

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-05-88-A

IN THE APPEALS CHAMBER

**Before: Judge Patrick Robinson, Presiding
Judge William H. Sekule
Judge Fausto Pocar
Judge Mandiaye Niang
Judge Arlette Ramaroson**

Registrar: Mr. John Hocking

Date: 8 November 2013

**THE PROSECUTOR
vs.
VUJADIN POPOVIĆ
LJUBISA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
VINKO PANDUREVIĆ**

*Public with Confidential Appendix
and Annexes A & B*

VUJADIN POPOVIĆ'S SEVENTH RULE 115 MOTION

The Prosecutor:

Mr. Peter Kremer, QC

Defence:

Mr. Zoran Živanović and Mrs. Mira Tapušковиć for Mr. Vujadin Popović
Mr. John Ostojic for Mr. Ljubisa Beara
Mrs. Jelena Nikolić and Mr. Stephane Bourgon for Mr. Drago Nikolić
Mrs. Natacha Fauveau-Ivanović and Mr. Nenad Petrusić for Mr. Radivoje Miletić
Mr. Peter Haynes QC and Mr. Simon Davis for Mr. Vinko Pandurević

VUJADIN POPOVIĆ 'S SEVENTH RULE 115 MOTION

I. INTRODUCTION

1. Vujadin Popović respectfully requests the admission into evidence of (1) his 92^{ter} Statement,¹ and (2) the transcript his testimony given before the *Karadžić* Trial Chamber on 5 and 6 November 2013,² appended in the confidential annexes, pursuant to Rule 115. As Popović could not be compelled to testify against himself in his own case, due diligence would not brought forth his testimony before Mr. Karadžić requested that he testify. Regardless, his testimony must be admitted as it would have impacted the Trial Chamber's verdict finding Popović guilty of murder with genocidal intent, and any factual findings that rest thereon. The appendix to this motion sets out in specific detail each factual finding affected by Popović's statement and testimony.

2. Popović is prepared to give live evidence before the Appeals Chamber should it, or the other Accused, wish to cross-examine him further regarding his testimony.

II. APPLICABLE LAW

3. Evidence is admissible pursuant to Rule 115 where it is not available to the Appellant during trial, or discoverable through the exercise of due diligence.³ The diligence standard encompasses "*appropriate* use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber".⁴ Where diligence and unavailability is shown, the Appeals Chamber then assesses whether the evidence could impact the verdict, not whether it "would probably" do so.⁵ The assessment of the weight and probative value of the evidence therefore, beyond the *prima facie* credibility and

¹ Witness Statement of Lieutenant Colonel Vujadin Popović, Annex A ("Statement").

² *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T ("*Karadžić*"), Transcript, 5 - 6 November 2013, Annex B, ("Annex B").

³ *The Prosecutor v. Popović et al*, IT-05-88-A, Decision on Radivoje Miletić's First and Second Motions for admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013, para. 6.

⁴ *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29-A, Decision on Dragomir Milošević's Third Motion to Present Additional Evidence, 8 September 2009 ("*D. Milošević Decision*"), para. 7.

⁵ *The Prosecutor v. Kupreškić*, Case No.: IT-95-16-A, Appeals Judgment, 3 October 2001 para. 69 ("The Appeals Chamber does, however, take this opportunity to clarify that, in its view, the more appropriate standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence "could" have had an impact on the verdict, rather than whether it "would probably" have done so.")

reliability standard set out in Rule 115, is a determination that the Appeals Chamber can make in a decision on a Rule 115 Motion, or in its final appeal judgement.

4. In 2002, admissibility requirements for evidence tendered under Rule 115 were strengthened – from “if the interests of justice so require”⁶ to their (more or less) current form, which requires a showing of unavailability at trial, relevance and credibility.⁷ That amendment did not, however, strike the interests of justice entirely from consideration. As early after the amendment as 2003, the *Krstić* Appeals Chamber set out that even if the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that if it had been admitted at trial, it would have affected the verdict.⁸

III. SUBMISSIONS

(i) Popović’s Testimony of 5 and 6 November 2013 was Unavailable at his Own Trial Which Concluded in 2009

5. Popović exercised his right not to testify in his own trial. Requirements for the *appropriate* use of all mechanisms of compulsion⁹ presume that the exceptional remedy of compulsion must be used fairly, in a manner that does not compromise either the rights of the potential witness or of the Accused. It follows then, that the right against self-incrimination – *i.e.* that an Accused person cannot be compelled to testify against himself – trumps the due diligence requirement for Rule 115. In short, due diligence does not require defence counsel to compel his own client to testify in his case, especially if such testimony would be against his client’s will.

6. Four years later, however, having seen how “Prosecution witnesses who [had] not quite [told] the truth were those who were taken into account,”¹⁰ and having seen how those same witnesses had testified again before the *Karadžić* Trial Chamber, Popović

⁶ See IT/32/Rev. 22, 28 December 2001.

⁷ RPE, IT/32/Rev. 49, 22 May 2013.

⁸ *The Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 4; *D. Milošević Decision*, para. 10.

⁹ *D. Milošević Decision*, para. 7.

¹⁰ Annex B, T. 43024.

opted to testify when asked. In any event, given that Mr. Karadžić has not hesitated to seek to use the compulsory powers of the Tribunal to call resistant witnesses, Popović chose the path of least resistance.¹¹ Both good cause and due diligence are therefore shown to admit his testimony on appeal.

(ii) The Evidence is Relevant and Credible

7. Each topic of Popović's 92^{ter} Statement and oral testimony relates directly to the events covered in the Trial Judgement. After preparing and signing a written 92^{ter} statement, Popović testified, under oath, before the professional judges of the Tribunal for two days. Though his authority over perpetrators remains in question on appeal, he was frank and forthright about events for which he could be considered liable for a failure to prevent or punish.¹² He was subject to rigorous cross-examination by the Prosecution; he was unshaken, his answers were coherent, and he remained consistent with his statement throughout. Though he had appealed his judgment and sentence, he is serving a life sentence unless the Appeals Chamber reverses the Trial Chamber's Judgment. As Prosecutor Nicholls himself put it: Popović "[does not] have much to lose."¹³

(iii) His Testimony Would Have Impacted the Verdict On Several Major Factual Findings Forming the Basis of his Conviction

a. The Hotel Fontana on 12 July 1995

8. Popović categorically denied, on the record and under oath, that Momir Nikolić's account of a conversation in front of the Hotel Fontana on the morning of 12 July 1995 was true.¹⁴ His account affects the Trial Chamber's belief of Momir Nikolić's account, alleging that Popović told him that "all balijas had to be killed."¹⁵ The Prosecution broadly dismissed Popović's statement, but did not specifically explore this issue on

¹¹ See e.g. Karadžić, Decision on Accused's Motion to Subpoena Svetozar Andric, 28 May 2013; Karadžić Decision on Accused's Motion to Subpoena Ljubisa Beara, 9 May 2013; Karadžić, Decision on Accused's Motion to Subpoena Zdravko Tolimir, 9 May 2013. The latter two Decisions are pending before the Appeals Chamber.

¹² See e.g. Annex B, T. 43114 (awareness of murders in Bišina); T43059-61, 43082 (awareness of "incident" at Kravica warehouse).

¹³ Annex B, T. 43069.

¹⁴ Statement, para. 18; Annex B, T.43012.

¹⁵ *The Prosecutor v. Popović et al*, IT-05-88-A, Judgement, 10 June 2010 ("Judgement"), para. 280-285.

cross, and offered no other documentation to contradict Popović's version of events. His evidence broadly affects the Trial Chamber's finding that the plan for the murder operation commenced in the morning of 12 July 1995.¹⁶

b. Bratunac on 13 July

9. Popović three times attested that he was unaware of the circumstances of the Bratunac prisoners on July 13th: "I knew that they were taken prisoner and that they were transported there, but I did not see them. At night I was at the motel..."¹⁷ He discredited the Trial Chamber's findings¹⁸ regarding the conditions of imprisonment at the Vuk Karadžić School, and, by extension, the Trial Chamber's inference of genocidal intent based on the conditions of detention.¹⁹ Indeed, while the Trial Chamber asserted that the conditions were "cramped" and that food and water were insufficient, ultimately it could not determine the number of men killed there.²⁰

c. Kravica Warehouse Killings on 13 July

10. Popović gave evidence that he had no authority over the soldiers at the Kravica warehouse – and indeed demonstrated how chains of command in the VRS would have impeded his actions where he had knowledge of crimes. He attests: "I didn't take steps because I thought after all it was the responsibility of the person in command of that unit. I cannot interfere in the command and the operation of another unit [...] I can send instructions to them along my own chain of command as to how they should work, but nothing else."²¹ This account contradicts the Trial Chamber's determination that the crimes at Kravica warehouse were "organized killings"²² orchestrated by the JCE, or that Popović had superior responsibility over perpetrators of crimes at Kravica or indeed throughout the area at the time.

¹⁶ Judgment, paras 280, 1051-1054, 1097, 1172.

¹⁷ Annex B, T. 43056, 43057, 43059.

¹⁸ Judgement, para 400-3.

¹⁹ Judgement, 1053.

²⁰ Judgement para. 794. Further, the burial of the victims from the Vuk Karadžić School in Glogova would have occurred on 15 July. *Compare* Judgement, paras 462-463, 1271 to Annex B, T. 43061-2.

²¹ Annex B, T. 43046-7.

²² Judgement, para. 1050.

d. Orahovac on 14 July

11. Popović's statement provided his whereabouts in Orahovac on 14 July, which do not align with the Trial Chamber's findings.²³ Popović arrived in front of the school at about 1 p.m. and spent about 20 minutes there.²⁴ After, he went to the Ročević school, where he saw 2 to 300 prisoners and canisters with water at the front door. He remained there for about half an hour, during which time he told the security guards to keep the drunken people away from the prisoners.²⁵ At approximately 2 p.m. he returned to Orahovac, where he found Beara, Obrenović, Trbić, and Nikolić and informed them about the prisoners' situations.²⁶ Sometime between 3 p.m. and 4 p.m., he left Orahovac and went to the Krivače IKM.²⁷ He never saw any killing of prisoners of war. He remained unaware of any plan to kill the prisoners throughout.²⁸ Having withdrawn a key witness to attest otherwise,²⁹ the Prosecution did not specifically challenge this account on cross-examination, and no alternative account was offered to contradict Popović.

12. Popović's testimony undermines the Trial Chamber's factual findings relating to the Grbavci school.³⁰ The Chamber considered that at most 2500, and at least 800 people were detained there; Popović's count was less than half the latter.³¹

"That two and a half thousand people fit into that room, that is simply impossible. And I brought 30 buses. Nobody was standing there. And one longer bus. Quite simply, it's not correct. This hall was not crowded. Some were [*sic*] sitting there, some were standing, some were walking. A school desk was in there too. It was a bit in front of the door, and water was distributed through that desk. They would take water, empty the other vessels, and so on."³²

²³ Judgment, para 482, 1105-1115, 1134-1141.

²⁴ Statement, para. 50-51.

²⁵ Statement, para. 52.

²⁶ Statement, para. 53.

²⁷ Statement, para. 53.

²⁸ Statement, paras 53-54.

²⁹ See *Karadžić*, Decision on Motion for Reconsideration and Request to Withdraw Evidence of KDZ486, 23 October 2013.

³⁰ Annex B, T. 43062-4. The Defence notes that the Prosecution misrepresented or misunderstood arguments in the Defence Final Trial Brief. The Brief disputed that the witness Bircakovic saw Popović in front of the Grbavci school "half an hour or an hour" after the prisoners arrived; it does not assert, as the Prosecution argues, that Popović was never there.

³¹ Statement para. 50.

³² Annex B, T.43064.

His account would also dispel the Trial Chamber's consequent inference that those conditions demonstrated genocidal intent.³³

e. Executions in Branjevo and Events in Pilica on 16 July

13. Popović's recollection of events differs with that of the Trial Chamber regarding events on 16 July, when killings were held to have occurred in Branjevo.³⁴ That morning Popović went to the Zvornik SUP, then returned to the ZB command, where Trbić told him that Beara had gone to Pilica and left orders for Popović to follow.³⁵ When he met Beara in front of the school in Pilica, he asked him who had ordered that the prisoners of war be killed and why, to which Beara did not really respond.³⁶ Popović searched for escaped prisoners in the village, and returned to the local commune building in Pilica.³⁷ He then heard bursts of gunfire coming from the Cultural Centre, and he went to the restaurant, where Beara said that "drunken idiots" had killed the prisoners.³⁸ At no point was he in Branjevo on 16 July 1995.³⁹ At no point did the Prosecution specifically challenge Popović's assertion that he never went to Branjevo on 16 July, or offer evidence demonstrating that he was indeed at the execution sites there.

14. According to Popović, the request for fuel, which the Trial Chamber found was made in furtherance of the murders, was not made by him, nor could it have even furthered the murders,⁴⁰ which had occurred before it arrived:

"It's obvious from this conversation that the duty operations officer is asking for 500 litres of fuel in my name. Now, I wonder if I called the duty officer and told him that, I would have had to call the communications centre in the Zvornik Brigade and ask for the duty operations officer. As soon as I got in touch with the communications centre in the Zvornik Brigade, I could have in the same manner called the communications centre of the Drina Corps, because that was the man I needed, and ask for the oil. I claim that somebody was asking for the oil in my name. I certainly didn't need it, and later on we'll see where it was used. Because to request something and not to use it, why? [...] to the best of my recollection, as I remember some of the statements, the transport of prisoners from the school in Pilica was finished around after 2.00. And when the fuel arrived, who needed it then? And another thing, Mr. Nicholls, it's visible, and you showed it from vehicle

³³ Judgement, para. 1180.

³⁴ Judgement, 1124-1138.

³⁵ Statement, paras. 65-66.

³⁶ Statement, para. 68.

³⁷ Statement, paras 70-71.

³⁸ Statement, para. 72.

³⁹ Statement, para. 78; *contra* Judgement, 1124-1138.

⁴⁰ Judgement, para 540-541, 550, 1124, 1130, 1132-1134.

work logs of machines, that they were filled up with fuel at their own gas stations. And thirdly, if these buses, if their tanks were filled with this fuel, then the vehicle logs would have to include this information, that their tanks were filled, because otherwise they would have to show what they did with it. [...]

Q. Is this another frame-up of you that's taking place in July 1995, right in the middle of the murder operation, the duty officers in Zvornik are writing down in the notebook: Popović requests 500 litres of D2, 500 litres of fuel? The intercepts say Popović need 500 litres of fuel or his work will stop. Are those fabrications? Is that what you're saying?

A. That's what the document says. I'm not saying that, but that's what the document says in this statement of this man. I have to admit something to you, it happened sometimes that I would ask for something and not get it and then all right. *And then if you would say it was ordered by the commander, then all of a sudden you could get it. These are little tricks that we all resorted to. That's the way it was.*⁴¹

f. Bišina Executions on 23 July

15. The executions in Bišina occurred before Popović arrived, and not in his presence.⁴² Popović did not dispute that he had visited Bišina, recalled in detail his conversations with the soldiers there, and was unshaken when pressed in cross-examination to admit otherwise.⁴³ Indeed, Popović's recollection that he was there is not *per se* inconsistent with the account of PW-172, who asserted "[Popović] was there," but never categorically stated *when* he arrived. According to Popović:

I am not contesting that I arrived there. Yes, I arrived there and I saw what I saw and I basically went numb, if I can put it that way. I was so shaken -- well, not shaken, at my wit's end. It was the first time in my life that I had seen something like that, for the very first time in my life. And that is why I said to those people: Please, bury them. And that is the only grave that had not been re-dug. So why would I not say relocate this grave too had I contributed to that at all? I mean, I could have sent a unit there, but no. In the report for that grave, you can see that that is the only one where the bodies were laid properly except that they were not marked, identified. Would I have done that had I felt all this guilt and had I really participated in what you said, I would have done something different as you expected it. I would have removed the grave and I would have tried to conceal it.⁴⁴

He also disputed the documentary evidence on which the Trial Chamber relied to find that Popović ordered men to Bišina to carry out the executions, because he signed the documents after the executions had taken place. "It's my signature, yes. I won't deny it. but [...] this vehicle log was brought to my desk and I signed at once for all these days. You can see the same pen is used [...]. Maybe the police person in charge was absent so

⁴¹ Statement, paras 80-85; Annex B, T.43086-88 (emphasis added).

⁴² *Contra* Judgment, paras 1147-1152.

⁴³ Annex B, T. 43114-43116, 43122, 43124.

⁴⁴ Annex B, T.43112.

they brought it to me and I signed it.”⁴⁵ The executions at Bišina therefore do not and should not corroborate the Trial Chamber’s findings that Popović was involved in the murder operation.⁴⁶

16. Finally, Popović denied under oath any involvement or knowledge of the whereabouts of wounded men from Milići Hospital on 23 July, or even his involvement in their deaths.⁴⁷ “Sincerely, Mr. Nicholls, if I knew I would have told you. Very frankly. I have no reason to hide that, but I don't know.”⁴⁸

IV. RELIEF SOUGHT

For the foregoing reasons, the Defence for Vujadin Popović respectfully requests the Appeals Chamber to

GRANT the Seventh Rule 115 Motion; and

ADMIT Annexes A and B in evidence.

Word count: 3,028.

Respectfully submitted,



Zoran Živanović



Mira Tapušković

⁴⁵ Annex B, T.43115.

⁴⁶ *Contra* Judgment paras 1150-1152.

⁴⁷ *Contra* Judgement , para.1156.

⁴⁸ Annex B, T.43137.