



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: 17 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: 17 January 2007

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

**DECISION ON REQUEST FOR CERTIFICATION TO APPEAL
DECISION TO GRANT LEAVE TO AMEND PROSECUTION'S
RULE 65 *TER* WITNESS AND EXHIBIT LISTS**

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 “Defence Motion on Behalf of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević for Certification of Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit list”, filed on 13 December 2006 (“First Motion”), pursuant to Articles 20, 21 and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 65 *ter*, 66, 73, 73 *bis* and 75 of the Rules of Procedure and Evidence (“Rules”);

NOTING that Defence counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević seek certification from the Trial Chamber for interlocutory appeal of its “Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List”, rendered on 6 December 2006 (“Impugned Decision”);¹

RECALLING that in the Impugned Decision the Trial Chamber (i) granted the Office of the Prosecutor (“Prosecution”) leave to add three witnesses—Danko Gojković, PW-108 and PW-109—to its Rule 65 *ter* Witness List; (ii) ordered the Prosecution either to immediately disclose the identity of PW-108 to the Defence and not to call PW-108 to give evidence in this case prior to 15 January 2006, or to submit a motion for protective measures for PW-108 no later than 12 December 2006;² and (iii) granted the Prosecution leave to add 276 exhibits to the its Rule 65 *ter* Exhibit List;

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

¹ First Motion, para. 1.

² On 12 December 2006, the Prosecution complied with the Impugned Decision, filing the “Confidential Prosecution’s Motion for Order of Protection and Confidential Annex A and *Ex Parte* Annex B”.

certification remains in the discretion of the Trial Chamber,³ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;⁴

NOTING that Defence counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević submit that the first criterion of Rule 73(B) is met *inter alia* because: (i) the additional three witnesses and the additional 276 exhibits “—even though many of them relate to the Accused Miletić—will have an impact on the case for the defence of all Co-Accused in this case—which rests on the alleged existence of a joint criminal enterprise—and ultimately affect the outcome of the trial”; (ii) the testimony of the additional three witnesses and the use of the additional 276 exhibits will lengthen the proceedings; (iii) the erroneous reading and application of the law and jurisprudence of this Tribunal by the Trial Chamber “will necessarily lead to the issues in this case being litigated on the basis of documents which should not have been admitted”;⁵

NOTING that Defence counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević submit that the second criterion of Rule 73(B) is met *inter alia* because of the need for a pronouncement by the Appeals Chamber on the legal standard applied by the Trial Chamber for the addition of evidence to the Prosecution’s Rule 65 *ter* Lists, especially in light of the Prosecution’s practice and forthcoming motions with respect to exhibits;⁶

NOTING the “Prosecution’s Response to ‘Defence Motion on Behalf of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević for Certification of Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List”, filed confidentially on 27 December 2006 (“First Response”), in which the Prosecution opposes the request for certification, arguing that the criteria of Rule 73(B) are not satisfied;⁷

CONSIDERING that pursuant to Articles 20(1) and 21(4) of the Statute an accused is entitled to a fair and expeditious trial, including adequate time and facilities for the preparation of his defence;

CONSIDERING that allowing the addition of exhibits to the Prosecution’s Rule 65 *ter* Exhibit List is distinct from admitting these exhibits into evidence, and that during the proceedings the Defence

³ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

⁴ *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.

⁵ First Motion, paras. 31-33. For the main potential grounds of appeal indicated by Defence counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević see First Motion, paras. 12-29.

⁶ First Motion, paras. 34-38.

⁷ First Response, paras. 1-4.

counsel of the accused are entitled to challenge the authenticity and admissibility of any of the Prosecution's exhibits, as well as the credibility of any of the Prosecution's witnesses;⁸

CONSIDERING that the Trial Chamber retains the obligation to assess the weight of each testimony presented at trial and each exhibit admitted into evidence taking into consideration the evidence in the case in its entirety;

FINDING that the addition of the three witnesses and 276 exhibits to the Prosecution's Rule 65 *ter* Witness and Exhibit Lists, respectively, does not involve "an issue that would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial" (emphasis added);⁹

FINDING FURTHER that, in any event, the addition of the three witnesses and 276 exhibits to the Prosecution's Rule 65 *ter* Witness and Exhibit Lists, respectively, does not involve "an issue [...] for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may *materially* advance the proceedings" (emphasis added);¹⁰

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

BEING ALSO SEISED OF the "Defence Motion on Behalf of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević to Strike Prosecution's Response to Defence Motion for Certification of Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List", filed on 4 January 2007 ("Second Motion"), pursuant to Articles 20, 21 and 22 of the Statute and Rules 54, 65 *ter*, 66, 73, 73 *bis* and 75;

NOTING that Defence counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević request the Trial Chamber to strike the First Response and not to consider it because it was filed out of time, that is more than seven days after the First Motion, and it is without merit and of no assistance to the Trial Chamber;¹¹

NOTING the "Prosecution's Response to 'Defence Motion on Behalf of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević to Strike Prosecution's Response to Defence Motion for Certification of Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List'", filed confidentially on 5 January

⁸ Rule 85 provides that "[e]ach party is entitled to call witnesses and present evidence. [...] [e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case."

⁹ Rule 73(B).

¹⁰ Rule 73(B).

¹¹ Second Motion, paras. 1-6.

2007 (“Second Response”), in which the Prosecution submits that its First Response was properly filed within 14 days of the filing of the First Motion;¹²

CONSIDERING that the time frame for filing a response to a motion is governed by Rule 126 *bis*, which provides that “[u]nless otherwise ordered by a Chamber [...] a response, if any, to a motion filed by a party shall be filed within fourteen days of the filing of the motion”;¹³

FINDING that the Prosecution filed the First Response in accordance with Rule 126 *bis*;

FOR THE FOREGOING REASONS

HEREBY DENIES the First and Second Motions.

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



Carmel Agius
Presiding Judge

Dated this seventeenth day of January 2007,

At The Hague

The Netherlands

[Seal of the Tribunal]

¹² Second Response, paras. 1-5.

¹³ The Trial Chamber notes that the time frame provided by Rule 126 *bis* for filing a response to a motion is longer than the time frame provided by Rule 73(C) for filing a request for certification. While Rule 73(C) provides that “[r]equests for certification shall be filed within seven days of the filing of the impugned decision”, Rule 126 *bis* provides that a response to a motion shall be filed within fourteen days of the filing of the motion. Furthermore, the Trial Chamber notes that the two Practice Directions mentioned in the Second Motion— Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155/Rev.3) of 16 September 2005 and Practice Direction on the Length of Briefs and Motions (IT/184/Rev.2) of 16 September 2005— are not relevant to the current proceedings.