



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: 15 April 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:** 15 April 2008

**PROSECUTOR**

v.

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

**PUBLIC**

**DECISION ON MILETIĆ'S REQUEST FOR CERTIFICATION OF THE  
DECISION ON DEFENCE OBJECTIONS TO THE ADMISSION OF THE  
EXPERT STATEMENT OF GENERAL RUPERT SMITH**

**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušević for Vujadin Popović  
Mr. John Ostojčić and Mr. Christopher Meek 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** “General Miletić’s Request for Certification to Appeal the Decision on Defence Objections to the Admission of Expert Statement of General Smith”, filed in the original French on 18 March 2008 (“Motion”),<sup>1</sup> in which Miletić seeks certification to appeal the Trial Chamber’s “Decision on Defence Objections to Admission of the Expert Statement of General Rupert Smith”, issued on 11 March 2008 (“Impugned Decision”);

**NOTING** the “Prosecution Response to General Miletić’s Request for Certification to Appeal the Decision on Defence Objections to the Admission of Expert Statement of General Smith”, filed on 1 April 2008 (“Response”), and “General Miletić’s Request for Leave to Reply and Reply to [the Response]”, filed in the original French on 4 April 2008 (“Reply”),<sup>2</sup> and the “Prosecution’s Request for Leave to Sur-Reply and Sur-Reply to [the Reply]”, filed on 9 April 2008 (“Sur-Reply”);

**NOTING** that in the Motion, Miletić submits that:

- a. in the Impugned Decision, the Trial Chamber “failed to correctly interpret the applicable law and failed to attach sufficient weight to the relevant considerations”;<sup>3</sup>
- b. the Impugned Decision “runs contrary to the [Trial Chamber’s] Second Decision Regarding the Evidence of General Smith”, filed on 11 October 2007 (the “Second Decision”), in that the Prosecution failed to demonstrate that General Smith’s Expert Statement (“statement”) met the necessary criteria for admission pursuant to Rule 89(C);<sup>4</sup>
- c. the Impugned Decision fails to account for the fact that the statement never appeared on the Prosecution’s Rule 65 *ter* Exhibit List, nor was it used during General Smith’s trial testimony and, accordingly, the Defence did not consider it necessary to cross-examine General Smith “on matters that were not raised in his direct examination and that came from a document not appearing on the Prosecution’s [Rule 65 *ter* Exhibit List]”;<sup>5</sup>

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<sup>1</sup> English translation filed 26 March 2008.

<sup>2</sup> English translation filed 9 April 2008.

<sup>3</sup> Motion, para. 7.

<sup>4</sup> *Ibid.*, paras. 9, 10–12.

<sup>5</sup> *Ibid.*, paras. 14, 10, 13.

- d. the Impugned Decision recognizes that portions of the statement go beyond General Smith's expertise as limited by the Trial Chamber in the Second Decision but does not specifically identify any of these portions which has "caused a state of legal insecurity which undermines the procedural fairness and the rights of the Defence";<sup>6</sup> and
- e. a resolution of this matter by the Appeals Chamber now would advance the proceedings because Miletić does not currently know what evidence has been admitted against him and, therefore, he must lead evidence in his defence case "in order to refute the [s]tatement in its entirety";<sup>7</sup>

**NOTING** that in its Response, the Prosecution argues that:

- a. the contents of the Motion "are mostly irrelevant to the test under Rule 73(B)";<sup>8</sup>
- b. Miletić's assertion that the statement was never used during General Smith's trial testimony is "preposterous" as the record is replete with references to the statement, some of them made by Miletić's Counsel herself;<sup>9</sup>
- c. Miletić is not prejudiced by the admission of the statement in whole without identification of which portions may comprise opinion evidence going beyond the bounds of General Smith's expertise, this being the same for "any admitted evidence, in respect of which the Trial Chamber may decide to rely on some parts but not on others in reaching its judgement";<sup>10</sup>
- d. the Impugned Decision is not contrary to the Trial Chamber's Second Decision but is, in fact, consistent with the Second Decision;<sup>11</sup>
- e. Miletić's argument regarding the statement's non-inclusion on the Prosecution's Rule 65 *ter* Exhibit List is "irrelevant, having never previously been addressed by the Defence";<sup>12</sup>
- f. Miletić's arguments "are also vitiated by the fact that at least one Defence military expert specifically refers to and disputes [the statement]";<sup>13</sup> and

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<sup>6</sup> *Ibid.*, paras. 17, 15–16.

<sup>7</sup> *Ibid.*, para. 18.

<sup>8</sup> Response, para. 4.

<sup>9</sup> *Ibid.*, para. 7.

<sup>10</sup> *Ibid.*, para. 8.

<sup>11</sup> *Ibid.*, para. 9.

<sup>12</sup> *Ibid.*

- g. Miletić's claim that a resolution of this matter by the Appeals Chamber now would materially advance the proceedings "is simply speculative";<sup>14</sup>

**NOTING** that in the Reply, Miletić states that:

- a. the Reply is necessary "to respond to the Prosecution's allegations regarding facts that appeared after the submission of the request for certification to appeal, and certain imprecise and/or inexact allegations put forward by the Prosecution in its Response";<sup>15</sup>
- b. the record of General Smith's testimony demonstrates that "not a single Party cited at any time the [statement] and that this [s]tatement was not presented to the witness";<sup>16</sup> and
- c. the fact that Gvero's military expert refers to the statement "is irrelevant for the present case and does not contradict [Miletić's] arguments";<sup>17</sup>

**NOTING** that in the Sur-Reply, the Prosecution states that:

- a. the Sur-Reply is necessary "to correct the Reply's persistent misstatement of the record";<sup>18</sup> and
- b. specific transcript references to General Smith's testimony squarely demonstrate that Miletić's persistent assertions that the statement was not used during that testimony "border on the bewildering and the absurd";<sup>19</sup>

**CONSIDERING** that the Trial Chamber does not consider either the Reply or the Sur-Reply particularly helpful to anything at issue in the Motion and the Response and, therefore, does not find it necessary to consider either pleading;

**CONSIDERING** 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

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<sup>13</sup> *Ibid.*, note 14.

<sup>14</sup> *Ibid.*, para. 11.

<sup>15</sup> Reply, para. 3.

<sup>16</sup> *Ibid.*, para. 8.

<sup>17</sup> *Ibid.*, para. 9.

<sup>18</sup> Sur-Reply, para. 1.

<sup>19</sup> *Ibid.*, paras. 2-4.

proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

**CONSIDERING** 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,<sup>20</sup> and that certification is not concerned with whether the decision was correctly reasoned or not;<sup>21</sup>

**CONSIDERING** that in the Second Decision, the Trial Chamber stated:

**CONSIDERING** that, based upon the material provided to the Trial Chamber, it is not satisfied that the Prosecution has established that General Smith possesses the specialised knowledge necessary to testify as an expert with regard to the function and operation of the VRS Main Staff or the command doctrine of the VRS at the relevant time;

**CONSIDERING**, however, that General Smith will not be precluded from testifying as to his personal experience with the VRS Main Staff, or his direct observations of the functioning of the VRS Main Staff and its officers, nor will he be precluded from testifying to reasonable inferences he drew from those direct experiences;<sup>22</sup>

and that the Trial Chamber ordered that “General Smith is allowed to testify as an expert with regard to the history, function and importance of a Main Staff in general, but not as an expert with regard to the function and operation of the VRS Main Staff, nor with regard to the command doctrine of the VRS”;<sup>23</sup>

**CONSIDERING** that in the Impugned Decision, the Trial Chamber stated “that wherever the statement includes opinion which goes beyond the limits established in the Second Decision, the Trial Chamber will have no regard to that evidence as expert opinion and, therefore, that it is not necessary to redact the statement”;<sup>24</sup>

**CONSIDERING** that the Trial Chamber is not satisfied, given the clear language in the Second Decision, that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate resolution by the Appeals Chamber might materially advance these proceedings;

**CONSIDERING**, therefore, that neither of the requirements of Rule 73(B) has been satisfied;

<sup>20</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

<sup>21</sup> *See* Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3; Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007, p. 3; *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.

<sup>22</sup> Second Decision, pp. 3–4.

<sup>23</sup> *Ibid.*, p. 5.

<sup>24</sup> Impugned Decision, p. 1.

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

**HEREBY DENIES** leave to file the Reply and the Sur-Reply and **DENIES** the Motion.

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



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Carmel Agius  
Presiding

Dated this fifteenth day of April 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**