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**UNITED
NATIONS**



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T
Date: 2 October 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding Judge
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 2 October 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
ADMISSION OF EVIDENCE
PURSUANT TO RULE 92 *BIS***

The Office of the Prosecutor

Mr. Mark Harmon

Counsel for the Accused

Mr. Novak Lukić
Mr. James Castle
Mr. Gregor Guy-Smith

1. Trial Chamber I (“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 “Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis* with Confidential Annexes A and B” filed partly confidentially on 1 May 2007 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

A. Prosecution Motion

2. In its Motion, the Prosecution seeks admission of written evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence (“Rules”), being the statements of the witnesses listed in Confidential Annex A (“Proposed Statements”), as well as the exhibits that accompany the written statements (“Proposed Exhibits”).¹

3. The Prosecution submits that many of the Proposed Statements are of a cumulative nature and contain facts regarding the impact of crimes upon victims or relating to relevant historical, political or military background, factors that favour admission of the evidence under Rule 92*bis*.² Furthermore, it is submitted that the admission of evidence in the form of written statements will expedite trial proceedings as well as prevent the victims from returning to the Tribunal to testify multiple times regarding the same evidence.³

4. According to the Prosecution, the Proposed Exhibits form an inseparable and indispensable part of the statements in which they are discussed and therefore are admissible in the present trial.⁴

B. Prosecution Report

5. On 23 May 2008, the Prosecution filed, partly confidentially, its “Report on Reduction of Length of Prosecution Case with Confidential Annex A” (“Prosecution Report”), in which the Prosecution seeks to amend its Motion to the effect that, subject to the acceptance of a Revised Witness List attached to the Report, it now only seeks admission of written evidence pursuant to Rule 92*bis* of the Rules of three witnesses in its Revised Witness List.⁵

¹ Motion, paras 1-2.

² Motion, paras 15-17.

³ Motion, para. 18.

⁴ Motion, para. 20.

⁵ Report, para. 6 and footnote 8.

C. Defence Response

6. On 19 June 2007, the Defence filed partly confidentially the “Response to Prosecution’s Motion for Admission of Evidence Pursuant to Rules 92*bis* and 92*ter*” (“Response”), whereby it opposes the Motion. As a preliminary point the Defence submits that the concept of equality of arms would be violated if the Proposed Statements were to be admitted without adequate opportunity for cross-examination.⁶ The Defence also alleges that the Trial Chamber and the Defence will be deprived of an opportunity to assess the demeanour of the witnesses merely from a review of the written evidence.⁷ The Defence incorporates these arguments by reference to the “Defence Memorandum Brief on the Application of the Rights Contained in the ICTY Statute and the ICCPR to the Presentation of Evidence with Appendix A”⁸ and the “Response to Prosecution’s Motion for Admission of Evidence Pursuant to Rules 89 and 92 *quater*”.⁹

7. Although the Response was filed prior to the Prosecution Report, the objections, which were raised in relation to the admission of written evidence of the three remaining witnesses in the Prosecution’s Revised Witness List, still stand. In this light, the Defence’s position is as follows:

- (a) In relation to Faris Gavrankapetanović, the position of the Defence is not stated.
- (b) In relation to Fikreta Pačarić, the Defence objects that some of the 92*bis* materials are not accompanied by translations.
- (c) In relation to Zjena Šljivo, the Defence objects that some of the 92*bis* materials are not accompanied by translations.

D. Prosecution Reply

8. On 26 June 2007, the Prosecution filed the “Prosecution’s Request for Leave to File Reply and Prosecution’s Consolidated Reply to Defence’s Responses to Prosecution’s Motions Pursuant to Rule 89 and Rules 92*bis*, 92*ter*, 92*quater*” (“Reply”), whereby the Prosecution recalls the Appeals Chamber’s findings that the right to cross-examine a witness is not absolute and thus, the Defence arguments should be rejected.¹⁰

⁶ Response, para. 3

⁷ Response, para. 3.

⁸ 16 May 2006.

⁹ 19 June 2007.

¹⁰ Reply, para. 19.

9. In the Reply the Prosecution also submits that it is improper for the Defence to incorporate by reference arguments made in a previous filing, which would be in excess of the word limit for responses.¹¹

II. APPLICABLE LAW

10. Rule 92 *bis* of the Rules governs the procedure for admission into evidence of written statements or transcripts in lieu of oral testimony of a witness, provided it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.¹² The evidence sought to be admitted pursuant to Rule 92 *bis* of the Rules must also fulfil the general requirements of admissibility pursuant to Rule 89 of the Rules. The proposed evidence must therefore be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.¹³ A written statement must be accompanied by a declaration of the provider that its contents are true and correct to the best of that person's knowledge and belief. This declaration must be witnessed and verified in writing by an authorised person.¹⁴

A. The Acts and Conduct of the Accused

11. Rule 92 *bis* of the Rules stipulates that the material sought to be admitted must not go to proof of the acts and conduct of the accused as charged in the indictment. The Appeals Chamber in *Galić* made a clear distinction here between a) the acts and conduct of others who commit the crimes for which the indictment alleges that the accused is individually responsible, and b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those other persons. The Appeals Chamber found that evidence going to proof of the latter renders material inadmissible under Rule 92 *bis*.¹⁵

B. Acts and Conduct of Others – Proximity to the Accused

12. When the evidence sought to be admitted under Rule 92 *bis* goes to proof of the acts and conduct of others as opposed to those of the accused, the Trial Chamber must still exercise its discretion under Rule 92 *bis* and take into account the proximity of such acts and conduct to the

¹¹ Reply, paras 2-3, 5, 19. See *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Defence Memorandum Brief on the Application of the Rights Contained in the ICTY Statute and the ICCPR to the Presentation of Evidence with Appendix A, 16 May 2006; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Order on Defence Memorandum Brief, 31 May 2006.

¹² Rule 92 *bis*(A) of the Rules introduces a non-exhaustive list of factors that may be taken into account by the Trial Chamber in favour or against admission of a written statement or a transcript pursuant to this Rule.

¹³ See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, (*Galić* Decision), para. 31.

¹⁴ Rule 92 *bis*(B) of the Rules.

¹⁵ *Galić* Decision, para. 9.

accused. This is particularly relevant in cases as the present one which concerns charges arising solely under Article 7(3) of the Statute. As stated by the Appeals Chamber:

[I]t may well be that the subordinates of the accused (or those alleged to be his subordinates) are so proximate to the accused that *either* (a) the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92 *bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form, *or* (b) the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event.¹⁶

C. Factors in Favour and Against Admitting Evidence Pursuant to Rule 92 *bis*

13. Rule 92 *bis*(A) introduces a non-exhaustive list of factors that may be taken into account by the Trial Chamber in favour or against admission of a transcript or written statement. Factors in favour of admission include where the evidence in question is of cumulative nature, relates to relevant historical, political or military background, consists of an analysis of the ethnic composition of the population, concerns the impact of crimes upon the victims, relates to issues of the character of the accused or relates to the sentencing factors. Factors militating against admission include where there is an overriding public interest in such evidence being presented orally, a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value, or there are any other factors which make it appropriate for the witness to attend for cross-examination.

D. Non-Admittance and Appearance for Cross-Examination

14. The proximity to the accused of the acts and conduct described in the written evidence is a factor to be taken into account by the Trial Chamber in deciding whether the evidence is so pivotal to the prosecution case that it should not be admitted in written form at all.¹⁷ Another factor to be considered by the Trial Chamber is whether the evidence in question relates to “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue”.¹⁸ Rule 92 *bis*(C) allows a Trial Chamber to call the provider of a written statement for cross-examination.

¹⁶ *Galić* Decision, para. 15 (emphasis in original). The Appeals Chamber further points out that “Rule 92*bis* was primarily intended to be used to establish what has now become known as “crime-base” evidence, rather than the acts and conduct of what may be described as the accused’s immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know”, *Galić* Decision, para. 16.

¹⁷ See *Galić* Decision, para. 15. If the witness was cross-examined in the previous proceedings, the Trial Chamber should also determine whether cross-examination in those proceedings adequately dealt with the issues relevant to the defence in the current proceedings, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006 (“*Martić* Decision”), para. 15.

¹⁸ *Martić* Decision, para. 15; *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, paras 24-25.

E. Probative Value

15. In assessing the statements' probative value, the Trial Chamber will consider the degree of precision of the information provided as well as whether the information is based on first-hand knowledge or hearsay. The Trial Chamber recognises that the cumulative nature of the evidence is presented in Rule 92 *bis* as one of the factors in favour of admission.

F. Associated Exhibits

16. It is well-established in the jurisprudence of the Tribunal that "exhibits accompanying written statements or transcripts form an inseparable and indispensable part of the testimony and can be admitted along with statements or transcripts".¹⁹ However, it is important to qualify this statement by noting that not every document referred to in the written statement of a witness automatically forms an "inseparable and indispensable part" of the testimony of this witness: "A document falls into this category if the witness actually discussed the document and if it is one without which the written statement would become incomprehensible or of lesser probative value".²⁰

III. DISCUSSION

A. Translation of Exhibits and Transcripts of Witness Testimonies

17. Although the Defence objects that some of the materials, in relation to Fikreta Pačarić and Zjena Šljivo, are unaccompanied by translations, the Prosecution has subsequently resolved this issue and provided translations. In light of this information, this objection of the Defence is moot.

B. Incorporation of Arguments by Reference to Previous Filings

18. The Trial Chamber notes that in its previous decision it rejected the objections presented by the Defence in "Defence Memorandum Brief on the Application of the Rights Contained in the ICTY Statute and the ICCPR to the Presentation of Evidence with Appendix A" insofar as they related to the procedure governed by Rule 92 *bis* of the Rules.²¹

¹⁹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *ter*, 22 February 2007, p. 3; *Prosecutor v. Naletilić and 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.

²⁰ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15.

²¹ See Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base, 22 September 2008, paras 15-25.

C. Admission of Rule 92 bis Evidence

19 The Proposed Statements and Exhibits must satisfy the requirements of Rule 92 *bis*, as well as the general requirements of admissibility in order to be admitted. After careful review of the Proposed Statements, the Trial Chamber makes the following determinations.

1. Faris Gavrankapetanović

20. Regarding Faris Gavrankapetanović the following written statements are at issue:

- (a) Written statement of 11 October 2001 confirming the witness' position as General Manager of the Koševo Hospital in Sarajevo and authenticating the accuracy and integrity of medical records and hospital documents;²²
- (b) Written statement of 13 December 2001 explaining the system of record keeping that is used at the Koševo Hospital in Sarajevo;²³ and
- (c) Written statement of 11 January 2002 confirming the validity of records from the Clinical Centre of the University of Sarajevo and amending the statements of 11 October 2001 and 13 December 2001.²⁴

21. As a preliminary point, the Trial Chamber notes that the Defence makes no objections in relation to the admission of the evidence of Faris Gavrankapetanović. However, the Trial Chamber must still assess the evidence against the requirements of Rule 92 *bis* and the general requirements for admission of evidence.

22. In terms of the requirements of Rule 92 *bis*, the Trial Chamber observes that the written statements of Faris Gavrankapetanović concern the reliability of medical data and record keeping at the Koševo Hospital in Sarajevo and does not go to the acts and conduct of Momcilo Perišić ("Accused"). Furthermore, the evidence "concerns the impact of crimes upon victims", which is a factor in favour of admission of evidence in the form of a written statement.²⁵ In addition, there are no factors against the admission of the evidence in written form. Moreover, the Trial Chamber finds this evidence relevant and of probative value. Finally, their probative value is not substantially outweighed by the need to ensure a fair trial. The Trial Chamber therefore concludes that the evidence meets the requirements of Rules 89 and 92 *bis*.

²² 0211-6038 – 0211-6041 (Eng. ERN) / 0215-6520 – 0215-6523 (0302-7693 – 0302-7696) (BCS ERN).

²³ 0214-4086 – 0214-4090 (Eng. ERN) / 0215-6524 – 0215-6528 (0304-2464 – 0304-2468) (BCS ERN).

²⁴ 0229-5723 – 0229-5726 (Eng. ERN) / 0215-6529 – 02156529 (BCS ERN).

²⁵ Rule 92 *bis* (A)(i)(c).

23. Considering that his evidence fulfils all relevant requirements, the Trial Chamber admits into evidence the written statements of Faris Gavrankapetanović pursuant to Rule 92 *bis* without the need for the witness to appear for cross examination.

24. In addition, the following exhibits accompany the written statements of Faris Gavrankapetanović:

- (i) Extract from the Sarajevo Clinical Centre reception and triage block;²⁶
- (ii) Two sets of medical documentation;²⁷
- (iii) Extract from record operating room of surgical clinics;²⁸
- (iv) Patient history from the University Medical Centre.²⁹

25. The Trial Chamber considers that these exhibits form an indispensable and inseparable part of the written statements they accompany. Therefore, the Trial Chamber admits into evidence the exhibits accompanying the written statements of Faris Gavrankapetanović pursuant to Rule 92 *bis*.

2. Fikreta Pačariz

26. Regarding Fikreta Pačariz the following written statements are at issue:

- (i) Written statement of 27 July 1995 made to the Bosnian authorities describing a shelling in Hrasnica and its impact on civilians;³⁰
- (ii) Written statement of 8 March 1997 made to an Investigator of the Prosecution describing a shelling in Hrasnica and its impact on civilians;³¹ and
- (iii) Written statement of 24 April 2006 made to an Investigator of the Prosecution describing a shelling in Hrasnica and its impact on civilians.³²

27. As a preliminary point, the Trial Chamber notes that the Defence makes no objections in relation to the admission of the evidence of Fikreta Pačariz, apart from its objection regarding translation which is now moot.

²⁶ 0301-4353 – 0301-4400 (Eng. ERN) / 0215-6586-0215-6602 (0211-6043 – 0211-6059) (BCS ERN).

²⁷ 1st set of documentation: 0302-2513 – 0302-2535 (Eng. ERN) / 0215-6530 – 0215-6556 (0211-6010 – 0211-6033) (BCS ERN). 2nd set of documentation: 0302-3410 – 0302-3433 (Eng. ERN) / 0215-6613-0215-6624 (0211-6071 – 0211-6082) (BCS ERN).

²⁸ 0303-4087 – 0303-4110 (Eng. ERN) / 0215-6603 – 0215-6612 (0211-6061 – 0211-6070) (BCS ERN).

²⁹ L005-6199 – L005-6206 (Eng. ERN) / 0215-6580 – 0215-6582 (0211-5962 – 0211-5967) (BCS ERN).

³⁰ 0048-5377-ET (Eng. ERN) / 0048-5377 (0607-5809) (BCS ERN).

28. In terms of the requirements of Rule 92 *bis*, the Trial Chamber observes that the written statements of Fikreta Pačarić concern a description of a shelling attack in Hrasnica: the evidence exclusively pertains to the “crime base” and does not go to the acts and conduct of the Accused. Furthermore, the evidence “concerns the impact of crimes upon victims”, which is a factor in favour of admission of evidence in the form of a written statement.³³ In addition, there are no factors against the admission of the evidence in written form. Moreover, the Trial Chamber finds this evidence relevant and of probative value. Finally, their probative value is not substantially outweighed by the need to ensure a fair trial. The Trial Chamber therefore concludes that the evidence meets the requirements of Rules 89 and 92 *bis*.

29. Considering that his evidence fulfils all relevant requirements, the Trial Chamber admits into evidence the written statements of Fikreta Pačarić pursuant to Rule 92 *bis* without the need for the witness to appear for cross examination.

3. Zjena Šljivo

30. Regarding Zjena Šljivo the following written statements are at issue:

- (i) Written statement of 27 July 1995 made to the Bosnian authorities describing a shelling attack in Hrasnica;³⁴ and
- (ii) Written statement of 8 March 1997 made to an Investigator of the Prosecution describing a shelling attack in Hrasnica.³⁵

31. As a preliminary point, the Trial Chamber notes that the Defence makes no objections in relation to the admission of the evidence of Zjena Šljivo, apart from its objection regarding translation which is now moot.

32. In terms of the requirements of Rule 92 *bis*, the Trial Chamber observes that the written statements of Zjena Šljivo concern a description of a shelling attack in Hrasnica: the evidence exclusively pertains to the “crime base” and does not go to the acts and conduct of the Accused. Furthermore, the evidence “concerns the impact of crimes upon victims”, which is a factor in favour of admission of evidence in the form of a written statement.³⁶ In addition, there are no factors against the admission of the evidence in written form. Moreover, the Trial Chamber finds this

³¹ 0048-5374 – 0048-5376 (0607-5810 – 0607-5812) (Eng. ERN) / 0048-5374 – 0048-5376-BCST (BCS ERN).

³² 0600-0846 – 0600-0851 (0607-5813 – 0607-5818) (Eng. ERN) / 0600-0846 – 0600-0851-BCST (BCS ERN).

³³ Rule 92 *bis* (A)(i)(c).

³⁴ 0307-6928 (Eng. ERN) / 0607-5846 (BCS ERN).

³⁵ 0607-5846 – 0607-5850 (Eng. ERN).

³⁶ Rule 92 *bis* (A)(i)(c).

evidence relevant and of probative value. Finally, their probative value is not substantially outweighed by the need to ensure a fair trial. The Trial Chamber therefore concludes that the evidence meets the requirements of Rules 89 and 92 *bis*.

33. Considering that his evidence fulfils all relevant requirements, the Trial Chamber admits into evidence the written statements of Zjena Šljivo pursuant to Rule 92 *bis* without the need for the witness to appear for cross examination.

IV. DISPOSITION

34. For the reasons set out above, and pursuant to Articles 20 and 21 of the Statute and Rules 54, 89 and 92 *bis* of the Rules, the Trial Chamber hereby

GRANTS leave to the Prosecution to file the Reply,

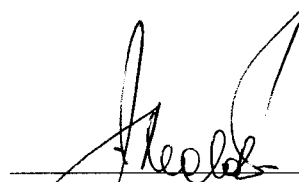
GRANTS the Motion,

DECIDES as follows:

1. The Proposed Statements are admitted into evidence;
2. The Proposed Exhibits accompanying the written statements of Faris Gavrankapetanović are admitted into evidence;

REQUESTS the Registry to assign exhibit numbers to the Proposed Statements admitted into evidence.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this second day of October 2008

At The Hague

The Netherlands

[Seal of the Tribunal]