



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-95-13/1-PT  
Date: 24 November  
2004  
Original: English

IT-95-13/1-PT  
D 2450 - D 2447  
24 NOVEMBER 2004

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**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Pre-Trial Judge

**Registrar:** Mr. Hans Holthuis

**Order of:** 24 November 2004

**PROSECUTOR**

v.

**MILE MRKŠIĆ  
MIROSLAV RADIĆ  
VESELIN ŠLJIVANČANIN**

**ORDER SETTING A TIME-LIMIT FOR DISCLOSURE  
PURSUANT TO RULE 66(A)(ii)**

**The Office of the Prosecutor:**

Mr. Jan Wubben

**Counsel for the Accused Mile Mrkšić:**

Mr. Miroslav Vasić

**Counsel for the Accused Miroslav Radić:**

Mr. Borivoje Borović

Ms. Mira Tapušković

**Counsel for the Accused Veselin Šljivančanin:**

Mr. Novak Lukić

Mr. Momčilo Bulatović

**I, Carmel Agius**, Judge 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”) and Pre-Trial Judge in these proceedings:

**PROPRIO MOTU**

**NOTING** the “Prosecution’s Notice of Filing It’s Provisional Witness List” (“Provisional Witness List”) filed confidentially by the Office of the Prosecutor (“Prosecution”) on 15 October 2004 pursuant to an oral order rendered by the Pre-Trial Judge in the course of the Status Conference of 7 October 2004;

**NOTING** that the Provisional Witness List contains the name of 25 witnesses that the Prosecution anticipates it will call at trial, purportedly in accordance with the oral order of the Pre-Trial Judge and Rule 66(A)(ii) of the Rules of Procedure and Evidence (“Rules”);<sup>1</sup>

**NOTING** that the Prosecution submits that it is unable to provide at this point in time the names of approximately 4 or 5 additional potential witnesses it may call to testify, because these are sensitive source witnesses, but that it “will continue to assess the status of these witnesses and will advise the Chamber and all the parties if they are to be placed on the witness list”.<sup>2</sup>

**NOTING** that the Prosecution submits it intends to add additional witnesses and that its final witness list will number around 53 witnesses, inclusive of the said sensitive source witnesses;<sup>3</sup>

**CONSIDERING** that the aforesaid means that there are approximately 23 witnesses the Prosecution intends to call at trial which it is not informing Defence counsel for the Accused of;

**CONSIDERING** that Rule 66(A)(ii) provides that

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands [...]

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

**CONSIDERING** that the oral order of the Pre-Trial Judge was on the following terms;

So within ten days from today, we shall be expecting a list indicating which of those witness statements fall under Rule 66(A)(ii) and which under Rule 68.<sup>4</sup>

<sup>1</sup> Provisional Witness List, Annexes A and B. The Prosecution wrongfully submits that its filing “sets forth a provisional list of 30 witnesses”: Prosecution Witness List, footnote 2.

<sup>2</sup> Provisional Witness List, para. 4.

<sup>3</sup> Provisional Witness List, footnote 2.

**CONSIDERING** that it may well be that the Prosecution has already disclosed to Defence counsel for the Accused copies of the statements of the remaining 23 witnesses it intends to call at trial, without however informing counsel of whether these statements were being disclosed pursuant to Rule 65(A)(ii) or pursuant to some other Rule (such as, for example, Rule 68);

**CONSIDERING** that, in that case and with respect to the statements of those witnesses, the Prosecution has not complied with the oral order of the Pre-Trial Judge;<sup>5</sup>

**RECALLING** that the Pre-Trial Judge may establish a time-limit for the purposes of 66(A)(ii) disclosure;

**RECALLING** further that pre-trial proceedings in this case have been ongoing for approximately two years;<sup>6</sup>

**CONSIDERING** that it is to be expected that by this stage the Prosecution is in a position to inform Defence counsel for the Accused of **nearly all** of the witnesses it intends to call at trial;

**CONSIDERING** that the fact that some of these are sensitive source witnesses does not relieve the Prosecution from disclosing their statements to Defence counsel if it has determined that it intends to call these witnesses at trial, unless it applies for non-disclosure of their identity pursuant to Rule 69;

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<sup>4</sup> Transcript of the Status Conference of 7 October 2004, T 255. The Pre-Trial Judge summarised the outcome of the Rule 65 *ter* meeting of 6 October 2004 between the parties and the Senior Legal Officer thus: "[t]o my knowledge, the Defence argued that they do not know which of these witnesses whose statements have been disclosed will be called at trial. During the 65 *ter* meeting the Senior Legal Officer asked the Prosecution to provide the Defence with a list of all the statements that have been disclosed to the Defence indicated which of those should at least provisionally be regarded as witnesses that will appear at trial and to copy the Pre-Trial Judge into it": Transcript of the Status Conference of 7 October 2004, T 253.

<sup>5</sup> See also analogously *Prosecutor v Krajišnik and Plavšić*, Decision on Motion from Momčilo Krajišnik to compel disclosure of exculpatory evidence pursuant to Rule 68, 19 July 2001, page 2: "that while Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely to disclose it; nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is not answer to say that the Defence are in a better position to identify it".

<sup>6</sup> The Accused Mile Mrkšić was the first of the three Accused to enter into the Tribunal's custody, in May 2002. The Accused Veselin Šljivančanin was the last of the three Accused to enter into the Tribunal's custody, in July 2003.

**FOR THE FOREGOING REASONS****PURSUANT TO** Rule 65 *ter*;**HEREBY ORDERS** the Prosecution, subject to any application it may make to the Trial Chamber pursuant to Rule 69 for non-disclosure of the identity of specific witnesses:

- i) to supplement its Provisional Witness List with the remaining witnesses it intends to call to testify at trial; and
- ii) to disclose to Defence counsel for the Accused copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*, by 31<sup>st</sup> January 2005 at the latest.

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

Dated this 24<sup>th</sup> day of November 2004,

At The Hague

The Netherlands

**Carmel Agius****Pre-Trial Judge****[Seal of the Tribunal]**