



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-99-36-PT
Date: 18 January 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 18 January 2002

THE PROSECUTOR

v.

Radoslav BRĐANIN & Momir TALIC

**DECISION ON "OBJECTION TO RULE 92 BIS PROCEDURE AND MOTION TO
QUASH AND EXCLUDE ALL RULE 92 BIS STATEMENTS" FILED BY
RADOSLAV BRĐANIN ON 13 DECEMBER 2001**

The Office of the Prosecutor:

Ms Joanna Korner
Mr Andrew Cayley

Counsel for the Accused Radoslav Brđanin:

Mr John Ackerman
Ms. Milka Maglov

Counsel for the Accused Momir Talić

Mr. Xavier de Roux
Mr. Michel Pitron

TRIAL CHAMBER II 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 (“the Tribunal”) is seised of the “Objection to Rule 92 *bis* Procedure and Motion to Quash and Exclude all Rule 92 *bis* Statements” filed by the defendant Brđanin on 13 December 2001 (“Motion”).

I. INTRODUCTION

1. In his Motion, the defendant Brđanin expresses concern over the procedure adopted by the Registry of the Tribunal for witnessing and certifying written statements pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”). He refers to a single statement that was witnessed by a Registry appointed Presiding Officer on 28 July 2001. Brđanin argues that, according to the notations made on the document by the Presiding Officer, the witness in question informed the Presiding Officer that he wished to make some changes to his statement before swearing to it. At that point the Presiding Officer left the room leaving the witness alone with an investigator from the Office of the Prosecutor. After a period of time, the witness determined that he did not, in fact, wish to make any changes and the Presiding Officer returned and resumed the proceedings. Brđanin argues that, because the Presiding Officer left the room, the possibility that the investigator put pressure on the witness not to change his statement cannot be discounted. Brđanin maintains that this apparent impropriety in the procedure adopted by the Registry calls every Rule 92 *bis* statement made in this case into serious question. He therefore asks the Trial Chamber to exclude all of the Prosecutor’s Rule 92 *bis* statements and demands that any testimony given by these witnesses be adduced *viva voce*.

2. On 18 December 2001, the prosecution filed its “Prosecution’s Response to “Objection to Rule 92 *bis* Procedure and Motion to Quash and Exclude all Rule 92 *bis* Statements” Filed by the Accused Radoslav Brđanin” (Prosecution Response). In this document, the prosecution points out that the Practice Direction on Procedure for the Implementation of Rule 92 *bis* (B) of the Rules of Procedure and Evidence (the presiding officer) (IT/192) (“practice direction”) clearly specifies that “[t]he Presiding Officer may not be involved in any way in the process of correction, amendment or modification of the [Rule 92 *bis*] statement.” The prosecution also suggests that the issue would be most appropriately

dealt with at the Status Conference scheduled for 16 January 2002. The motion was raised during that Conference, but the prosecution put forward no additional submissions.¹

II. DISCUSSION

3. Rule 92 *bis* designates the procedure that must be followed for a written statement to be admitted as evidence. The Rule provides that the statement can be witnessed by, *inter alia*, “a Presiding Officer appointed by the Registrar of the Tribunal for that purpose”.

4. Although Rule 92 *bis* uses the term “Presiding Officer” it has a different meaning to the term “Presiding Officer” in other Rules, such as Rule 71 on depositions. In the context of depositions, the Presiding Officer is responsible for taking the evidence of the witness. The witness is examined and cross-examined in same way that the witness would be in front of a Trial Chamber and the Presiding Officer must ensure that a record of the deposition is taken.

5. By contrast, a “Presiding Officer” appointed pursuant to Rule 92 *bis* has no involvement in the process of creating the written statement of the witness. Rather, it is for the party seeking to rely upon the statement, together with the witness, to produce the final version of the statement and to then present it to the “Presiding Officer” who, pursuant to Rule 92 *bis* (B) (ii), must simply verify:

- (a) that the person making the statement is the person identified in the said statement;
- (b) that the person making the statement stated that the contents of the written statement are, to the best of that person’s knowledge and belief, true and correct;
- (c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
- (d) the date and place of the declaration.

6. As the prosecution rightly points out, paragraph 10 of the Practice Direction makes it clear that a Presiding Officer cannot become involved in making any changes to a witness’s statement. It specifically states:

If the witness disagrees with the contents of the statement, or wishes to amend it or add to it, it will be the task of the representative of the requesting party to obtain a complete and final version of the statement. The Presiding Officer may not be involved in any way in the process of correction, amendment or modification of the statement.

¹ Pre-Trial Conference, 16 January 2001, Transcript, pp 549-550.

7. In light of this, it is clear that the Presiding Officer for the statement impugned by Brđanin, far from violating the procedure set down for Rule 92 *bis*, has strictly adhered to it. She removed herself from the room while the parties finalised the statement and, when that was completed, she returned to verify the factors set forth in (a)-(d) above. What happened between the witness and the investigator is a matter that the Presiding Officer should not be, and was not, involved in. There can be no suggestion of impropriety in these circumstances.

8. The witness in question was informed of the consequences of making a false statement and, with this warning in mind, nonetheless declared to the Presiding Officer that the statement presented was true and correct to the best of his knowledge and belief. If Brđanin is concerned that the contents of the statement were influenced in some way by the investigator who took down the statement, his remedy is to have the witness in question called for cross-examination. Brđanin may then question the witness about the circumstances under which the statement was prepared in order to determine whether any pressure was brought to bear. In his Motion Brđanin has asked for an opportunity to cross-examine the witness in question and the Trial Chamber is willing to accede to this request. However, the remedy sought by Brđanin of excluding this Rule 92 *bis* statement in totality, together with all other Rule 92 *bis* statements, and requiring that all the witnesses be called to give evidence *viva voce* is not warranted.

9. In rejecting the Motion, the Trial Chamber emphasises that it is not, thereby, admitting the Rule 92 *bis* statements produced by the prosecution. Rule 92 *bis* (A) (i) and (ii) set forth various criteria that the Trial Chamber must consider prior to admitting the statements. The Trial Chamber has not yet been provided with copies of the statements and, therefore, is not in a position to make a final decision about their admissibility. The Trial Chamber makes it clear, however, that the purported procedural irregularity argued by Brđanin in the Motion does not constitute a bar to the admission of the statements.

III. DISPOSITION

For the foregoing reasons,

TRIAL CHAMBER II HEREBY:

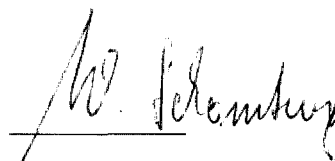
1. Orders that, if the Rule 92 *bis* statement made by the witness referred to in the Motion (the “attestation” of which is attached to the Motion) is admitted by the Trial Chamber, the witness will be called for cross-examination.
2. Dismisses the remainder of the Motion.

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

Dated this 18th day of January 2002,

At The Hague,

The Netherlands



Wolfgang Schomburg

Presiding Judge

[Seal of the Tribunal]