



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: 2 April 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Acting Registrar: Mr. John Hocking

Decision of: 2 April 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLIĆ MOTION FOR RECONSIDERATION AND
ORDER FOR ISSUANCE OF A *SUBPOENA DUCES TECUM***

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 Reconsideration of the Trial Chamber’s Decision on the Beara Motion for Reconsideration of the Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes”, filed confidentially on 25 March 2009 (“Motion”), in which Nikolić:

- a) requests the Trial Chamber to reconsider the “Decision on the Beara Motion for Reconsideration and Beara and Nikolić Joint Motion for Certification of the Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes” filed on 10 January 2008 (“January 2008 Decision”), given that there is a change of circumstances since the January 2008 Decision was issued, as Momir Nikolić has now been called as a Chamber witness,¹ and to prevent injustice,² and
- b) that as a corollary of the change of circumstances, the Trial Chamber should compel Momir Nikolić to disclose his personal notes made in the preparation of his defence (“Notes”) to all parties, no later than five days prior to his testimony; that this is indispensable for the defence to be able to cross-examine him well, and for the Trial Chamber in its search for the truth,³

NOTING the “Prosecution Response to Motion on behalf of Drago Nikolić Seeking Reconsideration of the Trial Chamber’s Decision on the Beara Motion for Reconsideration of the Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes”, filed confidentially on 30 March 2009 (“Prosecution Response”), in which the Prosecution opposes the Motion arguing that:

- a) it fails to demonstrate any error of reasoning of the Trial Chamber in the January 2008 Decision and while the Prosecution submits that it is “immaterial” to it whether Momir Nikolić is compelled to produce the Notes, the Motion fails to cite any legal basis for their compelled disclosure;⁴

¹ Motion, paras. 1–2, 15–17, 38.

² *Ibid.*, paras. 1, 19–21, 38–39.

³ *Ibid.*, paras. 4–5, 18, 22–42.

⁴ Prosecution Response, paras. 1, 5–6, 8.

- b) the Motion misreads the January 2008 Decision as the Trial Chamber did not exclude the possibility that the Defence or the Trial Chamber itself would call Momir Nikolić as a witness and as such there are no changed circumstances,⁵ and
- c) the Motion failed to establish circumstances justifying reconsideration to prevent injustice;⁶

NOTING the “Order to Summon Momir Nikolić”, filed on 10 March 2009, by which Momir Nikolić was summoned to appear as a Chamber witness to assist the Trial Chamber in its search for the truth;

NOTING the context in which the 2 November 2007 oral decision (“Oral Decision”)—the underlying decision subject of this Motion and the January 2008 Decision—was given, that is, the acknowledgement that Momir Nikolić could still be called by the Defence or the Trial Chamber itself, even though he had just been withdrawn as a Prosecution witness;⁷

NOTING FURTHER that the January 2008 Decision held that “[...] there was no basis in the Rules or the Tribunal’s jurisprudence for Beara’s assertion that he was entitled to compel disclosure of the personal notes that Momir Nikolić made in preparation of his defence” and that “no clear error of reasoning has been demonstrated”;⁸

CONSIDERING that reconsideration of a decision is permitted in exceptional cases “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice”⁹ and the party urging reconsideration satisfies the Trial Chamber that there are circumstances justifying reconsideration to prevent injustice;¹⁰

CONSIDERING that the Motion does not meet the test for reconsideration;

⁵ *Ibid.*, paras. 3–4.

⁶ *Ibid.*, paras. 7–8.

⁷ Oral Decision, T. 17401–17402 (2 November 2007).

⁸ January 2008 Decision, p. 4.

⁹ January 2008 Decision, p. 4; Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, pp. 4–5 and note 26 (“Decision of 20 July 2007 on Motion Requesting Reconsideration or Certification”). *See also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’appelant en reconsidération de la décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2 (stating the standard of the Appeals Chamber of both ICTY and ICTR for reconsideration of interlocutory appeals decisions).

¹⁰ January 2008 Decision, p. 4; Decision of 20 July 2007 on Motion Requesting Reconsideration or Certification, p. 5 and note 27. *See also* *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2 (considering that for an appellant to succeed in requesting reconsideration of an Appeals Chamber decision, “he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice”).

CONSIDERING that the Trial Chamber is not persuaded that there exists a change of circumstances that justifies the reconsideration of the January 2008 Decision as at the time it was given, the Trial Chamber had foreseen the possibility of Momir Nikolić appearing as a witness for one of the Defence teams or as a Chamber witness;¹¹

NOTING, HOWEVER, Rule 54 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which provides that, “[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for [...] the preparation or conduct of the trial”;

CONSIDERING that it is in the interests of justice for the Trial Chamber to have all relevant material before it;

CONSIDERING that the Notes have been identified by the parties;

PURSUANT TO Rule 54 of the Rules,

HEREBY DENIES the Motion; but

ORDERS AND DIRECTS *proprio motu* Momir Nikolić to bring with him to the hearing scheduled for 21 April 2009 the Notes and any other relevant documents, and

FURTHER ORDERS AND DIRECTS representatives of the Registry to take all necessary and diligent measures to serve this Decision and Order on Momir Nikolić.

¹¹ See January 2008 Decision, p. 2; Oral Decision, T. 17401–17402 (2 November 2007).

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



Carmel Agius
Presiding

Dated this second day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]