



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: 21 November 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:** 21 November 2007

**PROSECUTOR**

v.

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

**PUBLIC**

**DECISION ON CERTIFICATION AND CLARIFICATION OF THE TRIAL  
CHAMBER'S ORAL DECISION ON IMPEACHMENT OF A PARTY'S  
OWN WITNESS**

**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušковиć 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”), is seised of the “Defence Motion Seeking Certification of the Trial Chamber’s Oral Decision on Cross-Examination by a Party of its Own Witness”, filed on 21 September 2007 (“Certification Motion”), and the “General Miletić Defence Motion for Clarification of the Decision Regarding Impeachment of a Witness by the Party Calling the Witness, Rendered During the Hearing of 17 September 2007”, filed on 24 September 2007 in the original French (“Miletić Clarification Motion”)<sup>1</sup> and hereby renders its decision thereon.

## I. PROCEDURAL BACKGROUND

1. On 17 September 2007, the Trial Chamber, by majority, Judge Agius dissenting, rendered an oral decision on the “Impeachment of a Party’s Own Witness” (“Impugned Decision”), as follows:

it is open to any party to challenge the credibility of his or her witness in part or in full [...] it is for each party to determine to what extent and in what the credibility of a witness is to be challenged, and they clearly take the at their own peril; but in the end, the Chamber by majority is satisfied of their capability to assess the credibility of the witness in whole or in part based on the examinations conducted.<sup>2</sup>

2. On 21 September 2007, Popović, Beara, Nikolić, Gvero and Pandurević (“Defence”), filed the Certification Motion, requesting the Trial Chamber to certify the Impugned Decision, and to allow the Defence to file an interlocutory appeal before the Appeals Chamber.

3. On 24 September 2007, Miletić filed the Miletić Clarification Motion, which Borovčanin and Beara joined on 25 and 26 September 2007, respectively (collectively, “Clarification Motions”).

4. On 5 October 2007, the Prosecution filed the “Prosecution Response to 21 September 2007 Defence Motion Seeking Certification of the Trial Chamber’s Oral decision on Cross-Examination by a Party of Its Own Witness” (“Certification Response”), and on 8 October 2007 the “Prosecution Response to General Miletić’s Defence Motion for Clarification dated 24 September 2007” (“Clarification Response”), which incorporates in large part the arguments set out in the Certification Response.

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<sup>1</sup> English translation 25 September 2007.

<sup>2</sup> T. 15457–15458 (17 September 2007).

5. On 11 October 2007, Gvero filed a reply to the Certification Response, seeking leave pursuant to Rule 126 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>3</sup>

## II. SUBMISSIONS OF THE PARTIES

### Defence Submissions

6. The Certification Motion and the Miletić Clarification Motion relate to three issues, namely, (1) the impeachment of a party’s own witness without the witness being declared “hostile”; (2) the use of leading questions by a party impeaching its own witness; and (3) the scope of these leading questions.

7. In the Certification Motion, the Defence recalls that in the common law system as well as in other cases before this Tribunal “cross examination of a party’s own witness is allowed when a witness is declared hostile by the Court in question, following an application by the calling party”.<sup>4</sup> The Defence argues that permitting the Prosecution to cross-examine its own witness without first having him or her declared hostile removes all limits on the way a party may question its own witness, in particular the distinction between the appropriate use of leading and non-leading questions. Thereby, in the Defence’s submission, the Impugned Decision gives rise to a “new *modus operandi*” which “alters the cross-examination that can be conducted by the Defence”, since it “allows the party calling the witness to ask questions in re-direct that have not arisen in the course of the cross-examination by the opposing party”.<sup>5</sup> Furthermore, the Defence contend that the evidence elicited in this way goes “both to the credibility [of the witness] and to the truth of the contents”.<sup>6</sup> The Defence submits that for these reasons the standard for certification under Rule 73(B) is met.<sup>7</sup>

8. In arguing for clarification, Miletić, joined by Borovčanin and Beara, requests the Trial Chamber to rule that (1) “the party challenging the credibility of the witness it has called may not use leading questions without the witness being declared hostile”<sup>8</sup>; and (2) “the party challenging

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<sup>3</sup> Reply on Behalf of Milan Gvero to Prosecution Response to 21 September 2007 Defence Motion Seeking Certification of the Trial Chamber’s Oral Decision on Cross-Examination by a Party of Its Own Witness, 11 October 2007 (“Gvero Reply”).

<sup>4</sup> Certification Motion, paras. 9–11.

<sup>5</sup> Certification Motion, paras. 12–13, 18–19.

<sup>6</sup> Certification Motion, para. 13. *See also, ibid.*, paras. 4–8.

<sup>7</sup> Certification Motion, paras. 18–21.

<sup>8</sup> Miletić Clarification Motion, para. 9.

the credibility of the witness in re-examination must do so within the scope of the matters raised during the cross-examination”.<sup>9</sup>

### Prosecution Responses

9. The Prosecution argues that the Certification Motion should be denied because it “only briefly addresses the requirements under Rule 73(B)”,<sup>10</sup> and because the Impugned Decision “does not involve an issue that would have a significant impact on the proceedings” as it (1) “relates only to questioning that challenges the credibility of a witness”; and (2) makes clear that the Trial Chamber will accord the appropriate weight to the witness’s evidence.<sup>11</sup> With respect to the approach adopted by the Trial Chamber permitting a party to impeach its own witness, the Prosecution submits that “the existence of reasonable alternatives does not necessitate an interlocutory determination of the issue”.<sup>12</sup>

10. In the Clarification Response, the Prosecution states that the Impugned Decision is clear in its meaning and that the reasoning behind it is fully explained in Judge Kwon’s Separate Opinion of 29 April 2004 (“Judge Kwon April 2004 Separate Opinion”)<sup>13</sup>, thereby the Clarification Motions should be dismissed.<sup>14</sup>

11. Concerning the use of leading questions, the Prosecution argues that “[i]n circumstances where a witness’s credibility is at issue, there is clearly scope under this Rule [Rule 90(F)] for the use of leading questions as one means among others to test the witness’s credibility and to ascertain the truth”.<sup>15</sup>

12. Regarding the scope of the leading questions, the Prosecution states that “the examination of witnesses will not take place in a vacuum” because the opposing party may properly object to the form of questions where the subject-matter was not raised on cross-examination.<sup>16</sup> In addition, the Trial Chamber controls the questioning of witnesses and ensures that they are treated fairly and the rights of the Accused are respected.<sup>17</sup>

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<sup>9</sup> *Ibid.*

<sup>10</sup> Certification Response, para. 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, para. 6.

<sup>13</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, 29 April 2004 (“Judge Kwon April 2004 Separate Opinion”).

<sup>14</sup> Clarification Response, para. 1.

<sup>15</sup> Clarification Response, paras.4–5. *See also*, Certification Response, para. 5.

<sup>16</sup> Certification Response, para. 4; Clarification Response, para. 6.

<sup>17</sup> Certification Response, paras. 4, 7; Clarification Response, paras. 4–6.

## Defence Reply

13. Addressing the arguments raised in the Certification Response, Gvero argues that the Prosecution failed to address “the main thrust” of the Certification Motion, namely (1) the fact that in the Impugned Decision the majority adopted in whole Judge Kwon April 2004 Separate Opinion; and (2) the consequences of the Impugned Decision, in particular “as to whether the evidence elicited in the course of a party cross-examining its own witnesses goes to the truth of the answers”.<sup>18</sup>

## **III. DISCUSSION**

### Clarification

14. From the arguments raised by the Defence for Miletić, Borovčanin and Beara, the Trial Chamber is satisfied that clarification of its decision is required. It is evident from the Impugned Decision that a party need not seek permission to challenge the credibility of its own witness nor is the process of having a witness declared “hostile” necessary before taking such a step. However, the Trial Chamber is of the view that a party intending to challenge its own witness, in whole or in part, must make a declaration to that effect to the Trial Chamber. This is necessary because, contrary to the arguments advanced by the Defence, the Trial Chamber would not place limitations on the way in which such a challenge may be conducted. If a party decides to take that course of action, he or she should be able to “cross-examine” the witness using all of the relevant techniques, including leading questions. This is in fact a primary method used to challenge credibility. Similarly while in many cases such a challenge will arise on redirect, it will not necessarily be the case. A party may determine during the course of examination in chief that a challenge is merited and he or she should be able to do so at that time.

15. For these reasons, it is necessary that the Trial Chamber and the opposing party are clear when such a challenge begins and ends thereby allowing for a suspension of the normal rules which govern the conduct of examination in chief. As indicated previously in its decision, this approach will not lead to any wide spread overriding of the rules for the conduct of the proceedings.<sup>19</sup> As a party challenging the credibility of its witness does so at its own peril, the instances when this will occur are bound to be few and far between as has been evidenced in this trial to date.

16. For the same reasons, the Trial Chamber clarifies that evidence adduced through this process should not be limited to challenging the credibility of the witness, but may also be

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<sup>18</sup> Gvero Reply, paras. 2–5.

considered in relation to substantive issues – the truth of the contents may be considered in evaluating the totality of the evidence. Indeed, as stated in the Judge Kwon April 2004 Separate Opinion, “the professional judges have the competence to assess the truthfulness and to accord the proper weight to a witness’s evidence”.<sup>20</sup> In addition, Rule 90(F) provides that “[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time”.

### Certification

17. 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”.

18. Permitting a party to impeach his or her own witness and to use the evidence both for credibility and as to substantive evaluation, is an issue which affects not only the evidence of this witness but also of potential future witnesses. Therefore, the Trial Chamber is of the view that the cumulative effects of the Impugned Decision may raise it to the level of a decision that would significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would materially advance the proceedings.

## IV. DISPOSITION

For these reasons, pursuant to Rules 54, 73(B), and 126 *bis* of the Rules, the Trial Chamber hereby:

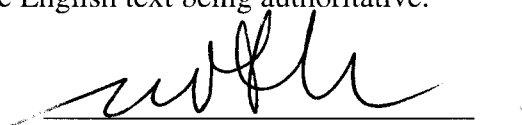
- (1) **GRANTS** leave to file the Gvero Reply;
- (2) **CLARIFIES** its decision as explained in Paragraphs 14 to 17; and
- (3) **GRANTS** the Certification Motion.

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<sup>19</sup> Impugned Decision, T. 15458 (17 September 2007).

<sup>20</sup> *Ibid.*, para. 6.

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



Carmel Agius  
Presiding

Dated this twenty-first day of November 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**