



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: 29 January 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: 29 January 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO ADD EIGHTEEN
WITNESSES TO ITS 65 *TER* LIST AND ADMIT THEIR WRITTEN
STATEMENTS PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor

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Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović 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”);

BEING SEISED OF the “Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit Their Written Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Attached Appendices”, filed confidentially on 3 January 2008 (“Motion”), in which the Prosecution seeks the addition of eighteen witnesses (“witnesses”) to its Rule 65 *ter* List, and further seeks the admission of written statements of the witnesses (“statements”) without cross-examination pursuant to Rule 92 *bis*;

NOTING the “Joint Defence Response to Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit Their Written Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed confidentially on 15 January 2008 (“Response”), and the “Prosecution’s Request for Leave to Reply and Reply to Joint Defence Response to Prosecution’s Motion to Add Eighteen Witnesses to its 65 *ter* List and to Admit Their Written Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 22 January 2008 (“Reply”);

I. PROCEDURAL BACKGROUND

RECALLING the “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 (“12 September 2006 Rule 92 *bis* Decision”), in which the Trial Chamber denied the Prosecution’s request to admit the statements as exhibits appended to the transcript of a different witness that testified in *Prosecutor v. Radislav Krstić*;¹

RECALLING the “Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed on 12 October 2006, in which the Prosecution sought the admission of the statements directly pursuant to Rule 92 *bis*;²

RECALLING the “Order on Prosecution Submission Pursuant to Rule 92 *bis* Decision Issued 12 September 2006”, issued on 13 December 2006 (“Order of 13 December 2006”), in which the Trial Chamber denied the Prosecution’s request, considering that

¹ 12 September 2006 Rule 92 *bis* Decision, paras. 92–94.

² Prosecution’s Submission Pursuant to the Trial Chamber’s 12 September 2006 Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 October 2006, para. 18(iv).

each of the Accused opposes the Prosecution's request [...] to admit eighteen written statements pursuant to Rule 92 *bis* that were originally appended as exhibits to the transcript of Witness No. 64 with the "*Confidential* Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", filed on 12 May 2006 [...], that Nikolić argues the Prosecution should file a new motion which outlines precisely how the eighteen proffered statements fulfil the requirements of Rule 92 *bis* and why the statements should be admitted in this trial, and that Miletić and Gvero argue the Prosecution has failed its burden of demonstrating why the statements should be admitted under Rule 92 *bis*(A), and that Popović and Pandurević assert that the Prosecution should have included these eighteen witnesses on its witness list, and should first move to amend the list by adding these witnesses;³

RECALLING that in the Order of 13 December 2006, the Trial Chamber ordered that

If the Prosecution wishes to introduce the eighteen written statements at issue in the Submission pursuant to Rule 92 *bis* it shall, in a single motion: 1) move to amend its witness list by adding each of the eighteen witnesses, and 2) file a new request to introduce the statements pursuant to Rule 92 *bis*, including an analysis of each statement detailing how it fulfils the requirements of Rule 92 *bis* and why it should be admitted in this trial;⁴

II. THE SUBMISSIONS

NOTING the Prosecution's assertion that it seeks to add the witnesses to its Rule 65 *ter* List because their evidence "largely goes to proof of the crime base and victim impact that underlies the charges contained in paragraph 33 of the Indictment",⁵ and that the Defence will not be prejudiced by the addition of the witnesses as "both the statements and the Prosecution's intention to seek their admission have been known to the Defence for at least a year";⁶

NOTING the Prosecution's arguments that the statements are appropriate for admission without cross-examination pursuant to Rule 92 *bis* because:

- a) the evidence does not go to the acts or conduct of any Accused;⁷
- b) the evidence is cumulative of testimony given by other witnesses, it relates to the historical record, it concerns the impact of the crimes upon victims, and otherwise relates to factors to be taken into account in sentencing;⁸
- c) "the Prosecution will not be able to call these eighteen witnesses to give live testimony due to time constraint, as well as considering the burden that would be imposed upon the victims to relive the events";⁹

³ Order of 13 December 2006, p. 3 (internal citations omitted).

⁴ *Ibid.*, p. 4.

⁵ Motion, para. 5.

⁶ *Ibid.*, para. 6.

⁷ *Ibid.*, para. 8.

⁸ *Ibid.*, para. 14.

⁹ *Ibid.*, para. 8.

- d) “[t]he evidence that would be *tested* by requiring cross-examination has already been effectively challenged through the examination of other evidence with which the statements at issue are consistent and cumulative”;¹⁰ and
- e) the statements satisfy the requirements of Rule 92 *bis*(B) because each statement comprises a “Record of Witness Interview” given before an authorised Investigating Judge in Bosnia and Herzegovina together with an accompanying statement made to a Prosecution investigator which is fully incorporated by reference in the Record and forms part of the statement;¹¹

NOTING that the Defence object to the Motion on the grounds that:

- a) the Prosecution should have filed the Motion within a reasonable time following the Order of 13 December 2006, and has shown no valid cause for its late request;¹²
- b) as the Prosecution failed to file the Motion within a reasonable time following the Order of 13 December 2006, the Defence “reasonably considered that the Prosecution reassessed its position as to these 18 witnesses”, especially as the Prosecution’s 16 October 2007 Submission Regarding the Presentation of the Remaining Evidence in the Prosecution Case made no mention of the witnesses or their statements;¹³
- c) “the Defence did not have a possibility to test this evidence through other Prosecution witnesses and will not have such possibility at this juncture of the trial” and, without cross-examination, the admission of the statements would be “obviously prejudicial to the Accused”;¹⁴
- d) the Prosecution itself created the current time constraints “due to their own indolence, or for strategic reasons, thus causing the late and untimely filing of the Motion”;¹⁵
- e) the statements “introduce some elements that have never been presented before the Tribunal”;¹⁶

¹⁰ *Ibid.*, para. 19.

¹¹ *Ibid.*, paras. 21–28.

¹² Response, para. 10.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, para. 19.

¹⁶ *Ibid.*, para. 21.

- f) all the statements present elements that the witnesses could not have observed themselves, some statements are internally inconsistent, and the relevance of at least two of the statements have not been shown;¹⁷
- g) “[t]he fact that the witnesses were warned of the consequences of giving false testimony, is valuable only for the record taken by the Investigative Judge and cannot be extended to the OTP statements given before the witnesses received the warning”;¹⁸
- h) as the statements were taken in criminal proceedings against Radislav Krstić in Bosnia and Herzegovina in 2000—while Radislav Krstić was an accused in the custody of the International Tribunal—the statements do not meet the requirements of Rule 92 bis(B) because “the proceedings in Bosnia and Herzegovina could not be legal, as it is not possible to have two parallel criminal proceedings against the same person for the same offence, and [...] the Investigating Judge did not act in accordance of the law and procedure of a State”;¹⁹ and
- i) the Defence has never had any possibility of cross-examining these witnesses;²⁰

NOTING that in its Reply, the Prosecution does not explain why it waited over a year to file the Motion, but characterises the Motion as timely pursuant to Rule 73, noting that the Order of 13 December 2006 did not specify a deadline;²¹

NOTING further the Prosecution’s assertions that “the record taken before the investigating judge included, for each witness, the affirmative and express adoption of their OTP statements, not just in terms of authorship but of the veracity of their respective content”;²² and that the Defence has provided no evidence or support for its argument that the statements before the Investigating Judge “lacked legal authorisation or legitimacy under the laws of Bosnia and Herzegovina”;²³

¹⁷ *Ibid.*, para. 22.

¹⁸ *Ibid.*, para. 25.

¹⁹ *Ibid.*, para. 26.

²⁰ *Ibid.*, para. 30.

²¹ Reply, para. 5.

²² *Ibid.*, para. 8.

²³ *Ibid.*, para. 9.

III. ANALYSIS

A. Addition of the witnesses to the Rule 65 *ter* List

CONSIDERING that although the Trial Chamber does not condone the Prosecution's decision to delay the filing of the Motion until this stage of the trial, the Prosecution is correct that it has violated no rule of procedure or order of the Trial Chamber, and the Motion is not technically untimely;

CONSIDERING that the Trial Chamber has held that "in striking a balance [...] at this stage of the proceedings, the Trial Chamber should primarily consider whether the rights of the Accused will be adequately protected if exhibits [...] will be added to the Prosecution Exhibit List"²⁴ and that "the Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the [...] exhibit list was shown";²⁵

CONSIDERING that the statements are *prima facie* relevant and of probative value to issues raised in the Indictment, and that the Trial Chamber's invitation to the Prosecution in the Order of 13 December 2006 establishes good cause for the Prosecution's request to add the witnesses to the Rule 65 *ter* List;

CONSIDERING the history of the Prosecution's requests for the admission of the statements of the witnesses,²⁶ and that the Defence has had ample opportunity to review the statements such that the rights of the Accused will not be prejudiced by the addition of the witnesses to the Prosecution's Rule 65 *ter* List at this stage of the trial;

B. Admission of the statements pursuant to Rule 92 *bis*

CONSIDERING that the statements concern primarily the impact of crimes upon victims and relate to factors to be taken into account in determining sentencing;

²⁴ Decision on Prosecution's Motion for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006, p. 6.

²⁵ *Ibid.*, p. 7.

²⁶ Confidential Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 May 2006; Prosecution's Submission Pursuant to the Trial Chamber's 12 September 2006 Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 October 2006.

CONSIDERING that to the extent the statements deal with the crime base they are cumulative to evidence already admitted and that nothing in the statements goes to the acts or conduct of any of the Accused;

CONSIDERING that the Trial Chamber is unable to glean from the Defence's unelaborated assertion which statements—if any—might “introduce some elements that have never been presented before the Tribunal”, and that the Trial Chamber's own review has revealed nothing in the statements to support the Defence assertion;

CONSIDERING that there is no overriding public interest in requiring these witnesses to present their evidence orally,²⁷ and that nothing in the nature or the source of the statements renders them unreliable,²⁸ and that any prejudicial effect of the statements does not outweigh their probative value;²⁹

CONSIDERING, therefore, that the Trial Chamber is persuaded that the statements are appropriate for admission without cross-examination pursuant to Rules 92 *bis*(A) and (C);

CONSIDERING that the declarations to the Prosecution investigators appear to have been fully adopted by the witnesses and incorporated into the statements made to the Investigating Judge after being warned “that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony”,³⁰

CONSIDERING that the Defence has provided no legal authority for its assertion that the making of the statements to the Investigating Judge were not legally obtained or that the Investigating Judge did not act “in accordance with the law and procedure of a State”,³¹

CONSIDERING, therefore, that the statements satisfy the requirements of Rule 92 *bis*(B);

IV. DISPOSITION

PURSUANT TO Rules 54, 73 *bis*, 92 *bis* and 126 *bis* of the Rules,

HEREBY GRANTS the Motion and **ORDERS** as follows:

1. The Prosecution is granted leave to file the Reply.

²⁷ Rule 92 *bis*(A)(2)(a).

²⁸ Rule 92 *bis*(A)(2)(b).

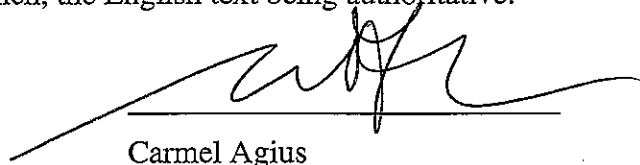
²⁹ *Ibid.*

³⁰ Rule 92 *bis*(B)(ii)(c).

³¹ Rule 92 *bis*(B)(i)(a).

2. The Prosecution is granted leave to add the witnesses listed in Appendix 1 of the Motion to its Rule 65 *ter* List.
3. By majority (Judge Agius dissenting solely as to whether cross-examination should be permitted), the statements and accompanying photographic exhibits attached to the Motion at Appendix 3 are admitted without the witnesses being required to appear for cross-examination.

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



Carmel Agius
Presiding

Dated this twenty-ninth day of January 2008
At The Hague
The Netherlands

[Seal of the Tribunal]