



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: 25 April 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: 25 April 2007

PROSECUTOR

v.

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

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
DECISION ADMITTING PW-104 INTERVIEW STATEMENTS**

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 “Defence Request on Behalf of Ljubiša Beara for Certification of the Trial Chamber’s Decision to Admit Two Unattested Interview Statements of *Viva Voce* PW-104 into Evidence”, filed on 7 March 2007 by Ljubiša Beara (“Beara Certification Request”), and the “Motion on Behalf of Drago Nikolić Joining the Defence Request on Behalf of Ljubiša Beara for Certification of the Trial Chamber’s Decision to Admit Two Unattested Interview Statements of *Viva Voce* PW-104 into Evidence”, filed on 12 March 2007 by Drago Nikolić (“Nikolić Joinder Motion”) (collectively, “Motions”), in which Beara and Nikolić seek certification to appeal the Trial Chamber’s decision rendered orally on 1 March 2007 (“Impugned Decision”);

RECALLING that in the Impugned Decision, the Trial Chamber admitted into evidence, upon the request of the Prosecution,¹ two interview statements given to the Prosecution by witness PW-104 on 7 and 9 April 2006 “on a limited basis, [...] and certainly not for the truth of their contents”;²

NOTING that, pursuant to Rule 73(B) of the Rules and Procedure and Evidence of the Tribunal (“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) 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;³

¹ The Prosecution sought the admission of the two statements of PW-104 into evidence “for the limited purpose, not for the truth of the matter [...] but simply to evaluate the testimony of the witness, [...] to see whether it’s true that he departed from his prior testimony, his prior statement, to see if it’s true that he said that he had never had these meetings [...] and to see if it’s true that the Prosecution made no record of what happened.” T. 8030 (1 March 2007). The Prosecution also submitted that “[b]ut Your Honours know the only evidence you are going to use is what the witness said before you here under oath”. T. 8031 (1 March 2007). *See also* T. 8034–8035, 8037 (1 March 2007).

² T. 8036 (1 March 2007).

³ *See* Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 bis, 19 October 2006, pp. 1–2 (citing *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *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).

NOTING that Beara and Nikolić mainly challenge the correctness of the Impugned Decision, arguing that the Trial Chamber erred in law and practice;⁴

CONSIDERING that the Trial Chamber will not address these submissions in its consideration pursuant to Rule 73(B);

NOTING that Beara and Nikolić submit that the two criteria set out in Rule 73(B) are met because:

- a. the admission of the two statements, subsequent to examination-in-chief, cross-examination and re-direct examination, “for unsubstantiated reasons, as in the present circumstances is antithetical to, and seriously damages the integrity of the present proceedings”; and it is evident that their probative value is substantially outweighed by their prejudicial nature and the need to ensure a fair trial as stipulated in Rule 89;⁵ and
- b. an expeditious resolution to this issue is required in order to avoid any risk of the Prosecution making it a practice to ask for admission of all statements of *viva voce* witnesses regardless of the extent to which material in the statements has been relied upon in examination-in-chief, cross-examination, or re-direct examination;⁶

NOTING the “Prosecution’s Response to ‘Defence Request on Behalf of Ljubiša Beara for Certification of the Trial Chamber’s Decision to Admit Two Unattested Interview Statements of *Viva Voce* PW-104 into Evidence”, filed on 21 March 2007 (“Response”), in which the Prosecution opposes the Beara Certification Request, arguing that the submissions set forth therein fail to satisfy the legal standard for certification required by Rule 73(B) as:

⁴ Beara and Nikolić make a number of submissions. First, the Prosecution misled the Trial Chamber into erroneously admitting the two “unattested” statements. Beara Certification Request, paras. 11–15; Nikolić Joinder Motion, para. 4. Second, the Trial Chamber erred by finding that the two statements had been extensively relied upon in cross-examination by Counsel for Beara. Beara Certification Request, para. 16. Third, the Trial Chamber erred in law by finding that the rights of the accused will not be prejudiced as a result of the admission of the two statements. Beara Certification Request, para. 17; Nikolić Joinder Motion, para. 4. Fourth, “the Trial Chamber relied on the fact that they are ‘professional judges’ and can therefore review the statements and not be swayed or prejudiced by purported facts contained therein, but never testified to under oath”. Beara Certification Request, paras. 18–22 (quotation at para. 18). Fifth, the Trial Chamber inconsistently applied the Rules and “the possibility is opened up of any statement or other evidence that has been as much as touched upon in cross-examination to be entered into evidence at the request of the OTP or according to the curiosity of the Trial Chamber”. Beara Certification Request, paras. 23–24 (quotation at para. 24).

⁵ *Ibid.*, paras. 25–26 (quotation at para. 25); Nikolić Joinder Motion, para. 6. Beara also submits that the admission of the two statements into evidence, “even though it may relate to only one or more Accused, will have an impact on the case for the defence of all Co-Accused in this case—which rests on the alleged existence of a joint criminal enterprise—and thus ultimately affects the outcome of the trial.” Beara Certification Request, para. 27.

⁶ *Ibid.*, para. 28; Nikolić Joinder Motion, para. 6. Beara also asserts that “it will be of the utmost importance to have the Appeals Chamber (a) pronounce on the applicable law and (b) set the boundaries within which any future the OTP requests which *de facto* modify the application of Rule 92 *ter*, Rule 89 and [Rule] 95 will be accepted by the Trial Chamber”. Beara Certification Request, para. 29.

- a. there can be no damage to the integrity of the proceedings, and no prejudice to the accused in the admission into evidence of the two statements for a limited purpose as there is no dispute that evidence may be admitted for such a purpose at the discretion of the Trial Chamber, and “the professional judges of this Tribunal” are fully able to assign the correct weight to all evidence adduced at trial;⁷ and
- b. the subject of the Beara Certification Request is the only occasion where the Prosecution applied to the Trial Chamber to exercise its discretion to admit a transcript of two interviews statements following cross-examination,⁸ and “[t]here has been no blurring of the Rules through the Decision to admit the prior statements of one witness for a limited purpose”;⁹

NOTING “Ljubiša Beara’s Defence Motion Seeking Leave to Reply, and Reply to Prosecution’s Response to Ljubiša Beara’s ‘Defence Request on Behalf of Ljubiša Beara for Certification of the Trial Chamber’s Decision to Admit Two Unattested Interview Statements of *Viva Voce* PW-104 into Evidence’”, filed on 26 March 2007 (“Reply”), in which Beara reiterates his request for certification to appeal and his objections to the Impugned Decision;¹⁰

CONSIDERING that determination of the present Decision is assisted by having regard to the Reply, and that the Trial Chamber will therefore grant leave to file the Reply;

CONSIDERING that the admissibility of evidence is governed by the Rules, which gives the Trial Chamber the discretion to decide what is admissible as evidence; and that a decision to admit evidence does not in any way constitute a determination as to the weight to be attached to it;

CONSIDERING that the Trial Chamber is composed of professional judges with the ability to give appropriate weight to the two statements, which were admitted for the sole purpose of evaluating the viva voce evidence given by PW-104;

CONSIDERING that, given the specific circumstances and limited purposes for admitting the two statements, the Trial Chamber is not persuaded that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber could materially advance the proceedings;

⁷ Response, para. 11.

⁸ *Ibid.*, para. 13.

⁹ *Ibid.*, para. 14. The Prosecution also contends that in his submissions Beara largely engages in “a misguided and irrelevant effort to demonstrate that the [Impugned] Decision was incorrect.” *Ibid.*, para. 7.

¹⁰ Reply, paras. 2–14.

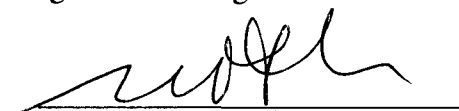
CONSIDERING, therefore, that the Trial Chamber is not satisfied that either of the two cumulative requirements provided for in Rule 73(B) has been met;

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

HEREBY ORDERS as follows:

- a. leave to file the Reply is granted; and
- b. the Motions are denied.

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



Carmel Agius
Presiding

Dated this twenty-fifth day of April 2007
At The Hague
The Netherlands

[Seal of the Tribunal]