



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: 19 May 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: 19 May 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLIĆ AND BEARA MOTIONS FOR CERTIFICATION
OF THE RULE 92 QUATER DECISION**

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. 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”), is seised of the “Defence Motion on Behalf of Drago Nikolić Seeking Certification of the Trial Chamber Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 28 April 2008 (“Nikolić Motion”), and of the “Defence Motion on Behalf of Ljubiša Beara Seeking Certification of the Trial Chamber Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 28 April 2008 (“Beara Motion”) and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND AND SUBMISSIONS OF THE PARTIES

1. On 21 April 2008, the Trial Chamber rendered its “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Impugned Decision”) and admitted into evidence the testimony of four deceased witnesses, namely Ljubo Bojanović, Milan Marić, B-161, and Miroslav Deronjić.

A. Motions

2. Nikolić and Beara respectively request the Trial Chamber to certify the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) and to allow them to file an interlocutory appeal.¹ In particular, Nikolić and Beara request certification of the Impugned Decision in relation to the admission of the evidence of Witness B-161 and Miroslav Deronjić.² Although the Nikolić Motion pertains to the evidence of B-161 while the Beara Motion focuses on the evidence of Miroslav Deronjić, both Accused indicate that they join and adhere to arguments which will be put forward by other co-Accused concerning the evidence of Miroslav Deronjić, for Nikolić, and the evidence of B-161, Ljubo Bojanović, and Milan Marić, for Beara.³

3. Nikolić and Beara submit that both criteria for certification set out in Rule 73(B) have been met, namely that the Impugned Decision involves issues that significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings.⁴

¹ Nikolić Motion, paras. 1, 22; Beara Motion, paras. 1, 23.

² Nikolić Motion, para. 2; Beara Motion, para. 2.

³ Nikolić Motion, para. 2; Beara Motion, para. 2.

⁴ Nikolić Motion, para. 6; Beara Motion, para. 6.

4. In particular, Nikolić and Beara argue that the Impugned Decision results from a number of errors of law and contend that these errors raise issues which significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.⁵

5. Firstly, Nikolić and Beara submit that, although the Trial Chamber will determine the weight to be attributed to the evidence of B-161 and Deronjić at a later stage, it has already determined in the Impugned Decision that this evidence has probative value. For this reason, it is submitted that the admission of this evidence which goes to the acts and conduct of the Accused will significantly affect the outcome of the trial.⁶

6. Secondly, Nikolić and Beara submit that the fairness of the proceedings is affected in so far as the Accused need to adduce evidence to counter the veracity of two events, namely the alleged visit of B-161 to the Zvornik Brigade Command, for Nikolić, and a private conversation with Deronjić which allegedly occurred in the evening of 13 July 1995, for Beara.⁷ In particular, Nikolić submits that the alleged visit of B-161 to the Zvornik Brigade Command rests on evidence provided by a deceased person who cannot be cross-examined and that of a witness who has proved to be not credible.⁸ Beara submits that the private conversation with Deronjić on the evening of 13 July 1995 rests on uncorroborated evidence provided by a deceased person who cannot be cross-examined and whose credibility has been challenged.⁹ Beara further argues that, by failing to follow the procedure of Rule 65 *ter* and the relevant case law of the Tribunal, the “Prosecutorial burden” has shifted to the Defence and this circumvention of the Rules by the Prosecution has affected his rights to a fair trial, as he has now less time to analyse the new evidence and prepare its case.¹⁰

⁵ Nikolić Motion, paras. 8, 10; Beara Motion, paras. 8, 10. In particular, Nikolić challenges the Impugned Decision on the ground that the Trial Chamber failed (a) with regard to Rule 65 *ter*, to strike a balance between “the Prosecution’s duty to present the available evidence to prove its case and the rights of the Accused to a fair trial”; (b) “to consider all arguments raised by the Parties”; (c) “to consider whether evidence was fully and effectively cross-examined at the admissibility stage pursuant to Rule 92 *quater*”; (d) “to be *fully satisfied* regarding the reliability of evidence sought to be admitted pursuant to Rule 92 *quater*, when such evidence goes to acts and conduct of the Accused”; (e) to give due importance to “corroboration in assessing whether evidence which goes to acts and conduct of the Accused can be admitted pursuant to Rule 92 *quater*”; (f) “to consider allegations affecting the character and background – and thus the credibility – of a witness at the admissibility stage pursuant to Rule 92 *quater*”; (g) to pronounce, especially when the evidence goes to the act and conduct of the Accused, “as to whether the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial”. *Ibid.* para. 8. In addition to the errors of law indicated by Nikolić, Beara argues that the Trial Chamber failed to take into account the requirement of Rule 65 *ter* (E) and the relevant case law of the Tribunal which state that the Witness List should include “all witnesses”. Beara Motion, para. 8, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s Motion for Admission of Witness Statements Pursuant to Rule 92 *quater*, 19 April 2007, para. 9.

⁶ Nikolić Motion, para. 11; Beara Motion, para. 11.

⁷ Nikolić Motion, para. 12; Beara Motion, para. 12.

⁸ Nikolić Motion, para. 12.

⁹ Beara Motion, para. 12.

¹⁰ *Ibid.*, para. 13.

7. Thirdly, Nikolić and Beara stress that the conduct of the proceedings will be affected as the Accused will have to recall Prosecution witnesses for further cross-examination as well as challenge the alleged events, and this will extend the duration of their respective defence case.¹¹

8. Nikolić and Beara further argue that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings.¹² They submit that, should the trial proceed without the Appeals Chamber pronouncing on the Impugned Decision and the Appeals Chamber later holding on the merits that the evidence of B-161 and Miroslav Deronjić should not have been admitted pursuant to Rule 92 *quater*, this would invalidate the final judgement in respect of any finding related to such evidence.¹³ They further submit that, should the Trial Chamber grant certification of the Impugned Decision, no delay in the proceedings would be incurred as the case of the first co-Accused, Vujadin Popović, will proceed as planned.¹⁴ In addition, Nikolić and Beara point out that, should the Appeals Chamber subsequently overturn the part of the Impugned Decision dealing with the evidence of B-161 and Miroslav Deronjić, their defence case would be reduced.¹⁵ Finally, they submit that in light of the seriousness of the infringement of the right of the Accused to a fair trial resulting from the admission of the evidence of B-161 and Miroslav Deronjić, allowing the Appeals Chamber to pronounce on this matter will materially advance the proceedings by “(a) avoiding a serious potential prejudice to the Accused; and (b) ensuring that this trial proceeds on a sound legal basis”.¹⁶

B. Response

9. On 13 May 2008, the Prosecution filed a consolidated response (“Response”), requesting that the Nikolić and Beara Motions be denied.¹⁷ The Prosecution submits that the conditions for certification under 73(B) have not been met and objects to the merits of the arguments advanced by Nikolić and Beara in support of their applications.¹⁸

10. Firstly, the Prosecution finds unfounded Nikolić’s and Beara’s claims that the mere admission of B-161 and Deronjić’s evidence will affect the outcome of the trial because the Trial

¹¹ Nikolić Motion, para. 13; Beara Motion, para. 14.

¹² Nikolić Motion, paras. 15–21; Beara Motion, paras. 16–22.

¹³ Nikolić Motion, para. 16; Beara Motion, para. 17.

¹⁴ Nikolić Motion, para. 17; Beara Motion, para. 18.

¹⁵ Nikolić Motion, para. 18; Beara Motion, para. 19.

¹⁶ Nikolić Motion, para. 19; Beara Motion, para. 20.

¹⁷ Consolidated Prosecution Response to Defence Motions on Behalf of Drago Nikolić and Ljubiša Beara Seeking Certification of the Trial Chamber’s Rule 92 *quater* Decision, 13 May 2008 (“Response”), paras. 1, 17.

¹⁸ *Ibid.*, paras. 1, 17.

Chamber has already determined that this evidence has probative value, and notes that the Trial Chamber has yet to decide on the weight, if any, which will be attributed to this evidence.¹⁹

11. Secondly, the Prosecution submits that Nikolić's and Beara's challenges to the degree of credibility of the evidence corroborating B-161's testimony and of the evidence of Deronjić itself are irrelevant to an assessment of whether the fairness of the proceedings is affected by the admission of this evidence.²⁰ In addition, the Prosecution submits that the lack of cross-examination of B-161's and Deronjić's evidence does not, of itself, affect the fair and expeditious conduct of the proceedings as the very purpose of Rule 92 *quater* is to enable the admission of evidence from deceased persons.²¹

12. Thirdly, the Prosecution argues that the admission of B-161's and Deronjić's testimonies demonstrate no additional grounds that would require to recall witnesses and that, in any event, recalling certain witness would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.²²

13. With regard to Beara's claims of prejudice resulting from the Prosecution's failure to follow the procedure of Rule 65 *ter*, the Prosecution argues that these claims are unfounded since Beara was aware that the Prosecution intended to call Deronjić as a witness and that he had been on notice, as early as 11 July 2007, of the method by which the Prosecution would seek the admission of Deronjić's evidence.²³

14. Finally, with respect to the second condition for certification under Rule 73(B), the Prosecution submits that the four arguments provided by Nikolić and Beara do not constitute valid arguments to conclude that an immediate resolution of these issues by the Appeals Chamber would materially advance the proceedings.²⁴

II. APPLICABLE LAW

15. Rule 73 (B) of the Rules governs the certification procedure and reads:

¹⁹ *Ibid.*, paras. 6, 12. The Prosecution submits that under this argument, every piece of evidence admitted by the Trial Chamber would automatically satisfy the first prong of the certification test pursuant to Rule 73 (B) since probative value is a prerequisite to admission. *Ibid.*

²⁰ *Ibid.*, paras. 7, 13.

²¹ *Ibid.*, paras. 7, 13.

²² *Ibid.*, paras. 8, 15. With regard to Beara's claim, the Prosecution further stresses that the Accused has been informed as early as April 2006 of the Prosecution's intention to call Deronjić as a witness. *Ibid.*, para. 15.

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, paras. 9–10, 16.

(B) Decisions 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.

16. The Trial Chamber notes that Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied. The Trial Chamber further stresses that, even where both requirements of Rule 73(B) are satisfied, a decision on certification remains discretionary in nature.²⁵ In addition, the Trial Chamber recalls that certification, pursuant to Rule 73(B), is not concerned with whether a decision was correctly reasoned or not.²⁶

III. DISCUSSION

17. Pursuant to the Trial Chamber's order in the Impugned Decision, on 7 May 2008 the Registrar assigned Witness B-161 the pseudonym "PW-102" in the *Popović et al.* case. The Trial Chamber will henceforth refer to the witness with his pseudonym in the current case.

18. The Trial Chamber notes that the motions only deal with the evidence of Witnesses PW-102 and Miroslav Deronjić. Although Beara indicates that he joins and adheres to arguments which will be put forward by other co-Accused concerning the evidence of PW-102, Ljubo Bojanović, and Milan Marić, the Trial Chamber notes that Nikolić is the only co-Accused who filed a motion for certification and that his motion focuses on the evidence of PW-102. No arguments have been put forward by any of the co-Accused in relation to the evidence of Ljubo Bojanović and Milan Marić.

19. With respect to the first criterion, the Trial Chamber notes that because the evidence admitted by the Trial Chamber in this instance goes to the acts and conduct of the Accused, the issue is one that would significantly affect the fair and expeditious conduct of the proceedings.

20. With regard to the second criterion of Rule 73 (B), the Trial Chamber is of the view that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings at this stage. If the Appeals Chamber were to rule that the Trial Chamber was wrong in admitting the evidence of Witnesses PW-102 and Miroslav Deronjić pursuant to Rule 92 *quater* and were to overturn the relevant part of the Impugned Decision, the Accused would be dispensed of adducing new evidence and the Defence case of one or more Accused would thereby incidentally be reduced.

²⁵ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2. See also, for example, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Miletić's Request for Certification of the Decision on Defence Objections to the Admission of the Expert Statement of General Rupert Smith, 15 April 2008 ("Decision of 15 April 2008"), p. 4.

21. The Trial Chamber is therefore satisfied that both criteria of Rule 73(B) have been met.

IV. DISPOSITION

22. For these reasons, pursuant to Rules 54 and 73(B), the Trial Chamber hereby **GRANTS** the Nikolić Motion and the Beara Motion for certification of the Impugned Decision with regard to the admission of PW-102's and Miroslav Deronjić's evidence.

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



Carmel Agius
Presiding

Dated this nineteenth day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ *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. *See also*, for example, Decision of 15 April 2008, p. 4.