UNITED
NATIONS

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: 28 July 2008

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: **28 July 2008**

PROSECUTOR

v.

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

PUBLIC

DECISION ON NIKOLIĆ'S MOTION PURSUANT TO RULE 92 *BIS*

Office of the Prosecutor
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Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell 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"), is seised of the "Motion on Behalf of Drago Nikolić Seeking Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", filed confidentially on 19 May 2008 ("Motion") and the "Notice and Further Motion on Behalf of Drago Nikolić Pursuant to Rule 92 *bis*", filed confidentially on 2 June 2008 ("Second Motion") and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. In the Motion, Nikolić requests the Trial Chamber to admit into evidence the written statements of 12 witnesses in lieu of their *viva voce* testimony, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules").[1] In the Second Motion, Nikolić requests the admission of an additional 3 witness statements.[2] On 2 June 2008, the Prosecution confidentially filed a "Prosecution Response to Confidential 'Motion on Behalf of Drago Nikolić Seeking Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*'" ("Response") and then confidentially filed a "Prosecution Response to the Confidential Notice and Further Motion on Behalf of Drago Nikolić Pursuant to Rule 92 *bis*" ("Second Response") on 10 June 2008. On 9 June 2008, Nikolić confidentially filed a "Defence Motion Seeking Leave to Reply and Reply to Prosecution Response to Confidential Motion on Behalf of Drago Nikolić Seeking Admission or Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*" ("Reply") and on 16 June 2008, Nikolić confidentially filed a "Defence Motion Seeking Leave to Reply and Reply to Prosecution Response to Confidential Notice and Further Motion on Behalf of Drago Nikolić Pursuant to Rule 92 *bis*" ("Second Reply").

II. SUBMISSIONS OF THE PARTIES

A. Motions

2. In the Motion and Second Motion, Nikolić requests the Trial Chamber to admit into evidence the written statements of a total of 15 witnesses in lieu of their *viva voce* testimony.[3] Nikolić submits that the statements should be admitted as they do "not *per se* go to the acts and conduct of the Accused as charged in the Indictment"[4] and "none of the factors against admission as

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[1] Motion, para. 1. *See also*, Annexes A – L.

[2] Second Motion, paras. 1–3, 32 (b). *See also*, Annexes A – C.

[3] Motion, para. 1; Second Motion, paras. 1–3. Nikolić provided notice in the Second Motion, that they will be delaying the submission of any application concerning a sixteenth witness. *Ibid.*, paras. 3, 32 (d).

[4] Motion, para. 15.

provided by Rule 92 *bis*(A)(ii) applies to the proposed statements."[5] He further asserts that the admission of the written statements pursuant to Rule 92 *bis* "will favour the expeditious conduct of the proceedings without affecting the fairness of the trial."[6]

B. Responses

3. In the Response the Prosecution requests leave to exceed the word-limit for filings.[7] In the Response and Second Response, the Prosecution states that it has no objection to the Trial Chamber admitting two of the statements without requiring the witnesses to appear for cross-examination.[8] The Prosecution also asserts that two of the statements[9] should not be admitted at all—even with cross-examination—arguing that these two witnesses have already testified before this Trial Chamber[10] and the admission of their statements pursuant to Rule 92 *bis* "essentially amounts to recalling the two witnesses"[11] which should not be allowed unless "good cause has been shown."[12] Finally, the Prosecution submits that the remaining 11 statements should not be admitted pursuant to Rule 92 *bis* and requests the opportunity to cross-examine the witnesses if the statements are admitted.[13] It argues that some of these witnesses are proposed to challenge Srećo Ačimović's and PW-101's testimony, and that others introduce alibi evidence for Nikolić on 16 and 17 July 1995.[14] It alleges that the evidence offered through these witnesses goes to the core of the Prosecution's case and relate to the acts and conduct of the Accused.[15] The Prosecution therefore requests that these witnesses be called *viva voce* or alternatively be subject to cross-examination.[16]

C. Replies

4. In the Reply and Second Reply, Nikolić reiterates "that the overall aim of the Defence Motion—seeking admission into evidence of [fifteen] written statements in lieu of *viva voce*

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[5] Motion, para. 16.
[6] Motion, para. 18.
[7] Response, para. 2.
[8] Witness 3DW-25. Response, para. 1.Witness 3DW-27. Second Response, para. 1.
[9] Witness 3DW-12 and Witness 3DW-19. Response, paras. 9–16.
[10] Response, para. 8.
[11] Response, para. 8.
[12] Response, paras. 7–8.
[13] Witnesses 3DW-6, 3DW-7, 3DW-8, 3DW-9, 3DW-13, 3DW-14, 3DW-21, 3DW-22, 3DW-23. Response, para. 1. Witnesses 3DW-11 and 3DW-17. Second Response, para. 1.
[14] Response, paras. 17–19.
[15] Response, paras. 17–19.
[16] Response, paras. 18, 21, 23.

testimonies pursuant to Rule 92 *bis*—[is] precisely to minimize the length of the case for the Defence of the Accused, [and] more particularly the court time required."[17]

5. In reference to the two statements to which the Prosecution objects on the grounds that the witnesses previously testified in the Prosecution case, Nikolić submits that these witnesses "are not being recalled for further cross examination but rather called as Defence witnesses"[18] and they "should be treated like any other Defence witness" without requiring any showing of good cause before calling them.[19]

6. Concerning the witnesses proposed to challenge the testimony of Srećo Ačimović and PW-101, Nikolić argues that the Prosecution evidently confuses evidence that challenges the credibility of a witness with evidence concerning the acts and conduct of the Accused as charged in the indictment, in that the proposed evidence of the witnesses is totally unrelated to the acts and conduct of the Accused.[20]

7. Referring to the three witnesses that the Prosecution contends are alibi witnesses, Nikolić submits that "a defence of alibi is offered by an accused who denies being involved in a crime committed pursuant to the indictment, at a specific location and time,"[21] and that, because the Indictment against the Accused does not specify any precise location where or time during which the Accused would have been involved in the commission of any unlawful act,[22] the proposed evidence of these witnesses does not constitute a defence of alibi.[23]

III. DISCUSSION

A. The Scope of Rule 92 *bis*

8. Pursuant to Rule 92 *bis*, a Trial Chamber may admit the evidence of a witness in the form of a written statement in lieu of oral testimony where the evidence goes to proof of matter other than the acts and conduct of the accused as charged in the indictment.[24] The Trial Chamber is not bound to admit all statements that are admissible under this Rule, but can use its discretion to determine

[17] Reply, para. 7, Second Reply, para. 7.
[18] Reply, para. 11.
[19] Reply, para. 10.
[20] Reply, paras. 30, 35; Second Reply, paras. 10, 20.
[21] Reply, para. 49.
[22] Reply, para. 51.
[23] Reply, para. 53.
[24] Rule 92 *bis*(A).

when the admission is appropriate.[25] Additionally, even if the written statement is admitted, the Trial Chamber may still require the witness to appear for cross-examination at trial.[26]

9. The Trial Chamber recalls that the applicable law related to the admission of evidence pursuant to Rule 92 *bis* was discussed and analysed in detail in its "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", issued on 12 September 2006, and it incorporates by reference that discussion without repeating it here.

B. The Proposed Statements

10. The Prosecution does not object to Nikolić's request to admit the statements of Witnesses 3DW-25 and 3DW-27 without cross-examination. Having reviewed the statements, the Trial Chamber considers that they are both appropriate for admission pursuant to Rule 92 *bis* without cross-examination. Neither statement concerns the acts and conduct of any Accused as charged in the Indictment, nor does the Trial Chamber find it necessary to require these witnesses to appear for cross-examination as their statements do not concern any live and important issues between the parties.

11. Nikolić proposes to admit the statements of Witnesses 3DW-12 and 3DW-19 to clarify narrow points of fact which purportedly contradict the testimony of two witnesses who testified during the Prosecution's case-in-chief.[27] The Prosecution objects to these statements being admitted in any form, asserting that Nikolić must show good cause for calling these witnesses in his case because they have already testified. The Prosecution characterises Nikolić's request as one to "recall" the witnesses, and relies upon a decision of the *Karemera* Trial Chamber of the ICTR.[28] That decision, however, dealt with a defence request to recall a Prosecution witness for further cross-examination during the Prosecution's case-in-chief. Here, Nikolić proposes to call the witnesses in his own case-in-chief, not for further cross-examination. The Trial Chamber is of the view that while it is preferable for the parties to adduce all relevant information from a witness in a single appearance, there may be instances where for strategic or factual reasons that is not possible. Subject to specific rules, a party is entitled to call the witnesses which the party believes has

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[25] Rule 92 *bis*(A) provides that: "A Trial Chamber *may* dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement" (emphasis added).

[26] Rule 92 *bis*(C) provides that: "The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination."

[27] Nikolić asserts that the proposed statement of Witness 3DW-12 will "clarify his earlier testimony which contradicts that of Witness PW-101." Motion, para. 42. As for Witness 3DW-19, Nikolić asserts that the statement will "clarify his earlier testimony which contradicts that of Witness PW-168." Motion, para. 56.

[28] Response, para. 7 (citing *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmen Mbonyunkiza, 25 September 2007, para. 5).

relevant evidence to adduce.[29] In the opinion of the Trial Chamber this right should not be restricted in these circumstances with a requirement for the relevant party to show cause for calling a particular witness even though the witness has testified already as part of the case for another party. Thus, Nikolić may lead the evidence of these witnesses in his case as he would any witness who will provide relevant, probative evidence admissible pursuant to Rule 89(C). However, any such evidence is still to be assessed on its merits as to admissibility in accordance with that Rule. In this instance, the Trial Chamber is not persuaded that the proposed statement of Witness 3DW-12 meets the threshold requirements of relevance and probative value. In particular, for the most part the evidence to be adduced has been related already by the witness in his previous testimony. To the extent that the statement adds some further detail it still relates to the same point—the treatment of a Muslim boy and the treatment of Muslim patients generally—and is consistent with what the witness has already said. This subject has been exhaustively covered already. To this end, the evidence adds nothing in terms of probative value. Accordingly, the Trial Chamber declines to admit the statement of Witness 3DW-12 pursuant to Rule 92 *bis*.

12. Conversely, the Trial Chamber is persuaded that the proposed statement of Witness 3DW-19 meets the threshold requirements of relevance and probative value. Moreover, given the importance of the proposed evidence to a live and important issue in this case,[30] the Trial Chamber is not persuaded that admitting the written statement—even with cross-examination—is appropriate. Rather, Witness 3DW-19 should testify *viva voce*.

13. The Prosecution argues that the statements of Witnesses 3DW-21, 3DW-22 and 3DW-23 relate to alibi evidence concerning Nikolić's whereabouts on 16 and 17 July 1995, and as such concern the acts and conduct of the Accused and are inadmissible pursuant to Rule 92 *bis*. Whether or not the evidence at issue is appropriately characterized as "alibi" evidence, each of the statements affirmatively addresses Nikolić's whereabouts during a period at issue in the Indictment. Accordingly, the Trial Chamber is of the view that the statements are inadmissible under Rule 92 *bis* because they relate to the acts and conduct of the Accused. Rather, the witnesses should testify pursuant to Rule 92 *ter*.

14. Nikolić proposes to admit the statements of Witnesses 3DW-6, 3DW-7, 3DW-8, and 3DW-9 to directly challenge the credibility of Srećo Ačimović, who testified in the Prosecution's case-in-chief. The Prosecution asserts that because Srećo Ačimović's evidence concerns the acts and conduct of Nikolić, any evidence which impeaches Srećo Ačimović's credibility also concerns the

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[29] *See e.g.*, Rules 73 *bis* and 73 *ter*.

[30] The proposed statement concerns the particulars of a conversation between Witness 3DW-19 and Witness PW-168 which allegedly occurred on 16 July 1995. Motion, Confidential Annex G.

acts and conduct of Nikolić. However, the phrase "acts and conduct of the accused [...] should be given its ordinary meaning: deeds and behaviour of the accused."[31] The Trial Chamber is not persuaded by the Prosecution's argument that the terms of the Rule should be extended to cover the evidence of these witnesses. Thus, none of the statements go to the acts and conduct of any Accused and are admissible under Rule 92 *bis*. However, the Prosecution has relied heavily upon the evidence of Srećo Ačimović regarding important issues that appear to be in sharp dispute between the parties, and his credibility is an important issue. Accordingly, the Trial Chamber is not persuaded that the statements of these four witnesses should be admitted without requiring the witnesses to appear for cross-examination.

15. Similarly, Nikolić proposes to admit the statements of Witnesses 3DW-13, 3DW-14, and 3DW-17 to challenge the credibility of PW-101, who also testified in the Prosecution's case-in-chief. None of the statements go to the acts and conduct of any Accused and are admissible under Rule 92 *bis*. However, similar to Srećo Ačimović, the Prosecution has relied heavily upon the evidence of PW-101 regarding important issues in sharp dispute between the parties, and his credibility is an important issue. Accordingly, the Trial Chamber is not persuaded that the statements of these three witnesses should be admitted without requiring the witnesses to appear for cross-examination.

16. Finally, Nikolić proposes to admit the statement of Witness 3DW-11 to challenge the credibility of Prosecution Witnesses PW-108 and PW-102. The statement does not go to the acts and conduct of any Accused and is admissible pursuant to Rule 92 *bis*. The Prosecution has relied upon the evidence of PW-108 and PW-102 regarding an important issue in dispute between the parties, and their credibility is an important issue. Accordingly, the Trial Chamber is not persuaded that the statement of Witness 3DW-11 should be admitted without requiring the witness to appear for cross-examination.

IV. DISPOSITION

17. For these reasons, pursuant to Rules 89, 92 *bis* and 92 *ter* of the Rules, the Trial Chamber hereby **GRANTS** the Motion and the Second Motion in **PART**, and decides as follows:

(a) Nikolić is granted leave to file the Reply and Second Reply.

(b) The Prosecution is granted leave to exceed the word limits for filings.

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[31] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22; see also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR.73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 13.

(c) The statements of Witnesses 3DW-25, and 3DW-27 are provisionally admitted without requiring the witnesses to appear for cross-examination, pending receipt of the statements in a form which fully complies with the requirements of Rule 92 *bis*(B).

(d) The statements of Witnesses 3DW-6, 3DW-7, 3DW-8, 3DW-9, 3DW-11, 3DW-13, 3DW-14, 3DW-17, 3DW-21, 3DW-22, and 3DW-23 may be admitted pursuant to the provisions of Rule 92 *ter*. Nikolić shall provide two versions of the statement of Witness 3DW-14 to the Registry, a public copy from which PW-101's name has been redacted, and an un-redacted copy which will be admitted under seal.

18. The Motion and Second Motion are denied in all other respects.

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

Carmel Agius
Presiding

Dated this twenty-eighth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE KWON

19. While I support the outcome of the decision, I do not agree with the opinion of the majority that the Defence should be at liberty to call witnesses who have already testified as part of the Prosecution case.

20. The majority holds as follows:

> The Trial Chamber is of the view that while it is preferable for the parties to adduce all relevant information from a witness in a single appearance, there may be instances where for strategic or factual reasons that is not possible. Subject to specific rules, a party is entitled to call the witnesses which the party believes has relevant evidence to adduce. In the opinion of the Trial Chamber this right should not be restricted in these circumstances with a requirement for the relevant party to show cause for calling a particular witness even though the witness has testified already as part of the case for another party. Thus, Nikolić may lead the evidence of these witnesses in his case as he would any witness who will provide relevant, probative evidence admissible pursuant to Rule 89(C).[32]

21. Although the majority qualifies a party's ability to call witnesses who have already testified as part of another party's case by making this ability "subject to specific rules", the majority goes on to substitute "specific rules" with the general requirements of Rule 89(C), *i.e.* relevance and probative value.[33] By doing so, the majority leaves the Defence at liberty to call witnesses who have already testified as part of the Prosecution case.

22. The ICTR has addressed the issue of recalling witnesses, albeit with respect to recalling a witness during the Prosecution case, by requiring that a party show good cause before it will be permitted to do so. In the case of *Karemera et al.*, the Defence filed a motion to recall a Prosecution witness for further cross examination on new evidence which came to light later in the Prosecution case.[34] In assessing good cause, the Trial Chamber must consider (i) the purpose for which the witness will testify, and (ii) the reason why the witness was not questioned on the relevant matter earlier.[35]

23. Rule 90(H) provides *inter alia*:

> (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

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[32] *Supra*, para. 11 (footnotes omitted).

[33] The majority also refers to Rules 73 *bis* and 73 *ter*, which are also general rules. *Supra* note 29.

[34] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonyunkiza", 25 September 2007, paras. 2–3

[35] *Ibid.*, para. 5.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

24. Bearing in mind the principle of judicial economy, as well as the text of Rule 90(H), I consider the Defence to be obliged to take the opportunity at first instance to exhaustively cross examine a witness, including, where relevant, drawing out points in favour of the Defence case, rather than calling the witness again during their own case for this very purpose.

25. For the foregoing reasons, I consider the situation in *Karemera et al.* to be no different to the case at hand. It is of no consequence that Nikolić seeks examination in chief of the recalled witness whereas the Defence in *Karemera et al.* sought further cross-examination. It follows then, that should the Defence wish to call a witness who has already given evidence for the Prosecution, the standard by which the Defence will be allowed to do so should be the same as if the witness was being recalled for further cross-examination, *i.e.*, the Defence must show good cause. In this regard, I note that "defence strategy" may constitute good cause, if reasonable.

26. I therefore do not agree with the reasoning of the majority that has accepted Nikolić's submission that there is no requirement to show good cause to recall Witnesses 3DW-12 and 3DW-19, and consider that this part of the Motion may be dismissed solely for this reason.

27. However, with regard to Witness 3DW-19, I note Nikolić's submission that further examination has become necessary in light of the testimony of PW-168.[36] It is apparent from the fact that Witness 3DW-19 testified before PW-168 that it was not possible for the Nikolić Defence to cross-examine 3DW-19 on issues arising from the testimony of PW-168. I consider this a satisfactory explanation as to why the witness was not questioned on this matter when called by the Prosecution. I therefore consider that good cause has been shown.

28. I concur with my colleagues' decision to dismiss 3DW-12 and to allow Witness 3DW-19 to testify *viva voce*, but for different reasons, as stated above.

[36] *See* Reply, para. 22.

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

Judge O-Gon Kwon

Dated this twenty-eighth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]