



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-05-87/1-T
Date: 18 March 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Order: 18 March 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF WRITTEN EVIDENCE OF WITNESS K14 IN LIEU OF
ORAL TESTIMONY PURSUANT TO RULE 92BIS**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner
Ms Priya Gopalan
Ms Silvia D'Ascoli

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

I. BACKGROUND

1. This decision of Trial Chamber II (“Chamber”) of the International Criminal 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 in respect of the “Prosecution’s Motion for Admission of Written Evidence of Witness K14 in Lieu of Oral Testimony, Pursuant to Rule 92bis”, filed on 21 January 2009 (“Motion”). The Prosecution seeks the admission into evidence, pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”), of the transcript of prior testimony of Witness K14 (“Witness”) given in *Prosecutor v. Milutinović et al.*, of exhibits dealt with in that testimony, *i.e.* a written statement of the Witness and the transcript of the Witness’s testimony given in *Prosecutor v. Milošević*, and of an exhibit which illustrates uniforms used by the Army of Yugoslavia (“VJ”) units and the Republic of Serbia Ministry of Internal Affairs (“MUP”) units (“associated exhibit”). This Motion has been filed separately from the Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis, filed on 28 October 2008, because of the Witness’s status as a protected witness.¹ On 4 February 2009, Counsel for Vlastimir Đorđević (“Defence”) filed “Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Written Evidence of Witness K14 in Lieu of Oral Testimony, Pursuant to Rule 92bis” (“Response”), in which the Defence opposed the Motion.

II. SUBMISSIONS

2. The Prosecution submits that the proffered evidence is admissible pursuant to Rule 92bis because it does not go to proof of the acts and conduct of the Accused as charged in the Indictment, nor does it address the Accused’s participation in a joint criminal enterprise or his intention or state of mind.² It is submitted by the Prosecution that the proffered evidence is “crime-base”, the type of evidence for which Rule 92bis was primarily intended.³ While it is the Prosecution’s case, *inter alia*, that direct perpetrators of the crimes alleged in the Indictment are subordinates of the Accused,

¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T (“*Milutinović et al.*”), “Order Regarding Protective Measures”, 14 December 2006, *Prosecutor v. Nikola Šanović*, Case No IT-05-87-T, “Decision on Ex Parte and confidential Prosecution’s Motion for Witness Protection Measures, 7 June 2002.

² Motion, para 9.

³ Motion, para 9.

it is submitted that the Witness does not describe events involving the conduct of members of the upper echelons of the Serbian MUP or who are proximate to the Accused.⁴

3. It is submitted that the proffered evidence is relevant, reliable and has probative value within the meaning of Rule 89. The Prosecution submits, taking a surprisingly narrow view of the effect of the evidence, that the proffered evidence is cumulative on other *viva voce* evidence, that it “directly and exclusively concerns the impact of crimes upon victims” and that it will be used primarily to establish the “crime base.”⁵ It is further submitted that there is no public interest in the oral presentation of this evidence within the meaning of Rule 92bis(A)(ii), as the Witness has already testified in the *Milutinović et al.* trial.⁶

4. The Prosecution further submits that the Witness should not be required to appear for cross-examination as the proposed evidence “does not go to the core issues of the case” such as the acts and conduct of the Accused, the role or participation of the Accused in the alleged joint criminal enterprise (“JCE”), the structure of command and reporting system of the Serb army and police or the position the Accused held during the conflict.⁷

5. The Prosecution submits that it is not necessary for the moving party to repeat the cross-examination of the Witness on exhibits accompanying the transcript which it seeks to have admitted into evidence, because they form an inseparable part of the witnesses’ evidence.⁸

6. The Defence submits that the proffered evidence does go to proof of the acts and conduct of the Accused, particularly with regard to his command responsibility under Article 7(3) of the Statute of the Tribunal (“Statute”) and the allegation of participation in a JCE.⁹ It further submits that the acts of members of the Serb police and army are so proximate to the Accused that it would not be fair to permit this evidence to be given in written form.¹⁰

7. The Defence further requests that should the proffered evidence be admitted, the Witness be called for cross-examination.¹¹ While the Defence concedes that the right to cross-examination is not absolute, it submits that it should not be easily denied. Additionally, the Defence submits that the Defence in the *Milutinović et al.* trial did not address issues specific to the Accused and had a

⁴ Motion, para 9.

⁵ Motion, paras 13-14.

⁶ Motion, para 14.

⁷ Motion, para 17.

⁸ Motion, para 6.

⁹ Response, para 8.

¹⁰ Response, para 12.

¹¹ Response, para 11.

different “focus”.¹² It argues that the Defence should be allowed to put questions to the Witness in order to identify the perpetrators of the crimes involving the Witness.¹³ In this respect it submits that only one of the accused in the *Milutinović et al.* was concerned to deal with the MUP, but did so from an entirely different view point than concerns the Accused in the present case.¹⁴

8. Finally, the Defence objects to the admission of the associated exhibit on the basis that the Defence has had “no opportunity to challenge the authenticity or creation of this document.”¹⁵

III. LAW

9. The Chamber recalls its recent “Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis”, filed on 16 March 2009, wherein the Chamber reviewed the law applicable to the admission of evidence under Rule 92bis, and also the circumstances in which exhibits referred to in an earlier transcript of evidence or written statement may be received in evidence with the transcript or statement. It will not repeat it in this decision.¹⁶

IV. DISCUSSION

10. The transcript of the evidence of the Witness in the *Milutinović et al.* trial, the other transcript and the written statement in the proffered evidence relate to the same events, between 24 March 1999 and the end of May 1999. These alleged events include:

- (a) The expelling of the Witness from her home, two days after the start of the NATO bombing;
- (b) While a member of a convoy of refugee, observing police beating up men in the convoy;
- (c) On the way to Priština with her family, observing police seizing people’s vehicles and a woman being taken to be raped in the forest;
- (d) The rape of the Witness by a police officer.

¹² Response, para 16.

¹³ Response, para 16.

¹⁴ Response, para 16.

11. This evidence is to be viewed in the context of the Indictment which alleges, *inter alia*, that the Accused participated in a JCE and also planned, instigated, ordered, or otherwise aided and abetted five counts of violations of the laws or customs of war, between 1 January 1999 and 20 June 1999,¹⁷ including, *inter alia*, deportation, forcible transfer, and sexual assault of women in the municipality of Priština and Gnjilane. It is alleged that the Accused is criminally responsible as the superior of the perpetrators and he is also charged pursuant to Article 7(3) of the Statute. The Indictment alleges that the Accused was both the Assistant Minister of Interior and that he had responsibility as superior for all units and personnel of the RJB in Kosovo during the period relevant to the Indictment.¹⁸

12. By Rule 89, evidence, whether oral or written, must be relevant and have probative value. From their content it is clear that the written statement and the two transcripts proposed for admission are relevant to charges alleged in the Indictment.¹⁹ Nothing appears, or is advanced by the Defence, which indicates that the Witness is not credible. Further, the transcripts reveal that this evidence has twice been received in other trials in this Tribunal and has been tested by cross-examination. It is not apparent there is such a degree of variation between her accounts in the two trials or in her written statement that the Chamber accepts, therefore, that this evidence apparently has probative value, while accepting that there are issues requiring resolution.

13. The Witness does not purport to describe any personal acts or conduct of the Accused. Quite the contrary. In her evidence of the expulsion from her home, she describes the perpetrators very generally as soldiers and policemen and other conduct by policemen only. In some cases she purports to identify perpetrators by a name, physical appearance, clothing or uniform, but never as to implicate the Accused himself. Her evidence, therefore, does not deal with the acts or conduct of the Accused as charged in the Indictment, within the meaning of Rule 92*bis* (A).

14. Further, neither does the evidence of the Witness purport to deal with the acts or conduct of any of the other members of the JCE named in the Indictment. It is also apparent from the descriptions given in the proffered evidence of the actual perpetrators, that the Witness is not dealing with the acts or conduct of any person holding high office or senior rank, or who might be expected to have any direct or close relationship with the Accused or any other named members of

¹⁵ Response, para 18.

¹⁶ *Prosecutor v Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, 16 March 2009.

¹⁷ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, "Fourth Amended Indictment", 9 July 2008 ("Indictment"), Indictment, para 33.

¹⁸ Indictment, para 14.

the JCE. Rather, the perpetrators described in the proffered evidence appear to be junior army or police personnel serving in the field and considerably removed physically and by functions from the Accused and other named members of the JCE. In these circumstances, it is not apparent that the proffered evidence deals with persons or matters proximate to the Accused. As has been indicated it is nevertheless relevant and of apparent probative value.

15. In the view of the Chamber, therefore, it would not be unfair to the Accused for the evidence of the Witness to be given, at least in part, in written form as proposed by the Motion. Even so, Rule 92bis(C) contemplates that a witness whose evidence is received in written form may be required to appear for cross-examination. Whether that should be required must be determined having regard to the circumstances of each case, but a fundamental consideration is whether, having regard to the interest of justice, cross-examination ought to be allowed as a matter of fairness.

16. In this particular case, an issue which is strongly disputed is whether the perpetrators were subordinates to the Accused for the purposes of Article 7(3) of the Statute, or whether they were forces acting in furtherance of the alleged JCE for the purposes of Article 7(1) of the Statute.²⁰ In either case the identity of the actual perpetrators or of their military or police unit may be material to the criminal responsibility of the Accused in this trial. Further, it appears from the Prosecution's Pre-Trial Brief that the Witness is the only witness relied upon by the Prosecution to provide evidence in relation to the alleged rape of Albanian women in the course of the expulsions in the Municipality of Priština.²¹ Her evidence also deals directly with expulsions and sexual assaults as charged in the Indictment.²²

17. It is the view of the Chamber that in these circumstances, it would be unfair if the Accused was not given the opportunity to cross-examine the Witness, in particular with regard to her description or identification of the perpetrators. The Chamber is persuaded that in the interest of justice, the Witness should attend for cross-examination.

18. The Chamber is also persuaded in this case that the transcript of evidence of the Witness in the *Milosević* trial and the previous written statement of the Witness, each of which are referred to in the testimony of the Witness in the *Milutinović et al.* trial and received as exhibits, form an

¹⁹ Indictment, Count 1 (deportation), Count 2 (Other Inhumane Acts (Forcible Transfer)), Count 5 (Persecutions on political, racial and religious grounds).

²⁰ Indictment, paras 21-22.

²¹ See *Prosecution v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, ("Prosecution's Submissions Pursuant to Rule 65ter (E) with Confidential Annex 1, Annex II, Annex III"), 1 September 2008, ("Prosecution Pre-Trial Brief"), para 232; See also *Prosecution v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, "Prosecution's Notice in Respect to its Rule 65ter Witness List with Annex 1", 1 September 2008, p 2173.

²² Indictment, paras 72(g), 72(i), 73, 77(a) and 77(c).

inseparable and indispensable part of the testimony of the Witness in the *Milutinović et al.* trial and may be admitted in evidence with the transcript of that evidence.²³ Nevertheless, the Chamber is not satisfied that the associated exhibit forms an inseparable and indispensable part of the Witness's testimony in the *Milutinović et al.* case. The Chamber notes that the Witness's testimony in the *Milutinović et al.* case does not discuss the associated exhibit *per se*, and that the associated exhibit is not one without which the Witness's testimony becomes incomprehensible or of lesser probative value.²⁴ However, the Chamber considers that the Witness's evidence contained in the associated exhibit focuses on the identification of the perpetrators and could potentially be helpful to illustrate the Witness's evidence in the *Milutinović et al.* trial. The Chamber finds it to be a preferable manner in which to deal with the associated exhibit to defer its admission until the Witness comes to testify, in order to enable the Prosecution to ask the Witness to comment on its content. The presence of the Witness in court will be of assistance in determining whether the associated exhibit sought for admission meets the criteria set out in the jurisprudence in relation to Rule 92*bis*.

For the reasons stated above,

The Chamber, pursuant to Rules 89 and 92*bis* of the Rules, **HEREBY GRANTS** the Motion **IN PART** in that it:

DECIDES that the proffered transcript of the previous testimony of the Witness in the *Milutinović et al.* trial, together with the exhibits referred to in that evidence and proffered as evidence in the Motion, i.e. the transcript of evidence in the *Milutinović et al.* trial and the previous statement of the Witness, may be admitted into evidence when the Witness appears for cross-examination.

DEFERS its decision on the admission of the associated exhibit until the time when the Witness appears in court to testify;

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

²³ *Lukić and Lukić* Decision, para 15; See also *Milošević* Decision, para 23; *Prosecutor v. Paško Ljubičić*, Case No.: IT-00-41-PT, "Decision on Prosecution's Motion for Admission of Transcripts Pursuant to Rule 92 *bis* (D) of the Rules", 23 January 2004, p 3; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No.: IT-98-34-PT, "Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D)", 9 July 2001, para 8.

²⁴ *Ibid*



Judge Kevin Parker
Presiding

Done this 18th day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]