



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-05-88-T
Date: 10 January 2007
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: 10 January 2007

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

**DECISION ON PROSECUTION'S THIRD MOTION FOR
LEAVE TO AMEND RULE 65 TER EXHIBIT LIST**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Zoran Živanović and Ms. Julie Condon 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. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović 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 “Prosecution’s Third Motion for Leave to Amend the Exhibit List”, filed confidentially on 15 December 2006 (“Motion”) by the Office of the Prosecutor (“Prosecution”), pursuant to Rule 73 and Rule 73 *bis* of the Rules of Procedure and Evidence (“Rules”);

NOTING the “Réponse du Général Miletić à la Troisième Requête du Procureur aux Fins d’Obtenir l’Autorisation de Modifier la Liste des Pièces à Conviction” filed confidentially on 27 December 2006 (“Response”), in which Radivoje Miletić partly opposes the Motion;

NOTING that the Prosecution seeks leave to add ten transcripts (“Intercepts”) of nine separate intercepted conversations to the Exhibit List filed pursuant to Rule 65 *ter* (“65 *ter* Exhibit List”);¹

NOTING that the Prosecution submits that the omission of the Intercepts was the result of an unfortunate error;²

NOTING that the Prosecution further submits that “[the Intercepts] are probative, relevant and material to the presentation of the Prosecution’s case in chief [...] their admission at this stage will not prejudice the rights of the Defence in terms either of notice or the ability to mount an effective cross examination or challenge to the evidence [...] [their] admission [...] will better enable the Trial Chamber as the finder of facts, to determine the substantive issues raised by the Indictment”;³

NOTING that Miletić objects to the addition of Intercepts 1, 4, 8 and 10 to the 65 *ter* Exhibit List, but not to the addition of Intercepts 2, 3, 5, 6, 7 and 9;⁴

NOTING that Miletić submits that the conversation recorded in Intercept 1 is alleged to have occurred on 19 January 1995, which is before the period which is the subject of the charges in the Indictment, that the conversation recorded in Intercept 10, in which Miletić is the only accused referred to, is alleged to have occurred on 28 October 1995 after the period which is the subject of the charges against him in the Indictment,⁵ and that neither of the two conversations is connected with the events which are part of the charges contained in the Indictment;⁶

¹ Motion, para. 1.

² Motion, para. 2.

³ Motion, para. 7.

⁴ Response, para. 3.

⁵ Response, para. 5.

⁶ Response, para. 6.

NOTING that Miletić concludes that Intercepts 1 and 10 are not probative, relevant or material to the presentation of the Prosecution's case;⁷

NOTING that Miletić submits that the conversations recorded in Intercepts 4 and 8 were allegedly intercepted by Witness PW-137 who gave his testimony on 12 December 2006, that if these Intercepts were to be added now to the 65 *ter* Exhibit List the Defence would be deprived of the ability to cross-examine the only witness able to authenticate the documents concerned, and that the authorisation of the addition of these Intercepts to the 65 *ter* Exhibit List at this stage would cause irreparable prejudice to the rights of the Defence and would therefore not be in the interests of justice;⁸

CONSIDERING that the Trial Chamber has held that "in striking a balance between [the Prosecution's duty to present the available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay], at this stage of the proceedings, the Trial Chamber should primarily consider whether the rights of the Accused will be adequately protected if exhibits [...] will be added to the Prosecution Exhibit List"⁹ and that "the Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the witness list and/or exhibit list was shown, taking into consideration the complexity of the case, on-going investigations, and translation of documents and other materials";¹⁰

NOTING that the Trial Chamber has stated that it will not decide on the admissibility of intercepts until all evidence relating to them has been tendered and after the parties have been invited to make written submissions on their admissibility;¹¹

FINDING that Intercepts 1 and 10 are *prima facie* relevant and of probative value to issues raised in the Indictment, because they purport to refer to one or more of the Accused in a context related to facts alleged in the Indictment;

FINDING that the Defence would be prejudiced by the addition at this stage to the 65 *ter* Exhibit List of Intercepts 4 and 8 if it will not have an opportunity to cross-examine the person who produced them;

⁷ Response, para. 6.

⁸ Response, para. 12.

⁹ Decision on Prosecution's Motion for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006, p. 6.

¹⁰ *Ibid.*, p. 7.

¹¹ T. 5549, 5550 (14 December 2006).

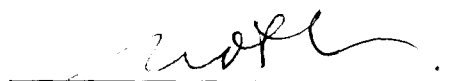
PURSUANT TO Rules 54 and 73 *bis* of the Rules,

FOR THE FOREGOING REASONS

HEREBY GRANTS the Motion and **ORDERS** that:

- a) The Prosecution be granted leave to add Intercepts 1, 2, 3, 5, 6, 7, 9 and 10 to its *65 ter* Exhibit List; and
- b) The Prosecution be granted leave to add Intercepts 4 and 8 to its *65 ter* Exhibit List, provided that, upon a request made by the Defence within seven days of the present Decision, the Prosecution shall make Witness PW-137 available for further cross-examination in regard to these two Intercepts only.

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



Carmel Agius
Presiding Judge

Dated this 10th day of January 2007,

At The Hague

The Netherlands

[Seal of the Tribunal]