

UNITED
NATIONS



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-PT
Date: 06 March 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Jean-Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision of: 06 March 2006

THE PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ
MILORAD TRBIĆ

**DECISION ON JOINT DEFENCE MOTION SEEKING THE TRIAL
CHAMBER TO ORDER THE REGISTRAR TO PROVIDE THE
DEFENCE WITH BCS TRANSCRIPTS OF PROCEEDINGS IN TWO
PAST CASES BEFORE THE INTERNATIONAL TRIBUNAL**

The Office of the Prosecutor:

Peter McCloskey

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Zoran Živanović for Vujadin Popović
John Ostojić for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
Aleksandar Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Đorđe Sarapa for Vinko Pandurević
Colleen Rohan and Vesna Janjić for Milorad Trbić

TRIAL CHAMBER II 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 “Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings in two Past Cases before the International Tribunal” (“Joint Defence Motion”), filed on 20 December 2005, requesting an electronic, written and searchable BCS version of the transcripts of the proceedings in the case *The Prosecutor v. Krstić* (“*Krstić case*”) and *The Prosecutor v. Blagojević and Jokić* (“*Blagojević case*”);

NOTING the “Prosecution’s Response to Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings in two Past Cases before the International Tribunal” (“Prosecution’s Response to Joint Defence Motion”), filed on 4 January 2006;

BEING SEISED FURTHER of the “Joint Defence Motion Seeking Leave to Reply” and **NOTING** the “Reply to the Prosecution Response to Joint Defence Motion Seeking the Trial Chamber to Order Registrar to Provide the Defence with BCS Transcripts in Two Past Cases (“Reply to Prosecution’s Response to Joint Defence Motion”), filed on 11 January 2006;

NOTING that the Joint Defence Motion submits that the Prosecution case is based almost entirely on the trial record of the *Krstić* case and the *Blagojević* case (“*Krstić* and *Blagojević* cases”);¹ that the material supporting the indictment (“supporting material”) against the Accused contains significant portions of the transcripts of the *Krstić* and *Blagojević* cases; and that the portion which is not included as part of the supporting material falls under Rules 66(A)(ii) or 68 of the Rules of Procedure and Evidence (“Rules”);²

NOTING that the Joint Defence Motion further argues that pursuant to Article 21(4)(a) of the Statute of the Tribunal (“Statute”), an accused has the right, in full equality, to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him;³ that material disclosed pursuant to Rules 66(A)(i), 66(A)(ii) and 68 is included in the material which informs the accused in detail of the nature and cause of the charges against him;⁴ that the transcripts of the *Krstić* and *Blagojević* cases are accessible to the Defence in English on

¹ Joint Defence Motion, para. 6.

² Joint Defence Motion, para. 7.

³ Joint Defence Motion, para. 10.

⁴ Joint Defence Motion, para. 12.

the EDS;⁵ that however, the Accused do not have access to the EDS, and even if the Accused did have access to the EDS, the transcripts on this system are not in a language they understand;⁶ that to overcome this difficulty, the Accused have been provided with an BCS audio version of the transcripts of the *Krstić* and *Blagojević* cases recorded on CDs (“BCS audio recordings”), which does not meet the obligations set out in Article 21(4)(a) and 21(4)(a)(b) of the Statute and is therefore not an acceptable solution;⁷

NOTING that the Joint Defence Motion submits in particular as to the Prosecution’s disclosure obligation under Rule 66(A)(i) that insofar as portions of the transcripts of the *Krstić* and *Blagojević* cases are included in the supporting material, Rule 66(A)(i) provides that the Prosecution shall make available to the Defence in a language which the accused understands copies of the supporting material;⁸ that “[...] ‘copies’ of the supporting material cannot refer to ‘audio recordings’, which would defeat the object and purpose of Rule 66 which is to ensure that the accused is promptly informed in a language he understands of the nature and cause of the charges against him”;⁹ that “having to listen to an ‘audio’ version of thousands of pages of transcripts is a very [...] difficult endeavour bearing in mind that the material cannot be searched nor organised for the purpose of preparing the case for the Defence, without listening to the same recording many times and making detailed notes [...] whereas all other parties involved have the benefit of written, electronic and searchable material, it cannot be said that the right of the accused to be informed – in full equality – is respected”;¹⁰

NOTING that the Joint Defence Motion submits in particular as to the Prosecution’s disclosure obligation under Rule 66(A)(ii) that the same reasoning put forward in relation to portions of the transcripts of the *Krstić* and *Blagojević* cases included in the supporting material “applies to portions of the transcript [...] which are specifically included in material disclosed pursuant to Rule 66(A)(ii) [...]”;¹¹

NOTING that the Joint Defence Motion submits in particular as to the Prosecution’s disclosure obligation under Rule 68 that “even though Rule 68 does not include the words ‘in a language which the accused understands’, the [reasoning stated above] also applies to material disclosed pursuant to Rule 68 as the obligation to translate Rule 68 material which is not in a language the accused understands rests in any event on the Registrar [...]”; “that Rule 68(ii) provides that the

⁵ Joint Defence Motion, para. 15.

⁶ Joint Defence Motion, paras 16-17.

⁷ Joint Defence Motion, paras 18, 20 and 26.

⁸ Joint Defence Motion, para. 21.

⁹ Joint Defence Motion, para. 22.

¹⁰ Joint Defence Motion, para. 23.

¹¹ Joint Defence Motion, para. 24.

Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically”, but that audio versions of transcripts are not “searchable”;¹²

NOTING that the Joint Defence Motion finally submits that “what makes this case different from other cases before the International Tribunal in this regard is the fact, recognised by the Prosecution, that the transcript of the [*Krstić* and *Blagojević* cases] is a primary source of material for the preparation of the case for the Defence”;¹³ and that the Defence, taking into consideration the standard United Nations labour costs, has suggested an alternative source to produce BCS transcripts which would be less expensive;¹⁴

NOTING that the Prosecution’s Response to Joint Defence Motion submits that according to a Prosecution estimate it would take 10 language assistants, approximately 150 working days to finish this task which would render it impossible to start the trial in a timely and expeditious manner;¹⁵ that the Prosecution would object to any attempt to outsource this task to a third party as it contains confidential material;¹⁶ that “the testimony from the [*Krstić* and *Blagojević* cases] are an important part of the current case; however, the Defence is mistaken when they conclude that the current case ‘is based almost entirely on the trial record’ of the two previous cases” as the majority of the potential live witnesses in the current case did not testify in the previous cases and the majority of the witnesses to be called who also gave evidence in the *Krstić* and *Blagojević* cases are crime base witnesses;¹⁷ that there is however “some very important direct evidence linking various accused to the crimes in testimony from the prior trials”, which can be identified in the English transcripts to better enable the Defence to find such testimony on the BCS audio recordings;¹⁸ and that by ensuring that the Accused have appropriate equipment to listen to the BCS audio recordings and by the provision of BCS indexes to the English transcripts, the Accused will be better able to locate the material passages of evidence in the BCS audio recordings;¹⁹

NOTING that the Reply to Prosecution’s Response to Joint Defence Motion submits that the Prosecution has overestimated the time necessary for the transcription of the BCS audio recordings so that a transcription should not jeopardize the accuseds’ right to an expeditious trial;²⁰ and that the Prosecution’s proposal to identify important direct evidence in testimony from the prior trials in the

¹² Joint Defence Motion, para. 25.

¹³ Joint Defence Motion, para. 32.

¹⁴ Joint Defence Motion, para. 34.

¹⁵ Prosecution’s Response to Joint Defence Motion, paras 5 and 10.

¹⁶ Prosecution’s Response to Joint Defence Motion, para. 6.

¹⁷ Prosecution’s Response to Joint Defence Motion, para. 12.

¹⁸ Prosecution’s Response to Joint Defence Motion, para. 13.

¹⁹ Prosecution’s Response to Joint Defence Motion, para. 14.

²⁰ Reply to Prosecution’s Response to Joint Defence Motion, paras 15 and 16.

English transcripts which links various accused to the crimes alleged does not satisfy the accused's right to have the material in their own language;²¹

CONSIDERING that Article 21(4)(a) of the Statute guarantees that the accused be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him;

CONSIDERING that Article 21(4)(b) of the Statute entitles the accused to have adequate time and facilities for the preparation of his defence;

CONSIDERING that Rule 66 (A) of the Rules gives effect to Article 21(4)(a) of the Statute by its more detailed requirements of disclosure; and that material disclosed pursuant to Rule 66(A) must be in a language the accused understands, irrespective of whether it will be actually offered by the Prosecution at trial;

CONSIDERING that Rule 66 relevantly provides that "(A) [...] the Prosecutor shall make available to the defence in a language which the accused understands (i) [...] copies of the supporting material which accompanied the indictment when confirmation was sought [...]; and (ii) [...] 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* [...]"

CONSIDERING that Rule 66(A)(i) provides for a disclosure of copies of the supporting material and that on its literal interpretation, the Rule can be satisfied by a disclosure of the specified material in audio format;

CONSIDERING that the objective of Rule 66(A) is to adequately *inform* the Accused of the nature and cause of the charges against them, and that the Accused are so informed as long as the material is provided in a language that they understand; irrespective of whether it is provided in audio or some other format;

CONSIDERING that it is not the case that the whole of the transcripts of the proceedings in the *Krstić* and *Blagojević* cases are required to be disclosed by the Prosecution pursuant to either Article 21(4)(a) of the Statute or Rule 66(A), and that the Trial Chamber does not accept the defence contention that the Prosecution case is based almost entirely on the trial record of the *Krstić* and *Blagojević* cases;

CONSIDERING that while some portions of the transcripts of the *Krstić* and *Blagojević* cases may be within the scope of Rule 68, it has been accepted in the case law of the Tribunal that, by contrast

²¹ Reply to Prosecution's Response to Joint Defence Motion, para. 17.

with Rule 66, Rule 68 does not provide for a disclosure of Rule 68 material in a language which the accused understands,²² so that a disclosure of the English transcripts of those parts of the *Krstić* and *Blagojević* cases which are within the scope of Rule 68 meets the obligations set out in Rule 68;

CONSIDERING FURTHER that the Prosecution proposal to identify in the English transcripts the direct evidence linking various Accused to the crimes charged and to also provide BCS indexes of the English transcripts should enable the Accused to more readily locate the relevant testimonies in the BCS audio recordings and to do so adequately so as to overcome any difficulty caused by the length of the total BCS audio recordings of the *Krstić* and *Blagojević* cases;

CONSIDERING that in the present circumstances the Accused have not shown that the proposed use of the BCS audio recordings would be significantly less efficient than the use of a transcription nor that it would infringe upon their right to a fair trial by affecting their ability to defend themselves effectively through counsel;

PURSUANT TO Article 21 of the Statute, Rule 66 and 68 of the Rules;

HEREBY GRANTS leave to Reply and **DENIES** the Joint Defence Motion.

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

Dated this sixth day of March 2006

At The Hague

The Netherlands



Judge Carmel Agius (Presiding)

[Seal of the Tribunal]

²² See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para. 8; *Prosecutor v. Mladen Naletilić et al.*, Case No. IT-98-34-T, Decision on Defence's Motion Concerning Translation of All Documents, 18 October 2000; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Oral Ruling, 30 July 2004, T. 4994-4998.