



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: 20 July 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: 20 July 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON DEFENCE MOTION REQUESTING RECONSIDERATION
OR CERTIFICATION OF DECISION ADMITTING EXHIBITS WITH
TESTIMONY OF WITNESS 168**

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

I. INTRODUCTION

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 Radivoje Miletić and Milan Gvero Requesting Reconsideration by the Trial Chamber of its Oral Decision on the Admission of Exhibits Tendered Through Witness 168 and in the Alternative Certification to Appeal” (“Motion”), filed on 4 May 2007, in which Miletić and Gvero seek reconsideration of an oral decision rendered 1 May 2007¹ (“Impugned Decision”), or, in the alternative, certification to appeal;

II. PROCEDURAL HISTORY AND PARTIES’ SUBMISSIONS

NOTING the “Prosecution’s Response to ‘Motion on Behalf of Radivoje Miletić and Milan Gvero Requesting Reconsideration by the Trial Chamber of its Oral Decision on the Admission of Exhibits Tendered Through Witness 168 and in the Alternative Certification to Appeal’” (“Prosecution Response”), filed on 18 May 2007, and the “Joint Defence Request for Leave to Reply to Prosecution Response to Defence Motion Seeking Reconsideration by the Trial Chamber of its Oral Decision on the Admission of Exhibits Tendered Through Witness 168 and in the Alternative Certification to Appeal” (“Joint Reply”), filed on 24 May 2007;

RECALLING that in the Impugned Decision, the Trial Chamber admitted into evidence 32 documents that were referenced by Witness 168 in his 16 May 2006 interview with the Prosecution² (“documents”), the transcript of which interview was admitted by the Trial Chamber pursuant to its decision that Witness 168 would be permitted to testify pursuant to Rule 92 *ter*;³

RECALLING that Witness 168 testified pursuant to Rule 92 *ter* following a written Prosecution request⁴ which the Accused did not oppose;⁵

NOTING that the Accused claim the Trial Chamber incorrectly applied the law, which resulted in violations of the Statute having “a direct impact on the fairness of the trial”, namely that:

¹ T. 10736 (1 May 2007).

² *Ibid.*

³ *Ibid.*; Ex. P02776, “Transcript of interview dated 16 May 2006”.

⁴ Submission to Convert Twelve Viva Voce Witnesses to Rule 92 *ter* Witnesses, filed on 28 February 2007. With regard to Witness 168, the Trial Chamber orally granted the Prosecution’s request on 20 March 2007. T. 9022 (20 March 2007).

⁵ T. 9022 (20 March 2007).

- a) 18 of the 32 admitted documents⁶ were never placed on the Prosecution's 65 *ter* Exhibit List, and that the original B/C/S versions of these 18 documents have never been made available to the Accused;⁷
- b) Rule 92 *ter* is not a legitimate basis for the admission of the documents and that, despite conceding that the documents are necessary for a "full understanding of the witness statement", the Accused assert the Trial Chamber could have achieved this understanding by simply marking the documents for identification;⁸
- c) the Accused were misled by the Prosecution into thinking that the Prosecution would not seek to have the documents admitted into evidence in that, although the Prosecution provided an index headed "Prosecution Exhibits for Witness 168", the front page of the index included a note that "the Prosecution intends to use only document [65 *ter* Number 192]";⁹

NOTING that the Prosecution argues the Motion should be denied in its entirety as it "fails to establish a valid reason for reconsideration and also fails to satisfy the requirements for certification pursuant to Rule 73(B)",¹⁰ specifically because:

- a) all the documents were placed on the Electronic Disclosure System ("EDS") as early as 19 September 2005 and, therefore, the Defence "has been on notice of both the existence of the contested exhibits and the fact that the Prosecution intended to make use of them for quite some time";¹¹
- b) all the documents were expressly referred to in Witness 168's interview transcript, to which the Defence has had access since 28 June 2006;¹²
- c) since 20 March 2007, the Defence has been on notice that Witness 168's interview transcript "would be proffered by the Prosecution in connection with the testimony of Witness 168 pursuant to Rule 92 *ter*";¹³

⁶ The Trial Chamber is mindful that the parties appear to have miscounted. Rather, 33 documents were admitted with this witness, for which 19 have never been assigned Rule 65 *ter* Exhibit List numbers (P02778, P02779, P02780, P02781, P02782, P02783, P02784, P02785, P02786, P02787, P02788, P02789, P02790, P02791, P02793, P02795, P02796, P02797, P02800).

⁷ Motion, paras. 11–13.

⁸ *Ibid.*, para. 18.

⁹ *Ibid.*, paras. 20–21.

¹⁰ Prosecution Response, para. 3.

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*, para. 7.

- d) the Rule 65 *ter* summary for Witness 168 specifically indicates that one of the purposes of Witness 168's testimony was to authenticate certain documents;¹⁴
- e) the documents are an integral part of Witness 168's interview transcript, without which the transcript "cannot be fully understood", and that it is accepted practice before the Tribunal "that documents used in the 92 *ter* statement may be admitted as evidence along with the statement";¹⁵
- f) the Defence argument that it reasonably believed the documents would not be tendered by the Prosecution is "less than persuasive [...] since the understanding of the 92 *ter* statement is predicated upon the use and admission of the documents discussed within it";¹⁶ and the admission of these documents "is a basic requirement of Rule 92 *ter*";¹⁷
- g) because the Defence has had ample time to consider the documents, it cannot in good faith advance any claim of prejudice, nor can it claim that the admission of the documents will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;¹⁸

NOTING, however, that the Prosecution also states that it will make an application to amend its Rule 65 *ter* Exhibit List "with respect to the 18 documents from Witness 168's statement";¹⁹

NOTING that in the Reply, the Defence asserts that the Prosecution Response "failed to recognise the main Defence argument namely that the Prosecution never requested the admission into evidence of these documents along with the witness statement", and that the Defence was never provided an index or even notification that the documents had been placed on the EDS, and that in the EDS the documents do not appear in the Srebrenica folder, but rather in the general collection folder;²⁰

¹³ *Ibid.*, para. 7.

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, para. 10.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, para. 20.

¹⁸ *Ibid.*, para. 19.

¹⁹ *Ibid.*, para. 22.

²⁰ Reply, paras. 2, 4-5.

NOTING that in the Reply, the Defence contends that, while every document need not be put to the witness, each and every document must be added to the Rule 65 *ter* Exhibit List “in order for that document to be admitted into evidence”;²¹

RECALLING the “[Confidential] Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List”, filed on 6 December 2006, in which the Trial Chamber permitted the addition of Witness 168 to the Prosecution’s Rule 65 *ter* Witness List, noting that:

- a) the Prosecution proposed to call Witness 168 to “authenticate and identify Drina Corps documents”;²²
- b) the intention of the Prosecution to proffer the trial testimony of Witness 168 became known to the Defence no later than 18 August 2006 “and that therefore the Defence have had sufficient time to review the relevant material and prepare before the witness gives evidence”;²³

RECALLING that, following her objection at trial to the admission of the documents, the Trial Chamber inquired of Counsel for Miletić whether she wished to have Witness 168 brought back into the courtroom for further cross-examination, and that Counsel for Miletić demurred to this request, stating that “in order to do that [she] would need to look through all the documents one by one”;²⁴

RECALLING that the Trial Chamber found that Counsel for Miletić had already had “ample time to look through all the documents”;²⁵

CONSIDERING that leave to file the Reply should be granted and the arguments in the Reply should be considered;

III. MOTION FOR RECONSIDERATION

CONSIDERING that a Trial Chamber has inherent discretionary power to reconsider a previous decision in exceptional cases “if a clear error of reasoning has been demonstrated or if it is

²¹ *Ibid.*, para. 7.

²² [Confidential] Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006, p. 7.

²³ *Ibid.*, p. 7.

²⁴ T. 10735 (1 May 2007).

²⁵ *Ibid.*

necessary to do so to prevent injustice”,²⁶ and that a party urging reconsideration must satisfy the Trial Chamber of particular circumstances justifying reconsideration in order to avoid injustice;²⁷

CONSIDERING that, although the assignment of a Rule 65 *ter* number is not an absolute requirement for the admission of a document into evidence,²⁸ the use of documents without Rule 65 *ter* numbers should be permitted only in exceptional circumstances;²⁹

RECALLING that in a previous oral decision, the Trial Chamber admitted two documents without Rule 65 *ter* numbers for the limited purpose of understanding the Rule 92 *ter* written evidence of PW-157;³⁰

CONSIDERING that, in principle, it may be appropriate for documents referenced in Rule 92 *ter* written evidence to be admitted for the limited purpose of understanding that written evidence;

CONSIDERING, however, that Witness 168’s Rule 92 *ter* written evidence, rather than being supplemented or explained by the documents admitted in the Impugned Decision, purports to “authenticate” those very documents and, therefore, the basis upon which the Trial Chamber admitted the documents in the Impugned Decision did not constitute exceptional circumstances excusing the Prosecution from its obligation to seek the addition of the documents to its Rule 65 *ter* Exhibit List;

CONSIDERING further that the 19 documents admitted in the Impugned Decision which have never been assigned Rule 65 *ter* numbers should be marked for identification pending a decision on a Prosecution motion to amend its Rule 65 *ter* Exhibit List, and that, accordingly, partial

²⁶ See Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 *bis*, 19 October 2006, p. 4; *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en reconsidération de la Décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* Appeal Judgement”), para. 203). *Accord Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, [Confidential] Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25 n. 40 (quoting the language of paragraph 203 of the *Kajelijeli* Appeal Judgement as definitively articulating the appropriate language for reconsideration of interlocutory decisions); *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, [Confidential] Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 6.

²⁷ See Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007, p. 3; *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2 (“[F]or the Appellant to succeed in its Request for reconsideration, he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice ... such particular circumstances include new facts or new arguments.”).

²⁸ T. 8530 (9 March 2007).

²⁹ Such as, for example, documents used for the first time in re-direct examination. See Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007, pp. 1, 4.

³⁰ See T. 7950 (28 February 2007).

reconsideration of the Impugned Decision is necessary to prevent potential injustice and correct an error of reasoning;

CONSIDERING, however, that, as for the remaining documents, the Trial Chamber is not satisfied that reconsideration of the Impugned Decision is warranted;

IV. MOTION FOR CERTIFICATION

CONSIDERING 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”;

CONSIDERING 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,³¹ and that certification is not concerned with whether the decision was correctly reasoned or not;³²

CONSIDERING, however, that in its submissions, the Defence focuses almost exclusively on alleged “violations” of the Statute and neglects to analyse whether the standards governing certification are met in this instance;

CONSIDERING that the Accused had notice of the Prosecution’s intent to tender Witness 168’s interview transcript as his Rule 92 *ter* written evidence, and that the documents admitted in the Impugned Decision play a prominent role in that written evidence and that, while the Prosecution’s misplacement of the documents on the EDS was not precise practice, all the documents were available to the Accused for review and use during cross-examination;

CONSIDERING that, despite the confusing language used by the Prosecution in its list of exhibits to be used, the Accused should reasonably have understood the Prosecution’s intention to tender the documents, given the avowed purpose of Witness 168’s testimony, and that he was shown the entire bundle of the documents during his examination-in-chief 4 days before the Impugned Decision;³³

³¹ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

³² See Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, n 3; Decision on Joint Defence Request for Certification to Appeal Rule 65 *ter* Oral Decision, 22 June 2007, p. 3; *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.

³³ T. 10715 (27 April 2007).

CONSIDERING that, with regard to the above remaining documents admitted in the Impugned Decision, 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, and is not of the opinion that an immediate resolution by the Appeals Chamber might materially advance these proceedings;

CONSIDERING, therefore, that, with regard to the remaining documents admitted in the Impugned Decision, neither of the requirements of Rule 73(B) has been satisfied;

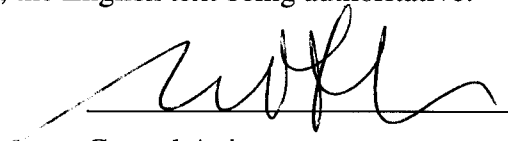
V. DISPOSITION

PURSUANT TO Rules 54, 73(B), 89, 92 *ter* and 126 *bis*,

HEREBY ORDERS as follows:

1. Leave to file the Reply is granted;
2. The 19 documents admitted in the Impugned Decision which have never been assigned Rule 65 *ter* numbers shall be marked for identification;³⁴
3. The Prosecution may file an application to add to its Rule 65 *ter* Exhibit List all the documents admitted in the Impugned Decision which do not yet have Rule 65 *ter* numbers;
4. In all other respects the Motion is denied.

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



Carmel Agius
Presiding

Dated this twentieth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁴ See, note 6 *supra*.