



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 October 2008  
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 October 2008

**PROSECUTOR**

v.

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

***PUBLIC***

**DECISION ON NIKOLIĆ'S MOTION FOR CERTIFICATION TO  
APPEAL THE TRIAL CHAMBER'S "DECISION DENYING THE  
PROTECTIVE MEASURES REQUESTED FOR DEFENCE WITNESS  
3DW5"**

**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. Predrag Nikolić for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell 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 “Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber’s Decision Denying the Protective Measures Requested for Defence Witness 3DW5”, filed by Nikolić on 23 September 2008 (“Nikolić Motion”);

**NOTING** the “Decision on Nikolić’s Motion for Protective Measures for Defence Witnesses”, issued confidentially by the Trial Chamber on 15 September 2008, in which the Trial Chamber reserved its decision on the request for protective measures pursuant to Rule 75 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) with regard to Witness 3DW5, pending an interview to be conducted with the witness prior to giving testimony;<sup>1</sup>

**NOTING** that, on 16 September 2008, the Trial Chamber interviewed Witness 3DW5,<sup>2</sup> and, in an oral decision, denied the request for protective measures (“Impugned Decision”);<sup>3</sup>

**NOTING** that, after having consulted Witness 3DW5 regarding the Impugned Decision,<sup>4</sup> Nikolić withdrew Witness 3DW5 on the grounds that the witness refused to testify in open session;<sup>5</sup>

**NOTING** that Nikolić requests the Trial Chamber to grant certification of the Impugned Decision pursuant to Rule 73(B) of the Rules, on the following grounds:

- a. the Impugned Decision involves issues which will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, because it directly resulted in the withdrawal of Witness 3DW5, and thus deprived Nikolić of his right to a fair trial and of the possibility to introduce additional highly probative evidence;<sup>6</sup> and
- b. an immediate resolution by the Appeals Chamber will materially advance the proceedings in the case, as an interlocutory appeal of the Impugned Decision, if granted, would not delay the proceedings as the examination of Witness 3DW5 would require

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<sup>1</sup> Decision on Nikolić’s Motion for Protective Measures for Defence Witnesses, 15 September 2008, pp. 3–4.

<sup>2</sup> T. 25809–25812 (closed session) (16 September 2008).

<sup>3</sup> T. 25816–25817 (16 September 2008).

<sup>4</sup> T. 25817–25818 (16 September 2008); Nikolić Motion, para. 8.

<sup>5</sup> T. 25818–25819 (partly in private session) (16 September 2008); Nikolić Motion, paras. 8–9.

<sup>6</sup> Nikolić Motion, paras. 15–17.

less than one day;<sup>7</sup> whereas if the Appeals Chamber granted the protective measures after the end of the trial, the verdict relating to the evidence to be provided by Witness 3DW5 would be affected;<sup>8</sup>

**NOTING** the “Prosecution Response to Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber’s Decision Denying the Protective Measures Requested for Defence Witness 3DW5”, filed confidentially on 29 September 2008 (“Response”), in which the Prosecution objects to the Nikolić Motion, arguing that it fails to satisfy the requirements of Rule 73(B) of the Rules;<sup>9</sup>

**NOTING** the “Motion on Behalf of Drago Nikolić Seeking Leave to Reply and Reply to Prosecution Response to Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber’s Decision Denying the Protective Measures Requested for Defence Witness 3DW5”, filed confidentially on 3 October 2008 (“Reply”), in which Nikolić seeks leave pursuant to Rule 126 *bis* of the Rules to reply,<sup>10</sup> and submits that the arguments set forth in the Response should be disregarded;<sup>11</sup>

**NOTING** that, pursuant to Rule 73(B) of the Rules, “[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) of the Rules precludes certification unless the Trial Chamber finds that both of its requirements are satisfied; that even where both requirements of Rule 73(B) of the Rules

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<sup>7</sup> *Ibid.*, para. 22.

<sup>8</sup> *Ibid.*, paras. 18–23.

<sup>9</sup> The Prosecution argues, *inter alia*, that the absence of Witness 3DW5’s testimony has no impact on the proceedings given its cumulative nature to the testimony of other witnesses and that the Impugned Decision did not cause the withdrawal of the witness; the Nikolić Motion thus “fails to identify any issue that significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial” and an immediate resolution by the Appeals Chamber will not materially advance the proceedings. Response, paras. 1, 6–16.

<sup>10</sup> Reply, para. 1.

<sup>11</sup> Nikolić submits that the Prosecution’s assertion that “the absence of the witness’s testimony has no impact on the proceedings” and that “the Impugned Decision did not cause Witness 3DW5’s withdrawal” is legally and factually incorrect. Nikolić further argues that regarding the second requirement of Rule 73(B) of the Rules the Response “entirely misconstrues the second criteria of the Rule 73(B) certification test”, “raises arguments which have no merit”, and “fails to respond to the submissions raised in the Nikolić Motion”. Reply, paras. 6–32.

are satisfied certification remains in the discretion of the Trial Chamber,<sup>12</sup> and that certification is not concerned with whether the decision was correctly reasoned or not;<sup>13</sup>

**CONSIDERING** that, although options other than withdrawing the witness were available, Nikolić made a deliberate decision to withdraw Witness 3DW5, following a request from the witness; and this withdrawal was Nikolić's decision and not the decision of the Trial Chamber;

**CONSIDERING** that the argument that the Impugned Decision directly resulted in the withdrawal of Witness 3DW5 is therefore without any merit;

**CONSIDERING** that the issue involved in the Impugned Decision is whether or not to grant the request for protective measures for Witness 3DW5;

**CONSIDERING** that the Trial Chamber is neither satisfied that the issue as such would significantly affect the fair and expeditious conduct of these proceedings or the outcome of this trial nor that an immediate resolution by the Appeals Chamber may materially advance the proceedings;

**FOR THE FOREGOING REASONS,**

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

**HEREBY GRANTS** Nikolić leave to file the Reply; and

**DENIES** the Nikolić Motion.

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



Carmel Agius  
Presiding

Dated this ninth day of October 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>12</sup> Decision on Motion Seeking Certification of the Decision on Joint Defence Motion and Supplementary Motion to Strike the Testimony of Witness PW-168, 11 March 2008, p. 4; Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 and Request for Variation of the Time-Limits, 12 July 2007, p. 4.

<sup>13</sup> Decision on Motion Seeking Certification of the Decision on Joint Defence Motion and Supplementary Motion to Strike the Testimony of Witness PW-168, 11 March 2008, p. 4; Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 And Request for Variation of the Time-Limits, 12 July 2007, p. 4; Decision on Defence Motion for Certification to Appeal Admitting PW-104 Interview Statements, 25 April 2007, p. 1.