



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 June 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

Registrar: Mr. John Hocking

Decision of: 15 June 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLIĆ MOTION REQUESTING THE TRIAL
CHAMBER TO EXERCISE ITS DISCRETION PURSUANT TO RULE 98**

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 Requesting the Trial Chamber to Exercise its Discretionary Powers Pursuant to Rule 98 to Call a Witness,” filed on 13 May 2009 (“Motion”);

NOTING that in the Motion, Nikolić requests the Trial Chamber to exercise its discretionary powers pursuant to Rule 98 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) to call Sreten Milošević as a *viva voce* witness in this case. Nikolić argues that as Sreten Milošević indicated that he did not want to appear as a witness on behalf of either the Prosecution or the Defence, although he would be willing to testify as a Trial Chamber witness, it is in the interests of justice and judicial economy that he be called by the Trial Chamber pursuant to Rule 98;¹

NOTING that Nikolić submits that Sreten Milošević’s testimony is highly relevant and probative, particularly in respect of Momir Nikolić’s alleged visit to the Standard Barracks on the evening of 13 July 1995;² and that following the withdrawal of Momir Nikolić as a Prosecution witness, the need for the Defence to call Sreten Milošević to give evidence on this matter had ceased to exist, but this need arose again after Momir Nikolić testified as a Chambers witness;³

NOTING that Nikolić further submits that Sreten Milošević’s testimony will aid the Trial Chamber’s search for the truth;⁴

NOTING that on 27 May 2009, the Prosecution filed the “Prosecution’s Response to Motion on Behalf of Drago Nikolić Requesting the Trial Chamber to Exercise its Discretionary Powers Pursuant to Rule 98 to Call a Witness” (“Response”), in which the Prosecution opposes the Motion, asserting that Sreten Milošević’s *viva voce* testimony is unnecessary and will not assist the Trial Chamber in its search for the truth.⁵ The Prosecution argues that Sreten Milošević has already told Nikolić that he does not recall Momir Nikolić’s visit,⁶ and that Milošević’s memory is “so poor as to be not credible”;⁷

¹ Motion, paras. 1, 3, 32–36.

² *Ibid.*, paras. 2, 13–20, 24–25.

³ *Ibid.*, paras. 2, 17–19.

⁴ *Ibid.*, paras. 2, 13, 21–22, 26–31.

⁵ Response, para. 1.

⁶ *Ibid.*, paras. 2, 4–14.

⁷ *Ibid.*, para. 2, 5, 15–19

NOTING that the Prosecution finally requests that should the Trial Chamber decide to call Sreten Milošević as a Trial Chamber witness, it should also direct Nikolić to disclose the factual substance of the contacts, meetings and interviews he has held with Sreten Milošević;⁸

NOTING that on 2 June 2009, Nikolić filed the “Motion on Behalf of Drago Nikolić Seeking Leave to Reply and Reply to Prosecution Response to Motion on Behalf of Drago Nikolić Requesting the Trial Chamber to Exercise its Discretionary Powers Pursuant to Rule 98 to Call a Witness” (“Reply”), requesting leave to reply and submitting that the Prosecution has improperly assessed the credibility of Sreten Milošević and mischaracterized the evidence he can provide.⁹ Nikolić points out that Momir Nikolić’s testimony “rests on the premise that he met with the Zvornik Brigade Duty Operations Officer that night” and therefore it is evident that the testimony of Sreten Milošević, the Zvornik Brigade Duty Operations Officer that night will assist the Trial Chamber in its search for the truth;¹⁰

NOTING that Nikolić claims that the Prosecution failed to identify any legal basis supporting the request concerning the disclosure of notes taken by investigators during the interviews with Sreten Milošević;¹¹

CONSIDERING that according to Rule 98 of the Rules, “[a] Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance”;

CONSIDERING that from a procedural standpoint, the Trial Chamber is not persuaded to exercise its discretion under Rule 98 and call Sreten Milošević as a Chamber witness;

PURSUANT TO Rules 85 and 126 *bis* of the Rules,

HEREBY GRANTS Nikolić leave to reply and **DENIES** the Motion.

⁸ *Ibid.*, paras. 6–7, 20–22.

⁹ Reply, paras. 1, 3, 13–19, 25–30, 33.

¹⁰ *Ibid.*, paras. 8–11.

¹¹ *Ibid.*, paras. 4, 12, 32.

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



Carmel Agius
Presiding

Dated this fifteenth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]