



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: 18 August 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Decision of: 18 August 2006

PROSECUTOR

v.

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

**DECISION ON JOINT DEFENCE MOTION SEEKING THE
POSTPONEMENT OF TRIAL PROCEEDINGS**

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 for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 Postponement of Trial Proceedings Until the Prosecution has Met its Obligations Pursuant to Rule 65 *ter* and the Trial Chamber’s Order of 14 July” (“Motion”), filed *confidentially* on 16 August 2006, in which the Defence teams for all seven Accused (“Defence”) request a postponement of the trial proceedings scheduled to commence on 21 August 2006, arguing that the Prosecution has failed to fulfil its disclosure obligations;

NOTING the Prosecution’s “Response to Joint Defence Motion Seeking the Postponement of Trial Proceedings” (“Response”), filed *confidentially* on 17 August 2006, in which the Prosecution asserts that “[t]here is no substance to this eleventh hour Joint Defence Motion”;¹

NOTING the “Joint Defence Motion Seeking Leave to Reply and Reply to Prosecution Response to Joint Defence Motion Seeking the Postponement of Trial Proceedings” (“Reply”), filed on 18 August 2006;

NOTING that the Defence asserts the Prosecution has failed in its disclosure obligations pursuant to Rule 65 *ter*(E)(iii) of the Rules of Procedure and Evidence (“Rules”), which requires that the Prosecution should provide the Defence with the list of exhibits the Prosecution intends to offer and copies of the exhibits so listed;²

NOTING that the Defence asserts that “no copies have been provided for 158 exhibits while 177 English and 114 BCS translations remain missing”;³

NOTING that the Defence asserts it has actively communicated with the Prosecution regarding the missing exhibits, that it appreciates the efforts of the Prosecution in its attempts to provide the exhibits, and that the Prosecution has done much work in this regard, nevertheless, the above listed exhibits and translations have not been provided;⁴

¹ Response, para. 2.

² Rule 65 *ter*(E)(iii).

³ Motion, para. 10.

⁴ Motion, paras. 11–13.

NOTING that the Defence asserts this failure by the Prosecution to discharge its disclosure obligations “has made it impossible for the Defence to prepare and be ready for trial for the beginning of trial proceedings scheduled for 21 August 2006”;⁵

NOTING that the Defence asserts that it must have the benefit of disclosure of all these exhibits before the start of trial proceedings, and that it must have “sufficient time to take stock and understand the substance of the proposed exhibits”;

NOTING that the Defence further asserts that the Prosecution has failed to comply with the terms of the Trial Chamber’s “Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings” (“Order”), issued on 14 July 2006, in that its “Prosecution’s Updated Witness List for August and September 2006” (“Witness Update”), filed on 7 August 2006, does not contain, *inter alia*, a list of proposed exhibits to be used with each witness, and that, therefore, the Defence is not in a position to comply with its own duties under the terms of the Order “to provide the Trial Chamber and the Prosecution with an estimate of the total time expected to be taken by each Defence team cross-examining each witness”,⁶ and that the Defence is also, therefore, unable to prepare adequately for trial;

NOTING that the Prosecution asserts that the Defence has “grossly overstated” the problems with disclosure in this case, including erroneously listing “scores – perhaps hundreds – of items which Defence counsel have possessed for months and which are readily accessible through a variety of means”,⁷ and demanding the translation of “self-explanatory items which simply are not appropriate for translation; e.g., photographs, rosters of names, and other lists bearing only names, dates and numbers”;⁸

NOTING that the Prosecution asserts that the Defence printout of exhibits does not contain two columns from the original 65 *ter* spreadsheet provided by the Prosecution, which includes exhibit numbers from earlier trials, “all of which can then be found on the JDB”, and that the Defence submission therefore gives “a somewhat false impression that exhibits are indeed missing, when they can easily be accessed even if they are not correctly hyperlinked to the 65 *ter* spreadsheet”;⁹

⁵ Motion, para. 13.

⁶ Motion, para. 24.

⁷ Response, para. 2.

⁸ Response, para. 2.

⁹ Response, para. 7.

NOTING that the Response contains an analysis of the thirteen categories of exhibits included in the Motion and purports to demonstrate “that the alleged defects in the 65 *ter* exhibit list are hardly as grave as the Defence insists”,¹⁰ and that the Prosecution asserts the Defence has failed to show any actual prejudice;¹¹

NOTING that the Reply challenges many of the Prosecution’s assertions in the Response, but that the Defence states it has now been provided with the “Prosecution’s Witness/Exhibit List for 21-25 August 2006”, filed on 17 August 2006, and “[c]onsidering the nature of the proposed exhibits which the Prosecution intends to use with these witnesses, the Joint Defence acknowledges that it would be possible to proceed with them as planned”;¹²

CONSIDERING that the parties are clearly in dispute as to whether the Prosecution has fully complied with its disclosure obligations pursuant to Rule 65 *ter*, but that, having thoroughly reviewed the list of exhibits the Defence asserts the Prosecution has failed to provide and the Prosecution’s analysis of that list, the Trial Chamber is not satisfied that the Prosecution’s partial non-fulfilment of its disclosure obligations has denied the Defence the ability to prepare adequately for trial;

CONSIDERING therefore, that it would not be in the interests of justice to delay the commencement of trial proceedings in this case and that it is unnecessary, at this time, to hold a hearing or schedule a Rule 65 *ter* meeting on this issue;

RECALLING the terms of the Order that the Prosecution should include in its monthly update a “list [of] the exhibits the Prosecution intends to use with each proposed witness, and an estimated total time to be taken for examination-in-chief of each witness”;¹³

CONSIDERING that, regardless of whether the Prosecution has or has not fully complied with its disclosure obligations pursuant to Rule 65 *ter*, it should have included in its Witness Update a list of the exhibits it intends to use with each proposed witness;

¹⁰ Response, para. 7.

¹¹ Response, para. 8.

¹² Reply, para. 13.


¹³ Order, para. I(a).

PURSUANT TO Rules 54 and 65 *ter* of the Rules,

HEREBY GRANTS the Motion, **IN PART** and **ORDERS** as follows:

1. The Prosecution shall comply without delay with its obligations pursuant to Rule 65 *ter* (E)(iii) by serving on each Defence team copies of all exhibits it intends to offer at trial which have not yet been provided.
2. The Prosecution shall provide the Trial Chamber and the Defence teams, by the commencement of trial proceedings on 21 August 2006, a revised Witness Update for August and September which shall include a list of all exhibits it intends to use with each witness listed.
3. The Defence shall have seven days from the filing of the revised Witness Update to provide the Trial Chamber and the Prosecution with an estimate of the total time expected to be taken by each Defence team cross-examining each witness.
4. Notwithstanding the terms of the Order, the Defence teams shall have until 5:00 p.m. on 22 August 2006 to provide the Trial Chamber and the Prosecution with an estimate of the total time expected to be taken by each Defence team cross-examining each witness listed in the "Prosecution's Witness/Exhibit List for 21-25 August 2006".
5. In all other respects, the Motion is denied.

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



O-Gon Kwon

Dated this eighteenth day of August 2006
At The Hague
The Netherlands

[Seal of the Tribunal]