



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: 16 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: 16 January 2007

PROSECUTOR

v.

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

**DECISION PERMITTING THE ADDITION OF ONE EXHIBIT
TO THE PROSECUTION'S RULE 65 *ter* LIST AND DENYING
AN ORAL REQUEST FOR CERTIFICATION PURSUANT TO
RULE 73(B)**

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”):

A. Background

BEING SEISED OF the “*Confidential* Prosecution’s Submission pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 9 January 2007 (“Submission”) by the Office of the Prosecutor (“Prosecution”) pursuant to the “Decision on *Confidential* Prosecution’s Motion for Leave to Convert Two 92 *bis* Witnesses to Rule 92 *ter*”, filed on 13 December 2006 (“Decision of 13 December 2006”), in which the Prosecution purports to comply with the Decision of 13 December 2006 by demonstrating good cause for the addition of a single intercept exhibit to its Rule 65 *ter* Exhibit List;

BEING FURTHER SEISED OF the “Popović Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Response to the Prosecution’s Submission” (“Popović Extension Request”), filed on 11 January 2007, in which the Popović Defence seeks a period of 14 days in which to respond to the Submission;

BEING FURTHER SEISED OF an oral request by the Nikolić Defence on 12 January 2007 (“Nikolić Certification Request”) to certify for appeal the Trial Chamber’s oral decision of 12 January 2007, in which the Trial Chamber granted the Prosecution’s request to add a single intercept exhibit to its Rule 65 *ter* Exhibit List, pursuant to Rule 73(B);

B. The Popović Extension Request

NOTING that the Popović Defence seeks 14 days from the 9 January 2007 filing of the Submission to respond, arguing that it has not had adequate time to respond to the arguments made in the Submission;

CONSIDERING that intercept 1 at Annex A (“the intercept”) of the “*Confidential* Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses” (“Prosecution’s Conversion Motion”) was disclosed to the Defence on 21 November 2006, and that the Popović Defence has had sufficient time to familiarise itself with the contents of the intercept;

CONSIDERING that, as outlined in Section C below, the objections to the addition of the intercept to the Prosecution’s Rule 65 *ter* Exhibit List have been sufficiently developed in the Popović Extension Request;

CONSIDERING that further submissions would not aid the Trial Chamber in its consideration of the Prosecution's request to add the intercept to its Rule 65 *ter* Exhibit List and, therefore, any extension of time to respond to the Submission is unwarranted;

NOTING that on 12 January 2007, the Trial Chamber rendered an oral decision denying the Popović Extension Request;¹

C. The Prosecution's Submission Request

RECALLING the "Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", filed on 12 September 2006 ("12 September 2006 Rule 92 *bis* Decision"), in which the prior transcript of Witness No. 77 was admitted pursuant to Rule 92 *bis*(D) without requiring the witness to appear for cross-examination² and the written statement of Witness No. 81 was provisionally admitted in part pursuant to Rule 92 *bis*(B) without requiring the witness to appear for cross-examination;³

RECALLING the Prosecution's Conversion Motion, filed on 21 November 2006, in which the Prosecution proposed, *inter alia*, to introduce the evidence of Witness Nos. 77 and 81 pursuant to Rule 92 *ter* rather than pursuant to Rule 92 *bis*;

RECALLING the "Defence Response on Behalf of Drago Nikolić to Prosecution's Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses", filed on 28 November 2006, in which the Nikolić Defence did not object to the appearance of Witness Nos. 77 and 81 pursuant to Rule 92 *ter*, but did object to adding the intercept to the Prosecution's Rule 65 *ter* Exhibit List;

RECALLING that the Nikolić Defence opposed the introduction of the intercept because 1) it was not listed on the Prosecution's Rule 65 *ter* Exhibit List, 2) it was not included in the Prosecution's motions for leave to amend the Rule 65 *ter* Exhibit List, filed on 18 August 2006, 13 September 2006, or 3 November 2006, 3) "conversion of the status of a witness should not be the 'shortcut' for the introduction of new material", and 4) the Accused would be prejudiced because he had not had sufficient notice to adequately prepare a defence;⁴

RECALLING the "Notice on Behalf of Vujadin Popović Joining 'Defence Response on Behalf of Drago Nikolić to Prosecution's Motion for Leave to Convert Two 92 *bis* Witnesses to 92 *ter*

¹ T. 5836 (12 January 2007).

² 12 September 2006 Rule 92 *bis* Decision, Disposition, para. 1.

³ 12 September 2006 Rule 92 *bis* Decision, Disposition, para. 6.

⁴ Nikolić Response, para. 3.

Witnesses””, filed on 29 November 2006, in which the Popović Defence joined the Nikolić Response “in its entirety”,⁵ and the “Bera Defence Notification on Joining the Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion for Leave to Convert Two 92 *bis* Intercept Operator Witnesses to 92 *ter* Witnesses”, filed on 30 November 2006, in which the Bera Defence joined the Nikolić Response;

RECALLING the Decision of 13 December 2006, in which the Trial Chamber ordered the Prosecution to promptly identify for the Trial Chamber and the Defence the specific written evidence of Witness Nos. 77 and 81 which the Prosecution proposed for admission pursuant to Rule 92 *ter*, and further ordered that the Prosecution would only be permitted to offer the intercept if the Prosecution demonstrated good cause for its addition to the Rule 65 *ter* Exhibit List;⁶

NOTING that the Prosecution advised the Defence and the Trial Chamber by email on 1 January 2007 of its intention to offer the trial testimony of Witness No. 77 on 6 November 2003 in *Prosecutor v. Blagojević and Jokić* (Case No. IT-02-60-T) pursuant to Rule 92 *ter* and that the Prosecution proposed to admit in unredacted form Witness No. 81’s statement which was conditionally admitted in part in the 12 September 2006 Rule 92 *bis* Decision;⁷

NOTING that the Prosecution submits that the intercept was not included in the 65 *ter* Exhibit List because the Prosecution had primarily focused on the period from June to October 1995 and had not intensively analysed the thousands of intercepts from before or after this period,⁸ but that the Trial Chamber’s 12 September 2006 Rule 92 *bis* Decision “spurred the Prosecution to broaden the scope of its analysis”,⁹ and that it was “shortly after the Trial Chamber’s Rule 92 *bis* decision that this intercept was discovered and translated”,¹⁰

NOTING that the Prosecution further submits that the intercept is relevant to the authenticity of all the intercepts offered in this trial,¹¹ and that while the intercept “does not involve events associated with the Srebrenica enclave, it does provide probative insight into the relationship between Accused Popović and Nikolić four months prior to those events, and exposes a pronounced ethnic bias on the part of both Accused”,¹²

⁵ Popović Notice, p. 2.

⁶ Decision of 13 December 2006, pp. 3–4.

⁷ Submission, para. 3.

⁸ Submission, para. 5.

⁹ Submission, para. 5.

¹⁰ Submission, para. 5.

¹¹ Submission, para. 6-7.

¹² Submission, para. 5.

NOTING that the Popović Extension Request submits that the Prosecution has not shown good cause for the addition of the intercept to the Rule 65 *ter* Exhibit List because the intercept “is not related to the events from the Indictment and [...] is out of its time-frame”;¹³

NOTING the oral submissions of the Popović Defence on 12 January 2007, in which the Popović Defence further argues that the Prosecution’s assertion in the Submission that the intercept demonstrates ethnic intolerance by the Accused Popović is factually incorrect, and further asserts that, contrary to the Prosecution’s assertion in its Submission, the intercept cannot be used to prove the veracity or authenticity of other intercepted communications from different locations and different time periods;¹⁴

NOTING the oral submissions of the Nikolić Defence on 12 January 2007, in which the Nikolić Defence argues that the Prosecution has not shown good cause for the addition of the intercept to its Rule 65 *ter* Exhibit List because the Prosecution has been in possession of the intercept since at least 13 December 2000 and has not exercised due diligence in preparing its case, and further argues that the intercept possesses no relevance or probative value to this trial as it is not directly related to the events at Srebrenica;¹⁵

NOTING the oral submission of the Beara Defence on 12 January 2007, in which the Beara Defence joined the submissions of the Popović Defence and the Nikolić Defence;¹⁶

CONSIDERING that the Prosecution has identified for the Trial Chamber and the Defence the specific written evidence of Witness Nos. 77 and 81 which it proposes for admission pursuant to Rule 92 *ter*;¹⁷

CONSIDERING all the submissions of the parties, and that for the reasons outlined in paragraph 5 of the Submission concerning the alleged relationship between the Accused Popović and Nikolić, the Prosecution has demonstrated that the intercept is *prima facie* relevant and probative, and that for the reasons outlined in paragraph 5 of the Submission for the Prosecution’s earlier failure to include the intercept, the Prosecution has shown good cause for the addition of the intercept to its Rule 65 *ter* Exhibit List at this time;

¹³ Popović Extension Request, para. 9.

¹⁴ T. 5837–5838, 5843–5844 (12 January 2007).

¹⁵ T. 5838–5843 (12 January 2007).

¹⁶ T. 5844 (12 January 2007).

¹⁷ Submission, para. 3.

NOTING that the Trial Chamber rendered oral decisions on 11 and 12 January 2007, respectively, to admit pursuant to Rule 92 *ter* the written evidence of Witness Nos. 81 and 77, as identified by the Prosecution in the Submission;¹⁸

NOTING that on 12 January 2007, the Trial Chamber rendered an oral decision granting the Prosecution's request to add the intercept to its Rule 65 *ter* Exhibit List;¹⁹

D. The Nikolić Certification Request

NOTING that the Nikolić Defence orally requests the Trial Chamber to certify for appeal, pursuant to Rule 73(B), the decision granting the Prosecution's request to add the intercept to its Rule 65 *ter* Exhibit List;²¹

NOTING that the Nikolić Certification Request is joined by the Popović Defence and the Beara Defence,²² and is supported by the Miletić Defence²³ and the Borovčanin Defence;²⁴

NOTING that, pursuant to Rule 73(B), “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

NOTING that Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that even where both requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber,²⁵ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;²⁶

NOTING that the Nikolić Defence argues that the first criterion of Rule 73(B) is met because the Trial Chamber has established a “very low threshold” for demonstrating good cause for the addition

¹⁸ T. 5751 (11 January 2007) and T. 5850–5851 (12 January 2007).

¹⁹ T. 5852 (12 January 2007).

²¹ T. 5854 (12 January 2007).

²² T. 5856 (12 January 2007).

²³ T. 5862 (12 January 2007).

²⁴ T. 5863 (12 January 2007).

²⁵ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

²⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005, para. 4.

of evidence to the Prosecution's Rule 65 *ter* Exhibit List, and that this negatively impacts the fairness of the trial to the Accused and will lengthen the proceedings;²⁷

NOTING that the Nikolić Defence argues that in the absence of a decision by the Appeals Chamber the Defence will continue to object whenever the Prosecution proposes to introduce additional witnesses or exhibits,²⁸ but that, should the Appeals Chamber uphold the standard applied by the Trial Chamber, the Defence "will stop objecting on this principle";²⁹

NOTING that the Prosecution opposes the request for certification, arguing that the criteria of Rule 73(B) are not satisfied, and that the "good cause standard" articulated by the Trial Chamber is appropriate;³⁰

CONSIDERING the submissions of the parties, and the nature of the evidence at issue, and that on a case by case basis good cause for the addition of evidence to a Rule 65 *ter* Exhibit List may be shown where a party demonstrates a reasoned basis for having conducted further investigation prompted by decisions of the Trial Chamber, which results in the discovery that evidence already in the possession of the party is *prima facie* relevant and probative;

CONSIDERING that the Defence has not demonstrated that the addition of the intercept to the Prosecution's Rule 65 *ter* Exhibit List "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings";³¹

CONSIDERING therefore that the cumulative requirements of Rule 73(B) have not been satisfied;

E. Disposition

FOR THE FOREGOING REASONS

PURSUANT TO Rules 54, 73(B), 73 *bis*, 92 *ter* and 127(A),

HEREBY ORDERS that:

- a) The Popović Extension Request is denied;

²⁷ T. 5868 (12 January 2007).

²⁸ T. 5859 (12 January 2007).

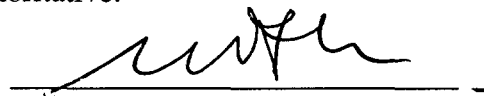
²⁹ T. 5860 (12 January 2007).

³⁰ T. 5863–5864 (12 January 2007).

³¹ Rule 73(B).

- b) Without prejudice to the Defence being permitted to challenge the ultimate admissibility of any intercepted communications recorded by Witness Nos. 77 or 81, the written evidence of Witness Nos. 77 and 81, as identified by the Prosecution in the Submission, shall be admitted pursuant to Rule 92 *ter* under the conditions set forth in Rule 92 *ter*(A);
- c) The intercept may be added to the Prosecution's Rule 65 *ter* Exhibit List; and
- d) The Nikolić Certification Request is denied.

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



Carmel Agius
Presiding Judge

Dated this 16th day of January 2007,
At The Hague
The Netherlands

[Seal of the Tribunal]