



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-T

Date: 30 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 of: 30 January 2007

PROSECUTOR

v.

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

**DECISION ON NIKOLIĆ'S MOTION FOR DISCLOSURE
PURSUANT TO RULES 65 *TER* AND 66**

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 “Motion On Behalf of Drago Nikolić Seeking an Order From the Trial Chamber Regarding Disclosure”, filed on 12 October 2006 with Annex A and confidential Annex B (“Motion”),¹ in which Drago Nikolić requests the Trial Chamber to order the Prosecution to provide, no later than ten days following the Chamber’s decision, a “complete list of material for each witness” the Prosecution intends to call at trial, as required by Rules 65 *ter* and 66(A)(ii) of the Rules of Procedure and Evidence (“Rules”); to disclose the EDS references for any material on this list which has not yet been disclosed or to confirm in writing that it has fulfilled its disclosure obligations for each witness;² and requests the Trial Chamber to hold that, in the event the Prosecution identifies material already in its possession which was not yet disclosed and must be disclosed pursuant to Rule 66(A)(ii), justifications be provided as to why such material was not identified earlier; and to hold additionally that the witness to whom such material pertains will not be permitted to testify sooner than 30 days following disclosure of this material;³

NOTING the following submissions of Nikolić:

- a. taken together, Rules 65 *ter*(E)(ii) and 66(A)(ii) oblige the Prosecution to identify the relevant material related to each witness it intends to call, and to disclose such material to the Accused no later than the beginning of trial;⁴
- b. the Prosecution in this case has failed to disclose to Nikolić a comprehensive list of the material it is obliged to disclose under Rule 66(A)(ii);⁵ it has failed to provide a complete set of indexes of such material;⁶ and this failure “significantly impedes” Nikolić’s ability to prepare effectively his cross-examination of these witnesses;⁷
- c. the Prosecution should therefore provide Nikolić with a comprehensive list of all relevant material it has the obligation to disclose for each witness who will testify in this case, and to confirm in writing whether Annex B to the Motion, which lists all material disclosed to Nikolić as of the date of the Motion, does indeed contain all the material for which the Prosecution has a disclosure obligation under Rule 66(A)(ii);⁸ and
- d. for any material in the Prosecution’s possession for which it has a disclosure obligation under Rule 66(A)(ii), the Prosecution should be required to explain why disclosure has not

¹ Motion paras. 2, 9. Nikolić compiled two indexes of material received to date from the Prosecution entitled Annex A and Annex B. Annex B was latter filed confidentially, as it contains the names of protected witnesses.

² *Ibid.*, paras. 1, 19.

³ *Ibid.*, para. 19.

⁴ *Ibid.*, para. 11 (underlining removed).

⁵ *Ibid.*, para. 6.

⁶ *Ibid.*, paras. 12, 14 (arguing that he has “undertaken a comprehensive review of all disclosure indexes received to this day”, which it has attached to the Motion as Annex B” and “[i]t is very likely that Annex B is incomplete”).

⁷ *Ibid.*, para. 7. *See also ibid.* (arguing that he has repeatedly brought this fact to the attention of both the Trial Chamber and the Prosecution); *ibid.*, para. 8 (arguing that he has not yet “been served with a comprehensive index of material disclosed in this case”).

⁸ *Ibid.*, paras. 15–16.

been made, and the witness to whom such material pertains should not be allowed to testify until 30 days after the material is disclosed;⁹

NOTING the “Prosecution’s Response to Motion on Behalf of Drago Nikolić Seeking an Order from the Trial Chamber Regarding Disclosure”, filed on 26 October 2006 (“Response”), in which the Prosecution opposes the relief sought in the Motion, and requests that the Trial Chamber dismiss the Motion on the following grounds:

- a. there is no precedent or support in the jurisprudence for Nikolić’s assertion that Rules 65 *ter*(E)(ii) and 66(A)(ii) require the Prosecution to make a “single, binding and final round of disclosure of witness lists and statements” during the pre-trial stage of proceedings;¹⁰
- b. as the Prosecution makes final preparations for a given witness to testify, it often identifies additional material falling within the purview of Rules 65 *ter*(E)(ii) and 66(A)(ii), and for this reason it is neither practicable nor possible to provide the Accused with a “wholesale confirmation” of all such material for every witness;¹¹
- c. where the Prosecution has discovered new material falling under Rules 65 *ter*(E)(ii) and 66(A)(ii) in such circumstances, it has always disclosed such material to the Accused immediately,¹² and it has habitually provided the Accused with each witness’s prior statements, interviews, testimony, and Rule 92 *bis* summaries well in advance of the witness’s testimony;¹³
- d. “[i]f the Prosecution were to disclose non-selectively all the material it might potentially rely on during the trial, [Nikolić] would be in no better position effectively to prepare [his] case”;¹⁴ and
- e. while “[t]here will be mistakes and oversights” and “[t]he process of disclosure has not been, not can it be, perfect”,¹⁵ the Prosecution recognises that it is not thereby relieved of its obligation to strive to meet the goal of complete disclosure, and stresses that it has provided Nikolić with “substantially all of the material described under Rules 65 *ter*(E)(ii) and 66(A)(ii) at the pre-trial stage and has disclosed additional material without prejudicing the Accused”,¹⁶

NOTING Rule 65 *ter*(E)(ii), which provides in part that the Prosecutor shall file, not less than six weeks before the pre-trial conference required by Rule 73 *bis*,

the list of witnesses the Prosecutor intends to call with [...] the name or pseudonym of each witness, a summary of the facts on which each witness will testify, an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule *quater*, and the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor’s case[;]

⁹ *Ibid.*, para. 18.

¹⁰ Response, para. 3.

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*, para. 7.

¹³ *Ibid.*, para. 8.

¹⁴ *Ibid.*, para. 11 (underlining removed).

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, paras. 13–14.

NOTING Rule 66(A)(ii), which requires the Prosecutor make available to the accused, within a time limit prescribed by the Trial Chamber, copies of the statements of a given witness the Prosecutor intends to call to testify at trial when a decision is made to call that witness;

NOTING that, pursuant to Articles 20 and 21 of the Statute, the Trial Chamber must ensure the proper administration of justice and the fair and expeditious conduct of the trial, which include the right of Nikolić and his co-Accused (collectively, "Accused") to have sufficient time prior to the testimony of a given Prosecution witness to be able to adequately prepare for cross-examination of that witness;

NOTING that, pursuant to the Trial Chamber's order of 14 July 2006, at set times on a monthly and weekly basis the Prosecution must provide the Chamber and the Accused with a list of all witnesses it expects to call in the following calendar month and in the following week, respectively; and that these lists shall include the exhibits the Prosecution intends to use with each proposed witness;¹⁷

NOTING that, in the present case, the Prosecution has adequately disclosed Rule 65 *ter*(E)(ii) and 66(A)(ii) material to Nikolić and his co-Accused, both by including material on the Electronic Disclosure System and by providing CDs containing such material;

CONSIDERING that it is not always possible for the Prosecution to have complete information on every single witness prior to trial, and that, in the preparation for a witness's testimony, the Prosecution may find additional material that has not been previously disclosed to the Accused;

CONSIDERING, therefore, that in the event that the Prosecution has been unable to disclose all relevant material relating to a particular witness pursuant to the pertinent Rules, the Prosecution is required to disclose such material immediately, and the Accused shall be given a sufficient period of time prior to that witness's testimony to be able to adequately prepare their respective cross-examinations;

NOTING that the Prosecution regularly provides the Accused, in advance of the witness's testimony, with a list of references to material already disclosed in relation to each witness, including the witness's prior statements or Rule 92 *bis* summaries, as well as relevant exhibits;

¹⁷ See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-T, Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings, 14 July 2006, para. 3:

By the fifteenth day of each month during trial, to the greatest extent possible, the Prosecution shall provide the Trial Chamber and the Defence teams with a list of all witnesses it expects to call in the following calendar month. This list shall include the exhibits the Prosecution intends to use with each proposed witness By 5:00 p.m. on Thursday of each week during trial, to the greatest extent possible, the Prosecution shall provide the Trial Chamber

CONSIDERING that, particularly in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the Prosecution, a certain level of flexibility must be maintained in striking a balance between the right of the accused to prepare adequately for cross-examination, and the practical realities faced by the Prosecution, including the need for full preparation of a witness's testimony;

CONSIDERING that, while it would be not realistic to expect the Prosecution to provide the Accused with a complete list of material for each witness it intends to call at trial at this time, the right of the Accused to adequately prepare their respective cross-examinations of each witness must always be preserved;

CONSIDERING that, with the occasional intervention and guidance of the Trial Chamber, the Prosecution in this case has been adequately complying with its disclosure obligations under the Rules and, to the greatest extent possible, with the Trial Chamber's order of 14 July 2006, without causing prejudice to the rights of the Accused;

CONSIDERING that the Trial Chamber will continue to remain vigilant and will address any specific concern raised by Nikolić or any other Accused, and will take all necessary measures to ensure that the rights of the Accused are fully respected;

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54, 65 *ter*(E)(ii), and 66(A)(ii) of the Rules,

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding

Dated this thirtieth day of January 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

and the Defence teams with a list of all witnesses it expects to call the following week. This list shall include the exhibits the Prosecution intends to use with each proposed witness[.]