



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: IT-98-29-T
Date: 2 August 2002
Original: English

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr Hans Holthuis

Decision of: 2 August 2002

PROSECUTOR

v.

STANISLAV GALIĆ

**DECISION ON PROSECUTION'S APPLICATION TO HAVE WITNESS BARRY HOGAN
ADDED TO ITS WITNESS LIST AND HIS EVIDENCE ADMITTED PURSUANT TO
RULE 92 *BIS***

Office of the Prosecutor:

Mr. Mark Ierace

Counsel for the Defence:

**Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin**

TRIAL CHAMBER I, Section B, (the “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 (the “International Tribunal”);

NOTING the “Prosecution’s Application to Have Witness Barry Hogan Added to its Witness List and His Evidence Admitted Pursuant to Rule 92 *bis*” (“the Application”) filed on 4 July 2002 to which is appended in Annex 1, the statement of Barry Hogan (the “Attached Statement”);

NOTING that the Prosecution seeks to reinstate its list of witnesses filed pursuant to Rule 65 *ter* on 29 October 2001 (the “Witness List”) on the basis of Rule 73 *bis* (D), to add Barry Hogan to its Witness List and submits the Attached Statement for admission under Rule 92 *bis*, on the grounds that: (i) it is relevant evidence because it details, in particular, various measurements made at the scenes of incidents and contains information pertaining to the methods of review and search of UNPROFOR documentation and their eventual disclosure to the Defence; (ii) it would not delay the trial nor cause undue hardship to the Defence; (iii) the Attached Statement does not contain evidence going to the acts and conduct of the accused and is therefore within the parameters prescribed in Rule 92 *bis* (A);

NOTING the “Defence’s Brief Regarding the Prosecution’s Request for Admission of Testimony of a Witness Barry Hogan Pursuant to Rule 92 *bis* of the Rules” filed on 11 July 2002 (“The Response”), in which the Defence opposes the Application on the grounds that: (i) the addition of a new witness to the Witness List must be exceptional and not made toward the end of the Prosecution case; (ii) the Prosecution’s right to prove certain facts by witnesses employed by the Prosecution must be limited; (iii) the reasons put forward for the relevance of the Attached Statement are not acceptable, e.g., measurements taken with regard to some sniping incidents should have been introduced during the examination of the witnesses concerned so the Defence would have been in a position to cross-examine them and it is not clear in which respect the UNPROFOR documentation has merits because “the Prosecution still didn’t submit any evidence about the authenticity of some UNPROFOR’s document, so this cannot be proved over this witness”;¹ (iv) the Application is made under Rule 92 *bis* (A) but the requirements of Rule 92 *bis* (A) (i) are not met;

NOTING that the Defence argues that should the Application be granted, the witness Barry Hogan must appear for cross-examination;

¹ The Response, para 6.

NOTING that Rule 92 *bis* (A) provides that: “[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the Indictment”; that Rule 92 *bis* (A) (i) provides that “[f]actors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims, (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence”;

CONSIDERING that Rule 92 *bis* (A) provides a test to admit evidence in the form of a written statement, namely that that evidence must not go to proof of the acts and conduct of the accused as charged in the indictment;

CONSIDERING that the Trial Chamber is satisfied that the Attached Statement does not contain evidence going to the proof of the acts and conduct of the accused within the meaning of the Appeals Chamber’s ruling on this matter;²

CONSIDERING further that although the information contained in the Attached Statement meets the requirement of Rule 92 *bis* (A), the Trial Chamber is of the opinion that, in view of the wording contained in Rule 92 *bis* (A) (“[a] Trial Chamber may admit”), the Trial Chamber exercises a discretion as to what evidence is admitted;

CONSIDERING that the list of six factors in favour of admitting written evidence in the form of a written statement enumerated in Rule 92 *bis* (A) (i) is not exhaustive; that that list of factors as well as other rules of evidence of the Tribunal, such as Rules 89, 90, 95 for instance, provide guidance to the Trial Chamber in respect of its use of discretion when deciding upon admission of evidence in the form of a written statement;

NOTING that Rule 90 (“Testimony of Witnesses”) sets out general rules concerning witnesses appearing before the Tribunal; that Rule 90 (D) specifically states that “[...] an investigator in charge of a party’s investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings”; that it is clear from this

² *Prosecutor v Stanislav Gali*}, “Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C)”, Case No. IT-98-29-T/AR73, 7 June 2002.

wording that the Rules do not preclude an investigator in charge of a party's investigation from giving evidence; that furthermore, Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value";

CONSIDERING therefore that, in itself, the status of Barry Hogan as an investigator of the Prosecution does not preclude him from giving evidence before the Trial Chamber;

NOTING that the Prosecution requests that, pursuant to Rule 73 *bis* (D), its List of Witnesses be reinstated to add the witness Barry Hogan; that Rule 73 *bis* (D) provides that "[a]fter commencement of the trial, the Prosecution may, if he or she considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called";

CONSIDERING that the spirit of Rule 73 *bis* (D) is to prevent the Prosecution from calling witnesses without sufficient notice to the Defence but also to ensure that the search for the truth is guaranteed by allowing the Prosecution to request its list of witnesses to be reinstated or varied and allowing the Trial Chamber to grant such request if it deems it to be in the interests of justice;

CONSIDERING therefore that the Trial Chamber has first to be satisfied that it is in the interests of justice to permit the Prosecution to reinstate or vary its Witness List;

CONSIDERING that the witness Barry Hogan provides various measurements he made at the scene of the scheduled sniping incidents number 3, 15, 20 and 25 upon the indication of the victim or persons present during the incidents and who subsequently testified in court;

CONSIDERING that 360 degree quick time movies, videos and various photographs taken with the assistance of the concerned witnesses were displayed in court showing relevant locations, spots and objects; that for instance, in respect of the sniping incident number 20, Barry Hogan gives the measurements of the height of the impact, both on the window and on the wall, of the second bullet that entered the apartment; that on the video admitted into evidence (P 3280H), the concerned witness, Akif Mukanović, pointed out to Barry Hogan the spot where the bullet hit the window and stated that it was "more or less" that spot;³ that providing the exact measures of an approximate spot does not add to the testimony of the witness in court and his statement in the video; that furthermore, Barry Hogan measured the height of the impact of the bullet on the wall, 97

³ T,p 3066-67.

centimeter, and mentioned it in the video that was admitted into evidence;⁴ that the evidence adduced, thus, sufficiently allows the Trial Chamber to assess the difference in height of the impact of the second bullet on the window and on the wall;

CONSIDERING that the Trial Chamber is in a position to similarly properly assess the size or proportion of the various objects, spots or locations shown in respect of the other incidents; that furthermore, the issue of the measures of the relevant locations and of relevant objects indicated by the witnesses has not been in dispute by the Defence;

CONSIDERING that the Attached Statement further contains information pertaining to the methods of review and search of UNPROFOR documentation from the various archives and their eventual disclosure to the Defence; that the Prosecution argues that such an issue has arisen on several occasions and in this regard the Attached Statement illuminates the steps taken by the Prosecution;⁵ that the Trial Chamber is not satisfied that the issue of the search and review of the UNPROFOR documentation is significantly relevant at this stage of the proceedings;

CONSIDERING that the Attached Statement does not add significantly enough to the ascertainment of the truth;

FINDING therefore that it is not in the interests of justice to allow the Prosecution to reinstate its List of Witnesses and thus to have the Attached Statement admitted into evidence;

⁴ *Ibid.*

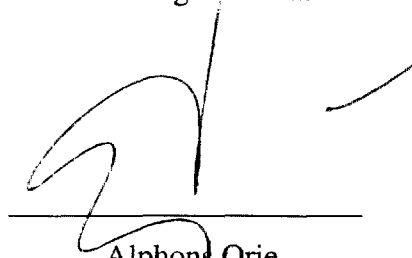
⁵ The Application, para 10.

FOR THE FOREGOING REASONS,

PURSUANT to Rules 54, 73 *bis*, 89, 90 and 92 *bis* of the Rules of Procedure and Evidence;

HEREBY DENIES the Application.

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

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a vertical line and a horizontal stroke.

Alphons Orie
Presiding Judge, Trial Chamber I, Section B

Dated this 2 August 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]