



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: 22 June 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:** 22 June 2007

**PROSECUTOR**

v.

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

**PUBLIC**

**DECISION ON JOINT DEFENCE REQUEST FOR CERTIFICATION  
TO APPEAL RULE 65 TER ORAL DECISION**

**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 and Mr. Nenad Petrušić 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 “Joint Defence Request for Certification of Trial Chamber Oral Ruling Concerning the Application of Rule 65*ter*”, filed on 15 March 2007 by all seven Accused in this case (respectively, “Joint Certification Request” and “Accused”), in which the Accused seek certification to appeal an oral decision of the Trial Chamber rendered on 9 March 2007 (“Impugned Decision”);

**RECALLING** that in the Impugned Decision, the Trial Chamber admitted into evidence three documents that the Prosecution used in its re-examination of Witness Stephanie Frease,<sup>1</sup> which were not on the Prosecution’s Exhibit List filed pursuant to Rule 65 *ter* (“65 *ter* Exhibit List”) or on the list of proposed exhibits provided by the Prosecution to the Trial Chamber and the Accused prior to the beginning of the examination-in-chief of each of its witnesses (“Proposed Exhibit List”);<sup>2</sup>

**RECALLING** the Impugned Decision, in which the Trial Chamber stated:

[t]he original [Rule 65 *ter* Exhibit] list is filed at the pre-trial stage, and as such, it relates directly to the Prosecution’s intention at that time. Obviously the Prosecution, in preparing this list, cannot be expected to anticipate the content and direction of every cross-examination so as to be in a position to also include any document that might possibly be needed for re-direct. Material identified for use in re-direct need not be included in the 65 *ter* list, or be given a 65 *ter* number before it is made use of. Needless to say, this procedure would equally be applicable to the Defence at the appropriate time. Similarly, the Defence contends that the Prosecution has to identify such documents as part of the list of exhibits intended to be used with the witness, which list is tendered prior to examination-in-chief. Again, the Prosecution cannot be expected to list any document that it thinks might possibly be needed for re-direct.<sup>3</sup>

**NOTING** that the Accused submit that the Trial Chamber erred as a matter of law in its application of Rule 65 *ter* because the Trial Chamber’s pragmatic and purposeful approach to Rule 65 *ter* is contrary to both the Statute of the Tribunal (“Statute”) and the Rules of Procedure and Evidence of

<sup>1</sup> The three documents are: Ex. P02438 (Intercepted Communication); Ex. P02467 (Order by the Drina Corps Command); and Ex. P02469 (List of Deceased Soldiers of the Zvornik Brigade). See T. 8264–8288 (6 March 2007).

<sup>2</sup> Pursuant to the Trial Chamber’s order on 14 July 2006, at set times on a monthly and weekly basis the Prosecution must provide the Trial Chamber and the Accused with a list of all witnesses it expects to call. The list must include the exhibits the Prosecution intends to use with each proposed witness. See Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings, 14 July 2006 (“Order Concerning Guidelines”), p. 2.

<sup>3</sup> T. 8531 (9 March 2007). The Trial Chamber further explicated that “we do attach importance to Rule 65 *ter* [...] but we also take a purposeful and pragmatic approach to it. While generally the Prosecution should be applying to amend its list when it intends to use new documents with a particular witness, as circumstances will vary from case to case, this is not an absolute requirement”, and that listing any document that might be used for re-examination by the Prosecution in the Proposed Exhibit List “would actually serve to confuse, rather than clarify matters, as the

the Tribunal (“Rules”), as well as the practice adopted by other Trial Chambers,<sup>4</sup> and its ruling ignores one of the features of trials before the Tribunal, namely, “the quantity of potentially relevant material in the possession of the Prosecution for any given trial [...] and the need to circumscribe the proceedings”;<sup>5</sup>

**NOTING** that the Accused argue that both criteria set out in Rule 73(B) are met in this case on the following grounds:

- (1) to allow the Prosecution to use a document not included in its Rule 65 *ter* Exhibit List without making the proper application in advance significantly affects the fair and expeditious conduct of the proceedings in this case;<sup>6</sup> moreover the Trial Chamber’s endorsement of this practice impacts on the testimony of witnesses as well as the preparation of the case for the Defence as a whole;<sup>7</sup> and
- (2) the intervention of the Appeals Chamber is necessary at this time to materially advance the proceedings and to shed light on the real meaning and proper application of Rule 65 *ter*;<sup>8</sup>

**NOTING** the “Prosecution’s Response to ‘Joint Defence Request for Certification of the Trial Chamber Oral Ruling Concerning the Application of Rule 65 *ter*’”, filed on 21 March 2007 (“Response”), in which the Prosecution argues that the submissions put forth in the Joint Certification Request fail to establish the threshold requirements of Rule 73(B) because:

- (1) the Trial Chamber’s approach is fully consistent with the Statute and the Rules, as well as with “the realities and constraints” of trial proceedings; and the pre-trial disclosure requirements of Rule 65 *ter* cannot reasonably predict every possible scenario at trial, “particularly as a result of cross-examination or other matters over which the Prosecution effectively has little or no control”;<sup>9</sup> and

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[Proposed Exhibit List] for each witness would be cluttered with material which might never, in reality, then be introduced by the Prosecution.” T. 8530, 8532 (9 March 2007).

<sup>4</sup> *Ibid.*, paras. 9–10, The Accused refer to the practice adopted by the Trial Chamber in *Prosecutor v. Hadzihasanović and Kubura*. *Ibid.*, n 4.

<sup>5</sup> *Ibid.*, para. 11.

<sup>6</sup> *Ibid.*, paras. 13–19. The Accused submit that if any document used in re-examination was “already in the possession of the Prosecution: (a) there is no reason which can justify why it was not added on the Prosecution Rule 65*ter* List of Exhibits; or (b) it must be a document which should have been disclosed to the Defence either pursuant to Rule 66 (A)(ii) because it relates to the Prosecution own witnesses or to Rule 68 as an exculpatory document.” *Ibid.*, para. 18.

<sup>7</sup> *Ibid.*, para. 20.

<sup>8</sup> *Ibid.*, paras. 21–24.

<sup>9</sup> Response, paras. 5–6 (quotation at para. 6). The Prosecution further argues that “[t]he Trial Chamber’s Decision thus, properly recognizes that the pre-trial notice considerations toward which Rule 65 *ter* is directed, simply do not obtain in the case where the use of the exhibits at trial is occasioned by no less than the nature and extent of the examinations undertaken by the defence itself.” *Ibid.*, para. 9

- (2) Rule 65 *ter* does not expressly or implicitly require documents to be on the Rule 65 *ter* Exhibit List in order to be used for the re-examination of witnesses;<sup>10</sup> and the three documents admitted were unquestionably relevant and clearly responded to the issues raised on cross-examination;<sup>11</sup>

**NOTING** the “Joint Defence Motion Seeking Leave to Reply, and Reply to Prosecution’s Response to Joint Defence Request for Certification of the Trial Chamber Oral Ruling Concerning the Application of Rule 65 *ter*”, filed on 26 March 2007 (“Reply”), in which the Accused argue that:

- (1) the Response should be disregarded because it addresses solely whether the Impugned Decision is correct in law and fails to address the two criteria set forth in Rule 73 (B) as well as the issues raised by the Accused;<sup>12</sup> and
- (2) the Reply is necessary to highlight the erroneous submissions in the Response and to assist the Trial Chamber in ruling upon the Joint Certification Request;<sup>13</sup>

**CONSIDERING** that in light of the issue at hand, leave to file the Reply will be granted;

**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, in the opinion of the Trial Chamber, 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; that even where both requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber; and that certification is not concerned with whether the decision was correctly reasoned or not;<sup>14</sup>

<sup>10</sup> *Ibid.*, para. 8. The Prosecution also argues that the Impugned Decision “neither directly implicates nor makes mention of the disclosure requirements of Rule 66 (A) (iii) or Rule 68.” *Ibid.*

<sup>11</sup> *Ibid.*, para. 9.

<sup>12</sup> Reply, paras. 2, 5–13. The Accused contend that while the arguments in the Response “may become relevant if included in the Prosecution Response to the Joint Defence interlocutory appeal if certification granted, at this stage they should not be considered.” *Ibid.*, para. 8.

<sup>13</sup> *Ibid.*, paras. 3, 13.

<sup>14</sup> See Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3.

**NOTING** that, one of the three documents at issue, Ex. P02438 had previously been added to the 65 *ter* Exhibit List by the Trial Chamber's decision of 10 January 2007;<sup>15</sup>

**RECALLING** that in the present case, before conducting its re-examination of Witness Stephanie Frease, the Prosecution furnished the Accused with a list enumerating exhibits to be used during the re-examination including the three documents;<sup>16</sup>

**RECALLING** that the Prosecution used the three documents in its re-examination in order to put questions to Witness Stephanie Frease on matters arising directly from the cross-examination by the Accused;<sup>17</sup>

**RECALLING** that the Trial Chamber granted leave for three of the Accused to re-cross-examine Witness Stephanie Frease solely regarding the three documents;<sup>18</sup>

**CONSIDERING** that the issue whether or not documents which have not been included in the 65 *ter* Exhibit List can be used in re-examination may be an important one;

**CONSIDERING** however that new documents can be added to the 65 *ter* Exhibit List for use in examination-in-chief when good cause has been shown and that the Impugned Decision presupposes that documents to be so used shall be limited to the confines of re-examination, namely, the three documents the subject matter of which was raised by the cross-examination;

**CONSIDERING** therefore that the Trial Chamber is not satisfied that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;

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<sup>15</sup> Decision on Prosecution's Third Motion for Leave to Amend Rule 65 *ter* Exhibit List, 10 January 2007 (Ex. P02438 was identified as Intercept 10). *See also* T. 8278, 8311, 8315–8316 (6 March 2007).

<sup>16</sup> T. 8310 (6 March 2007).

<sup>17</sup> During the re-examination of Witness Stephanie Frease on 6 March 2007, the Prosecution used (1) Ex. P02438 with regard to the questions on extension number 155, about which Beara had inquired in his cross-examination on 2 March 2007, and (2) the two other documents, Ex. P02467 and Ex. P02469, as corroborative of the intercepted conversation between Popović and Nikolić dated 20 April 1995 (Ex. P02352 marked for identification), which Popović had used during his cross-examination on 27 February 2007. *See* T. 7870–7876 (27 February 2007), T. 8092–8093 (2 March 2007), T. 8264–8266, T. 8275–8279 (6 March 2007).

<sup>18</sup> Miletić, Popović, and Nikolić were granted leave to re-cross-examine Witness Stephanie Frease concerning the three documents. *See* T. 8288–8308 (6 March 2007). Beara also asked for re-cross-examination of the witness but the Prosecution opposed his request, arguing that Beara did not set forth any grounds upon which to permit re-cross-examination and that he elicited most of the information which was the subject of the re-examination. The Trial Chamber dismissed the request of Beara, ruling that "giving such authorisation for the reasons that you yourself specified would run against the basic principles [...] in the jurisprudence of this Tribunal and [in relation to] regulating re-cross, we in particular would refer to the response of [the Prosecution] that explains in detail why in some of these instances re-cross shouldn't be granted and we fully agree with those reasons." *See* T. 8290–8293, 8304 (6 March 2007).

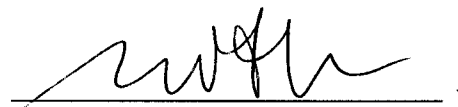
**CONSIDERING** further that, given the advanced stage of the proceedings in this case and the time necessary for a decision to be made by the Appeals Chamber, the Trial Chamber is not satisfied that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings;

**PURSUANT TO** Rules 54, 73(B), 89, and 126 *bis* of the Rules,

**HEREBY** by majority, Judge Prost dissenting, **ORDERS** as follows:

- (i) leave to file the Reply is granted; and
- (ii) the Joint Certification Request is denied.

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



Carmel Agius  
Presiding

Dated this twenty-second day of June 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

**DISSENTING OPINION OF JUDGE KIMBERLY PROST**

1. I depart from the majority as to whether the requirements of Rule 73(B) have been met in this case. With regard to the first requirement, while appreciating the limited reach of the decision in terms of evidence properly adduced on re-examination, I am still of the view that its cumulative effect raises it to the level of a decision that could significantly affect the fair and expeditious conduct of the proceedings. I note in particular its relevance to both the Prosecution and Defence cases and potential application to a number of documents. In addition, it is not only specific exhibits at issue but also the use of that material with witnesses and any consequential effect on such testimony. As to the second component of the requirements, in my view, intervention by the Appeals Chamber would materially advance the proceedings. If it were to overturn the Trial Chamber's decision, an early determination of the matter would eliminate the need for a potentially complex analysis of the evidence in relation to documents admitted and testimony provided as a result. For these reasons, I would have granted certification.

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

A handwritten signature in black ink, appearing to read 'K. Prost', written over a horizontal line.

Judge Kimberly Prost

Dated this twenty-second day of June 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**