Prosecution’s question to PW-165³ on the grounds that the Prosecution asked “inappropriately” PW-165 what he had discussed during the interview with Counsel for Nikolić and that, by asking such question, the Prosecution put “unethically” pressure on PW-165;⁴

RECALLING that the Trial Chamber in the Impugned Decision denied Nikolić’s objection and stated that:

As to the questioning of a witness regarding what the other party had discussed with him or her, we see no reason why that is inappropriate or unethical. No authorities in support of the proposition were provided, and it would seem to be a practice entirely consistent with the concept that there is no property in the witness, a principle which both parties agreed upon. As to allegations that the witness was pressured by the Prosecution, there is nothing in the description of the meeting provided, or the information sheet that evidences any such pressure [on PW-165]. In these particular circumstances, reminding a witness of the need to tell the truth when testifying cannot be construed as threatening or pressuring him.⁵

NOTING that in the Certification Request, Nikolić first requests the Trial Chamber to recognise the Certification Request as validly filed on the following grounds:

¹ Certification Request, paras. 1–2.

² Rule 15 *bis* (A) provides that in the case where “(ii) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days”.

³ The Prosecution asked PW-165, “what did you tell me about seeing Drago Nikolić at the check-point [at a meeting with the Prosecution held after PW-165 met with Counsel for Nikolić a week before his testimony]?” T. 9925 (3 April 2007).

- (1) the Impugned Decision was rendered immediately before a recess in this case,⁶ during which the Tribunal was not working and Counsel for Nikolić was absent in The Hague;
- (2) Counsel for Nikolić required significant research to decide whether to request certification of the Impugned Decision;⁷ and
- (3) it was difficult for Counsel for Nikolić to communicate with Nikolić as his family visited him during the recess;⁸

NOTING that, pursuant to Rule 127 (A)(ii), a Trial Chamber may, on good cause being shown by motion, “recognise as validly done any act done after the expiration of a time so prescribed of such terms, if any, as is thought just and whether or not that time has already expired”;

CONSIDERING that in light of the circumstances put forward by Nikolić, the Trial Chamber is satisfied that good cause to recognise the Certification Request validly filed has been shown;

NOTING that Nikolić next requests the Trial Chamber to grant the certification of the Impugned Decision on the following grounds:

- (1) the Impugned Decision involves an issue that will significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, because (a) it cannot be in the interest of justice for a Trial Chamber sitting pursuant to Rule 15 *bis* to render decisions which go directly to the credibility of the witness being heard,⁹ (b) the Defence is placed in the unfair position of opting not to meet Prosecution witnesses,¹⁰ and (c) the Prosecution’s practice of reminding witnesses several times of the need to tell the truth can only lead to random and arbitrary evidence being heard by the Trial Chamber as well as harmful and unpleasant situations for witnesses;¹¹ and
- (2) an immediate resolution by the Appeals Chamber will materially advance the proceedings, by (a) setting the parameters in relation to the matters which can be heard or adjudicated by

⁴ See T. 9925–9927, 9935–9946, 9951–9952, 9954–9955 (3 April 2007).

⁵ T. 9957–9958 (4 April 2007).

⁶ The recess was taken from 5 to 13 April 2007.

⁷ Certification Request, para. 3.

⁸ *Ibid.*, paras. 3–4.

⁹ *Ibid.*, para. 14. Nikolić argues that the matter which gave rise to the Impugned Decision originated from a split decision, Judge Kwon dissenting and that this procedural error could not be cured by the fact that the Presiding Judge withdrew his dissent before rendering the Impugned Decision. *Ibid.*, para. 7.

¹⁰ *Ibid.*, para. 20. Nikolić also submits that it may be necessary to meet Prosecution witnesses “(a) to protect the rights of the Accused; (b) to facilitate and expedite the conduct of the proceedings; and (c) in the interest of justice”. *Ibid.*

¹¹ *Ibid.*, para. 29.

a Trial Chamber while sitting pursuant to Rule 15 *bis*;¹² (b) setting the parameters concerning those matters which can be discussed by the Prosecution when meeting witnesses prior to their testimony, including whether or not they may question the witnesses on their dealings with the Defence,¹³ and (c) holding whether or not it is appropriate for the Prosecution to remind witnesses several times of the need to tell the truth in these circumstances as well as in general;¹⁴

NOTING the “Prosecution’s Response to ‘Request on Behalf of Drago Nikolić for Certification of the Trial Chamber’s Oral Ruling Regarding the Conduct of the Prosecution When Proofing Witness PW-165 and Request for Variation of the Time-Limits’”, filed on 1 May 2007 (“Response”), in which the Prosecution argues that the Certification Request fails to satisfy the requirements of Rule 73(B) because:

- (1) Nikolić provides neither legal authority nor factual support for his arguments;¹⁵ and
- (2) the Impugned Decision leaves no uncertainty as to the parameters in regards to matters that the Trial Chamber can hear and adjudicate under Rule 15 *bis*, as well as governing the Prosecution’s meeting with a witness;¹⁶

NOTING the “Motion Seeking Permission to Reply and Reply on Behalf of Drago Nikolić to Prosecution’s Response to ‘Request on Behalf of Drago Nilolić for Certification of the Trial Chamber’s Oral Ruling Regarding the Conduct of the Prosecution When Proofing Witness PW-165 and Request for Variation of the Time-Limits’”, filed on 2 May 2007 (“Reply”), in which Nikolić submits that the arguments set forth in the Response should be disregarded;¹⁷

NOTING the “Prosecution’s Motion Seeking Leave to File a Sur-Reply and Sur-Reply to Defence Reply to Prosecution’s Response to ‘Request on Behalf of Drago Nikolić for Certification of the Trial Chamber’s Oral Ruling Regarding the Conduct of the Prosecution When Proofing Witness PW-165 and Request for Variation of the Time-Limits’”, filed on 9 May 2007 (“Sur-Reply”);¹⁸

¹² *Ibid.*, para. 16.

¹³ *Ibid.*, para. 22.

¹⁴ *Ibid.*, para. 30.

¹⁵ Response, paras. 9–11.

¹⁶ Response, paras. 13–15.

¹⁷ Nikolić submits that (1) it is inappropriate and illogical for the Prosecution to be entitled to file a response within 14 days and (2) the Prosecution focuses entirely on supporting the Trial Chamber’s Decision without addressing the important issues of principle raised by Nikolić in the Certification Request. Reply, paras. 6, 8–11.

¹⁸ The Prosecution seeks leave to file the Sur-Reply to respond solely to the submission by Nikolić in the Reply arguing that “the Defence has refrained from meeting with some Prosecution witnesses, leading to longer proceedings than

NOTING the “Response on Behalf of Drago Nikolić to Prosecution’s Motion Seeking Leave to File a Sur-Reply and Sur-Reply to Defence Reply to Prosecution’s Response to ‘Request on Behalf of Drago Nikolić for Certification of the Trial Chamber’s Oral Ruling Regarding the Conduct of the Prosecution When Proofing Witness PW-165 and Request for Variation of the Time-Limits’”, filed on 11 May 2007 (“Response to Sur-Reply”);¹⁹

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;²⁰

NOTING that, pursuant to Rule 73(C), “[r]equests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision”;

NOTING that Rule 126 *bis* provides in its relevant part that “[a] reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber”;

CONSIDERING that the Reply, the Sur-Reply, and the Response to Sur-Reply are not of assistance to the Trial Chamber and that therefore it is not in the interests of justice for the Trial Chamber to grant leave to file them;

CONSIDERING that nothing in the Rules restricts the powers of a Trial Chamber sitting under Rule 15 *bis* and that no such arguments were made at the time nor does the Impugned Decision address that particular issue;

expected and unpleasant situations for the witness involved” since Nikolić filed the Certification Motion, and contends that the Reply fails to offer any support for such a claim. Sur-Reply, paras. 1–11.

¹⁹ Nikolić submits that the Sur-Reply should be denied *in toto* on the basis that it is of no relevance to the Certification Request and of no assistance to the Trial Chamber in adjudicating on it. Response to Sur-Reply, paras. 1–8.

²⁰ See Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3.

CONSIDERING that the Trial Chamber is not satisfied that the issue as to whether the Prosecution can ask a witness questions about the defence interview is one that can significantly affect the fair and expeditious conduct of the proceedings;

CONSIDERING that the ruling as to whether undue pressure was exerted by the Prosecution was specific to the circumstances of the interview of PW-165 and therefore is not one that affects the proceedings generally;

CONSIDERING further that in light of the nature of the issues at hand the intervention of the Appeals Chamber will not materially advance the proceedings;

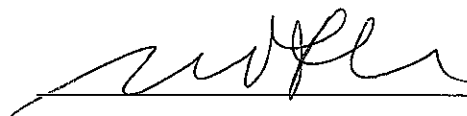
CONSIDERING therefore that the Trial Chamber is not satisfied that either of the two-fold requirements provided for in Rule 73(B) has been met;

PURSUANT TO Rules 54, 73(B), 89, 126 *bis*, and 127 of the Rules,

HEREBY ORDERS as follows:

- a. the Certification Request is recognised as validly filed;
- b. leave to file the Reply, the Sur-Reply, and the Response to Sur-Reply is denied; and
- c. the Certification Request is denied.

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



Carmel Agius
Presiding

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

[Seal of the Tribunal]