



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-98-34-PT

Date 22 June 2000

Original: English

IN THE TRIAL CHAMBER

Before: Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mrs. de Sampayo Garrido-Nijgh, Registrar

Decision of: 22 June 2000

THE PROSECUTOR

v.

**MLADEN NALETILIĆ
VINKO MARTINOVIĆ**

**DECISION ON PROSECUTION MOTION FOR APPROVAL OF RULE 94 *ter*
PROCEDURE (FORMAL STATEMENTS)**

The Office of the Prosecutor:

Mr. Franck Terrier

Defence Counsel:

**Mr. Branko Šerić
Mr. Krešimir Krsnik**

TRIAL CHAMBER I 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;

BEING SEISED of the Prosecution's "Motion for Approval of Rule 94 *ter* Procedure (Formal Statements)" filed on 14 March 2000;

NOTING the "Defence's Reply to the Prosecutor's Motion for Approval of Rule 94 *ter* Procedure (Formal Statements)" dated 17 April 2000;

NOTING the oral submissions of the parties on this issue at the Status Conference on 16 May 2000;

NOTING that Rule 94 *ter* of the Rules of Procedure and Evidence (hereinafter "the Rules") provides that "to prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on the fact affidavits or formal statements, signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed";

NOTING the Prosecutor's interest in submitting the formal statements of witnesses, many of whom reside in the Federation of Bosnia and Herzegovina ("BiH"), for use at trial pursuant to Rule 94 *ter*;

NOTING that Article 230 of the Law on Criminal Proceedings of the Federation of BiH does allow witnesses to take an oath before an investigating judge during the pre-trial stage of a case in certain circumstances; and that witness statements taken before BiH investigating judges in Zenica were admitted pursuant to Rule 94 *ter* in the trial of *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T;

NOTING the Prosecution's concern that the procedure used in the *Kordić* case would not provide sufficient protection for its witnesses in this case because it believes the situation in the area around Mostar (where these witnesses live) is more uncertain than the situation in Zenica (where the witnesses in *Kordić* lived), and the Prosecution feels it would not be able

to restrict access to information about the identity of its witnesses and the substance of their testimony once it was sent to the BiH government;

NOTING that the Prosecutor therefore claims that “it is unlikely that the Prosecutor will be able to obtain a significant number of formal statements under Rule 94 *ter* by strictly adhering to the terms of Rule 94 *ter*,” and asks that the Trial Chamber use its inherent powers under the Rules to “modify the procedure for obtaining and accepting Rule 94 *ter* evidence” to allow Rule 94 *ter* statements to be taken by the Prosecution’s own investigators without regard to BiH law, provided that those investigators observe certain formalities (such as photocopying the witness’ passport or identity card and having the witness sign a declaration acknowledging that their statement may be used in trial proceedings before the Tribunal and that lying in such a statement is an offence punishable by fine or imprisonment);

NOTING the Defence’s argument that this procedure is contrary to the plain text of Rule 94 *ter*, which only allows for the admission of “affidavits or formal statements, signed by other witnesses *in accordance with the law and procedure of the State in which such affidavits or statements are signed*” (emphasis added);

NOTING the Defence’s argument that, if the Prosecutor would like the procedure for obtaining and accepting Rule 94 *ter* evidence to be modified, the Prosecutor should propose an amendment of Rule 94 *ter*, to be voted on by the Judges of the Tribunal in plenary meeting pursuant to Article 15 of the Statute (“Rules of Procedure and Evidence”) and Rule 6 (“Amendment of the Rules”);

CONSIDERING that the Trial Chamber believes that the Prosecution’s proposed procedure is not “in accordance with the law and procedure of the State in which such affidavits or statements are signed” and therefore does not satisfy the express terms of Rule 94 *ter*;

CONSIDERING that the Trial Chamber believes that the parties have not exhausted all potential means of obtaining statements in accordance with the terms of Rule 94 *ter*, such as working with the BiH authorities to come up with an alternate procedure to limit the number of persons who might have access to confidential information, or having witnesses give their statements not in Mostar but in some other neighboring region of BiH where they might feel more secure;


CONSIDERING that it is interests of both the Prosecution and Defence to come up with a procedure that both sides may use to obtain statements for use pursuant to Rule 94 *ter*;

FOR THE FOREGOING REASONS

DENIES the Prosecution's Motion, without prejudice to further solutions proposed by the parties, in accord with the prior discussion, and further Trial Chamber rulings.

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

Done this twenty-second day of June 2000,
At The Hague,
The Netherlands.



Almiro Rodrigues
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)