



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: 30 October 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: 30 October 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON MOTIONS FOR CERTIFICATION OF DECISION ON
DEFENCE RULE 94 *BIS* NOTICE REGARDING PROSECUTION EXPERT
WITNESS RICHARD BUTLER**

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 Motion for Certification of the Trial Chamber’s Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler”, filed on 26 September 2007 (“Joint Defence Motion”), by the Defence on behalf of the Accused Popović, Beara, and Pandurević (collectively “Defence”) and the “Motion on Behalf of Drago Nikolić Joining the Joint Motion for Certification of the Trial Chamber’s Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler” filed on 27 September 2007 (“Nikolić Motion”);

NOTING that the Defence and the Defence for Nikolić are seeking certification of the Trial Chamber’s “Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler” filed on 19 September 2007 (“Impugned Decision”);¹

NOTING that pursuant to Rule 73(C), “[r]equests for certification shall be filed within seven days of the filing of the impugned decision [...]”, and that therefore the deadline for a request for certification in this case was on 26 September 2007;

NOTING that the Nikolić Motion was filed out of time and did not contain a request for an extension of time, but that in the special circumstances of this case, the Trial Chamber will exceptionally accept the Nikolić Motion as validly filed;

NOTING that in the Joint Defence Motion it is submitted that:

(1) the Trial Chamber in concluding that “the mere fact that the expert witness is or was employed by a party, or testified for a party in other cases, does not disqualify him or her from testifying as an expert”² and that “objectivity and independence are not prerequisites for a witness to be qualified as an expert”³ distinguished itself from a decision regarding Prosecution witness Philip Coo in the *Milutinović* case upon which the Defence was relying without explanation;

¹ Joint Defence Motion, para. 1; Nikolić Motion, para. 1 in which Nikolić is providing notice to the Trial Chamber that he is joining the Joint Defence Motion on all arguments.

² Joint Defence Motion, para 4, quoting the Impugned Decision para. 27.

³ Joint Defence Motion, para 4, quoting the Impugned Decision para. 26.

(2) the question of the admissibility of his “expert” report will not be considered until after Butler has given testimony,⁴ resulting in (i) “the rights of the Defence being subverted through the “back door” admission of the report”,⁵ (ii) if the report is considered inadmissible under Rule 89(C), “Butler cannot rightfully be taken to elements of his report during examination-in-chief”,⁶ and (iii) “[i]f Butler cannot give evidence in accordance with his report, then his oral evidence cannot assist the Trial Chamber in its understanding or determination of issues in dispute”;⁷

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 [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

CONSIDERING that in the case of a witness such as Butler, the question of the criteria for qualification of expert witnesses, and in particular whether a person who is linked to a party through employment or by virtue of previous testimony can give expert evidence on behalf of that party, is an issue which could affect the fair and expeditious conduct of the proceedings or the outcome of a trial;

CONSIDERING further that an immediate determination on the above issue by the Appeals Chamber prior to the evidence being considered with reference to judgment in the case would materially advance the proceedings;

CONSIDERING, however, that the evidence of Butler need not be delayed pending a decision from the Appeals Chamber as his evidence can be redacted or disregarded if the Trial Chamber’s finding is reversed;

⁴ Joint Defence Motion, para. 2(ii).

⁵ Joint Defence Motion, para. 14(i).

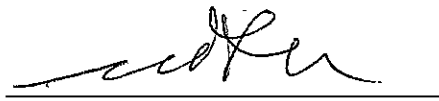
⁶ Joint Defence Motion, para. 14(ii).

⁷ Joint Defence Motion, para. 14(iii).

PURSUANT TO Rule 73(B) of the Rules,

GRANTS the Joint Defence Motion and Nikolić Motion and certifies the appeal against the Impugned Decision.

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



Carmel Agius
Presiding

Dated this thirtieth day of October 2007
At The Hague
The Netherlands

[Seal of the Tribunal]