



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-A
Date: 1 June 2011
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision of: 1 June 2011

PROSECUTOR

v.

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

PUBLIC

**DECISION ON DEFENCE REQUESTS FOR EXTENSION OF
TIME TO FILE MOTIONS PURSUANT TO RULE 115**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušević for Mr. Vujadin Popović
Mr. John Ostojić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of four motions filed by respective Counsel for Vujadin Popović (“Popović”),¹ Drago Nikolić (“Nikolić”),² Radivoje Miletić (“Miletić”),³ Vinko Pandurević (“Pandurević”)⁴ (jointly, “Defence Motions”) in relation to the time-limit for filing motions seeking admission of additional evidence on appeal pursuant to Rule 115 of the Tribunal’s Rules of Procedure and Evidence (“Rules”). The Office of the Prosecutor (“Prosecution”) filed its consolidated response on 20 May 2011.⁵ Popović filed his reply on 23 May 2011.⁶ Nikolić, Miletić and Pandurević did not reply.

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II (“Trial Chamber”) rendered its Judgement.⁷ The Trial Judgement has been appealed by Popović,⁸ Counsel for Ljubiša Beara,⁹ Nikolić,¹⁰ Miletić,¹¹ Pandurević,¹² and the Prosecution¹³ on numerous grounds. Briefing in relation to these appeals has been in its final stage since 2 May 2011.¹⁴

¹ Vujadin Popović’s [sic] Motion for Enlargement of Time to File Rule 115 Motion, 10 May 2011 (“Popović’s Motion”); see also Annex: List of Post-Trial Extraordinary Disclosures (confidential) attached to Popović’s Motion (“Annex to Popović’s Motion”).

² Motion on Behalf of Drago Nikolić Joining “Vujadin Popović’s Motion for Enlargement of Time to File Rule 115 Motion”, 11 May 2011 (“Nikolić’s Motion”).

³ Radivoje Miletić’s [sic] Motion for Extension of the Rule 115 Time-Limit, 17 May 2011 (“Miletić’s Motion”).

⁴ Pandurević Motion for the Extension of the Rule 115 Time-Limit, 18 May 2011 (“Pandurević’s Motion”).

⁵ Prosecution’s Consolidated Response to the Motions to Extend the Time to File Rule 115 Applications, 20 May 2011 (“Response”).

⁶ Vujadin Popović’s [sic] Reply to Prosecution’s Consolidated Response to Motions to Extend the Time to File Rule 115 Applications, 23 May 2011 (“Popović’s Reply”).

⁷ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”).

⁸ Vujadin Popović’s [sic] Notice of Appeal, 8 September 2010 (confidential); Notice of Withdrawal and Refiling of Public Redacted Version of Vujadin Popović’s [sic] Notice of Appeal, 25 February 2011.

⁹ Appellant, Ljubisa [sic] Beara’s Notice of Appeal, 8 September 2010.

¹⁰ Notice of Appeal on Behalf of Drago Nikolić, 8 September 2010 (confidential); Public Redacted Version of Notice of Appeal on Behalf of Drago Nikolić, 7 March 2011.

¹¹ *Acte d’appel de la défense de Radivoje Miletić* [sic], 8 September 2010. The English translation was filed on 24 September 2010.

¹² Notice of Appeal on Behalf of Vinko Pandurević [sic] Against the Judgment of the Trial Chamber Dated 10th June 2010, 8 September 2010 (confidential); Public Redacted Version of Notice of Appeal on Behalf of Vinko Pandurević [sic] Against the Judgment of the Trial Chamber Dated 10th June 2010, 9 March 2011.

¹³ Prosecution’s Notice of Appeal, 8 September 2010.

¹⁴ Reply Brief on Behalf of Vujadin Popović, 2 May 2011 (confidential) (see also Corrigendum to Brief in Reply on Behalf of Vujadin Popović [sic] and Notice of Refiling of Vujadin Popović’s [sic] Reply Brief, 18 May 2011 (confidential)); Appellant Ljubiša Beara’s Reply Brief, 2 May 2011 (confidential); Brief in Reply on Behalf of Drago Nikolić, 2 May 2011 (confidential) (see also Corrigendum to Brief in Reply on Behalf of Drago Nikolić and Notice of Re-filing of the Brief in Reply on Behalf of Drago Nikolić, 4 May 2011 (confidential)); *Réplique à la Réponse du Procureur au Mémoire d’appel de Radivoje Miletić* [sic], 2 May 2011 (confidential), the English translation was filed on 30 May 2011; Pandurević Reply to Prosecution’s Response Brief, 2 May 2011 (confidential) (see also Notice of Re-filing and Re-filed Pandurević Reply to Prosecution’s Response Brief, 6 May 2011 (confidential)); Prosecution Consolidated Reply Brief, 2 May 2011 (confidential).

3. Appeal proceedings with regards to Milan Gvero have been suspended pending further order of the Appeals Chamber.¹⁵

II. DISCUSSION

A. Arguments of the Parties

1. Defence Motions

4. Popović argues that the time-limit prescribed by Rule 115 of the Rules for filing motions seeking admission of additional evidence on appeal is insufficient in light of the “size and complexity of [this] case, compounded by the enormous mass of disclosures released since the conclusion of the *Popovic* [*sic*] trial”.¹⁶ In particular, he states that the “extraordinary disclosures” released by the Prosecution so far amount to 62,271 pages and 221 video or audio hours.¹⁷ Popović further claims that his Defence team has exhausted funding for support staff, and only the lead counsel has been able to review and analyse the contents of the post-trial disclosures.¹⁸ He insists that a more thorough review of these materials will be needed to “reveal additional exonerating and relevant evidence for Popovic’s [*sic*] Appeal”.¹⁹ He concludes that in these circumstances, the time-limit of 30 days for filing his motion pursuant to Rule 115 of the Rules is “frightfully inadequate” and requests an extension of “120 days, up to and including 1 September 2011”.²⁰

5. Nikolić joins Popović’s Motion both in terms of the arguments and the relief sought.²¹ He adds that since 8 September 2010, “another 9 sets of disclosure have been made available in the Srebrenica collection of the [Electronic Disclosure Suite] as well as 17 CDs/DVDs containing disclosure material”,²² and refers to the voluminous ongoing disclosure from the *Tolimir case*.²³

6. Miletić seeks an extension of time for filing motions requesting admission of additional evidence, on the following two grounds: (i) continued post-trial disclosure, including voluminous

¹⁵ Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 13 December 2010 (confidential; public redacted version filed on 16 May 2011), para. 15(B). See also Decision on Prosecution’s Motion Seeking Clarification on Decision Relating to Gvero’s Health Condition, 21 December 2010 (confidential).

¹⁶ Popović’s Motion, para. 2.

¹⁷ *Ibid.*, para. 3, referring to the Annex to Popović’s Motion.

¹⁸ *Ibid.*, para. 3.

¹⁹ *Ibid.*

²⁰ *Ibid.*, paras 4-5.

²¹ Nikolić’s Motion, paras 1, 4.

²² *Ibid.*, para. 2.

²³ *Ibid.*, para. 3, referring to, *inter alia*, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Defence Requests for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case, 2 June 2010.

materials from ongoing trials,²⁴ and (ii) the current unavailability of the Trial Judgement in a language that the convicted persons understand.²⁵ With respect to the latter, he submits that “[t]he selection of evidence possibly falling under the category of Rule 115 of the Rules is a question of fact and a process in which the Accused must be involved”; yet, for him to be effectively consulted in this regard, he must understand the Trial Judgement.²⁶ On this basis, Miletić requests that the Appeals Chamber extend the time-limit under Rule 115 of the Rules until an appropriate date following the translation of the Trial Judgement into Bosnian/ Croatian / Serbian (“B/C/S”).²⁷

7. Pandurević accepts the arguments of his co-appellants in relation to the size and complexity of this case, along with ongoing post-trial disclosure.²⁸ Rather than specify a proposed length of extension, he relies upon the Appeals Chamber “to determine the appropriate length of time for filing the Rule 115 motion”.²⁹

2. Response

8. In its Response, the Prosecution suggests that “[a] reasonable enlargement of the deadline for Rule 115 motions in relation to material that became available to the Defence only after the issuance of the Trial Judgement is warranted.”³⁰ It argues, however, that the Appeals Chamber should take into account that disclosure of the material has been accomplished in a manner to facilitate review.³¹ It also argues that the Appeals Chamber should not consider, for the purposes of determining length of any extension, the projected translation date of the Trial Judgement into B/C/S.³²

3. Reply

9. In reply, Popović takes issue with the Prosecution’s suggestion that the Appeals Chamber should only consider post-trial disclosure, arguing that “the cut-off point for the admissibility of evidence under Rule 115” is the conclusion of trial and not the issuance of a trial judgement.³³ He adds in this regard that, as his Defence team received no remuneration during the period between

²⁴ Miletić’s Motion, paras 6-10.

²⁵ *Ibid.*, paras 6, 11.

²⁶ *Ibid.*, para. 13.

²⁷ *Ibid.*, para. 14.

²⁸ Pandurević’s Motion, para. 2.

²⁹ *Ibid.*, para. 3.

³⁰ Response, para. 2.

³¹ *Ibid.*, para. 3.

³² *Ibid.*

³³ Popović’s Reply, paras 1-2.

the completion of the trial proceedings on 15 September 2009 and the rendering of the Trial Judgement, no review of disclosures could reasonably have been conducted.³⁴

B. Analysis

10. Rule 115(A) of the Rules provides that a motion seeking the admission of additional evidence on appeal must be filed “not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.” In this case, the time-limit of 30 days ends on 1 June 2011. The Appeals Chamber further recalls that

the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible *after it became aware of the existence of the evidence sought to be admitted*.³⁵

11. The Appeals Chamber therefore considers that parties cannot seek extension of this time-limit *in abstracto* or in anticipation of a future motion to present (currently unidentified) additional evidence. Rather, a party can apply to present concrete additional evidence, and if it does so after the time-limit has passed, it must demonstrate good cause or cogent reasons for its delay, according to the applicable stage of proceedings. The party can then set forth the cause or reasons for delay in a preliminary submission or, more commonly, “as part of the Rule 115 motion itself with a request that the motion be recognized as validly filed.”³⁶

12. Consequently, the Appeals Chamber need not consider the arguments presented in the Defence Motions or determine any new time-limit for possible motions to be filed under Rule 115 of the Rules.

III. DISPOSITION

13. In light of the foregoing, the Appeals Chamber **DISMISSES** the Defence Motions as premature, without prejudice to the right to file motions seeking admission of additional evidence on appeal, provided that they demonstrate good cause or cogent reasons, as applicable, for the late filing with respect to the proffered evidence.

³⁴ *Ibid.*, paras 3-4.

³⁵ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2 (emphasis added); see also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić’s Motion for Leave to File His Second Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, p. 3.

³⁶ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 9.

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



Judge Patrick Robinson
Presiding

Dated this 1st day of June 2011,
At The Hague,
The Netherlands

[Seal of the Tribunal]