



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-05-88/2-T
Date: 7 September 2011
Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 7 September 2011

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF THE
WRITTEN EVIDENCE OF BEHARA KRDŽIĆ
PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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 Motion for Admission of the Written Evidence of Behara Krdžić Pursuant to Rule 92 *bis*”, filed on 22 July 2011 (“Motion”), in which the Prosecution requests that the Chamber admit the written evidence of Behara Krdžić pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”);¹

NOTING that the Chamber previously denied the Prosecution’s request for the admission of Krdžić’s written evidence without prejudice as a result of an apparent omission in the evidence previously provided to the Chamber;²

NOTING that the Prosecution submits that the Motion was filed “to correct a purely administrative error that resulted in the Trial Chamber having before it an incomplete witness statement”³ and that: (1) the proposed evidence does not mention the Accused and therefore does not go to the acts and conduct of the Accused;⁴ (2) the proposed evidence is corroborated by other evidence currently before the Chamber;⁵ (3) the proposed evidence meets several factors weighing in favour of admission, including that the statement is of a cumulative nature, relates to the relevant historical background, and concerns the impact of crimes upon victims;⁶ (4) the factors weighing against admitting the proposed evidence do not apply because there is no overriding public interest in Krdžić’s oral testimony, no reason to find the statement unreliable, and no reason to suppose that its prejudicial effect would outweigh its probative value;⁷ (5) the proposed evidence was previously admitted in the *Popović* case pursuant to Rule 92 *bis* and was presented orally before the Tuzla Cantonal Court during criminal proceedings against Radislav Krstić, which involved substantially similar events as the current proceeding, occurring within the same time frame;⁸ and (6) there are no

¹ Motion, para. 1.

² Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rules 92*bis* and 94*bis*, 7 July 2010 (“Decision on Prosecution’s First Rule 92 *bis* Motion”), para. 86. The evidence previously provided to the Chamber included a “Record of Witness Interview” before an investigating judge of the Cantonal Court in Tuzla, which referred to a five page statement to the Office of the Prosecutor, despite the fact that the statement appended to the “Record of Witness Interview” was only two and a half pages long. *Ibid.*

³ Motion, para. 1.

⁴ Motion, para. 13.

⁵ Motion, para. 16; *see also* Appendix B to the Motion (referring to, *inter alia*, the evidence of DutchBat witnesses also present in Potočari, including Robert Franken, Pieter Boering, and others; Bosnian Muslim witnesses and relatives of victims including PW-011 and PW-012; Adjudicated Facts including 433–439, 441–444, 446–451; and documentary evidence such as Ex. P00213, Ex. P01940, and Ex. P01369).

⁶ Motion, para. 17.

⁷ Motion, para. 18.

⁸ Motion, para. 19.

circumstances that make cross-examination absolutely necessary in order to protect the rights of the Accused, particularly when considered in light of the traumatic nature of Krdžić's experience;⁹

NOTING that the Accused submits that the proposed evidence should not be admitted pursuant to Rule 92 *bis* notwithstanding that it contains no reference to his acts and conduct because Krdžić could provide information pertaining to how and why the civilians came to gather at and depart from Srebrenica, Potočari, and the Srebrenica enclave;¹⁰

NOTING the Accused's further submission that the proposed evidence does not clearly identify the context in which Krdžić gave the proposed evidence to the Prosecution;¹¹

NOTING the requirements of Rules 89 and 92 *bis* set out and discussed in the Decision on Prosecution's First Rule 92 *bis* Motion;¹²

NOTING that, pursuant to Rule 92 *bis*, the Chamber may admit the statement of a witness in lieu of oral testimony where the evidence goes to proof of a matter other than the acts and conduct of the Accused and that such evidence may be admitted without cross-examination;

RECALLING that, in the Decision on Prosecution's First Rule 92 *bis* Motion, the Chamber already found that the proposed evidence (1) is *prima facie* relevant and probative pursuant to Rule 89(C), (2) does not relate to proof of the acts and conduct of either the Accused or proximate members of the alleged JCEs, (3) is appropriately characterised as crime base evidence, and (4) is sufficiently cumulative within the meaning of Rule 92 *bis*;¹³

CONSIDERING that Chamber has reviewed the proposed evidence, which satisfies the requirements of Rule 92 *bis*(B) and clearly identifies the context in which the statement was given to the Prosecution within the statement itself;

CONSIDERING that the proposed evidence is cumulative in that other witnesses have testified to the gathering of civilians at Srebrenica and Potočari, and that the Accused has had the opportunity to cross-examine them;¹⁴

⁹ Motion, para. 20.

¹⁰ Response to Prosecution Request that the Statement of Behara Krdžić be Admitted Pursuant to Rule 92 *bis* of the Rules ("Response"), 24 August 2011, paras. 2–3.

¹¹ Response, para. 4.

¹² Decision on Prosecution's First Rule 92 *bis* Motion, paras. 26–35.

¹³ Decision on Prosecution's First Rule 92 *bis* Motion, para. 76.

¹⁴ See e.g. PW-017, T. 678–722 (18 March 2010); PW-023, T. 752–779 (22 March 2010); Paul Groenewegen, T. 1174–1222 (15 April 2010); Robert Franken, T. 3378–3567 (30 June–6 July 2010); Pieter Boering, T. 8982–9095 (15–16 December 2010); Mirsada Malagić, T. 10041–10057 (16 February 2011).

CONSIDERING further that the Chamber will take the fact that the Accused has not had an opportunity to cross-examine Krdžić into account when assessing the probative value ultimately attributed to the proposed evidence;

PURSUANT TO Rules 89 and 92 *bis*;

HEREBY GRANTS the Motion and **ORDERS** that the proposed evidence be admitted without requiring Krdžić to appear for cross-examination.

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



Judge Christoph Flügge

Presiding Judge

Dated this seventh day of September 2011
At The Hague
The Netherlands

[Seal of the Tribunal]