



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-97-24-T

Date: 12 February 2003

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Decision of: 12 February 2003

THE PROSECUTOR

v.

MILOMIR STAKIĆ

**DECISION ON DEFENCE MOTION FOR CHAMBER
TO APPOINT A LEGAL OFFICER FOR RULE 92 *BIS***

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian

Defence Counsel for Milomir Stakić:

Mr. Branko Lukić
Mr. John R. Ostojić

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 (“Tribunal”),

BEING SEIZED of a motion filed by the accused, Milomir Stakić on 4 February 2003 (“Motion”), in which the Defence moves for this Chamber to appoint a Presiding Officer for the purpose of certifying witness statements for admission under Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”),

NOTING that Rule 92 *bis* provides in relevant part:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a witness 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.

[...]

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person’s knowledge and belief and

(i) the declaration is witnessed by:

[...]

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose;

[...]

(E) Subject to Rule 127 or any order to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

NOTING the Practice Direction on Procedure for the Implementation of Rule 92 *bis* (B) of the Rules of Procedure and Evidence, dated 20 July 2001 (“Practice Direction on Rule 92 *bis*”),¹

NOTING that the Defence only provided the Chamber with a Final List of Witnesses for its case on 11 November 2002 and at that time, it failed to provide any proffers for its witnesses,

¹ See Practice Direction on Procedure for the Implementation of Rule 92 *bis* (B) of the Rules of Procedure and Evidence, dated 20 July 2001, IT/192.

NOTING that, as a direct result of the Defence's failure to live up to its obligations under the Rules, the Trial Chamber, on 21 and 22 November 2002, was required to initiate a procedure whereby Defence counsel presented orally in court a summary of the areas in relation to which a particular witness was expected to testify, thereby allowing the Judges to rule at that time on the admissibility of the proposed Defence witnesses,

NOTING that, according to the resulting final witness list only one witness (Rule 65 *ter* no. 079) was identified as a Rule 92 *bis* witness,

NOTING that, therefore on 17 January 2003, the 3rd of March 2003 was the original deadline set by this Chamber for the Defence to file any motion to admit statements under Rule 92 *bis*,

NOTING that in its Motion, the Defence argues that, on the basis of the principle of equality of arms, the Chamber should admit the same number of written statements under Rule 92 *bis* in the Defence case as it did in the Prosecution case, that is, nineteen (19) written statements, without identifying which witnesses it intends to call pursuant to Rule 92 *bis*,

NOTING that in a Rule 65 *ter* (I) conference held on 4 February 2003, the Defence, for the first time, indicated that it would seek to admit the written statements of up to twenty-four witnesses under Rule 92 *bis*, without identifying which witnesses it intends to call pursuant to Rule 92 *bis*,

NOTING that, on 5 February 2003, in light of the fact that the Defence was seeking to admit up to twenty-four written statements and had not yet initiated the appropriate procedure for the admission of such written statements under the Rules, a new deadline of 17 February 2003 was set in relation to any Defence motion to admit statements under Rule 92 *bis*:

Taking into account that the OTP has a right to respond and presiding officer has to be appointed by the Registrar of the Tribunal, for that purpose under Rule 92(B) and the procedure under Rule 92 *bis*, preparation and implementation, will take a lot of time, we hereby rearrange the deadline for this motion under Rule 92 *bis* from the 3rd of March to the 17th of February. Only this allows us to continue as scheduled.²

NOTING Judge Schomburg's additional remarks at the hearing of 5 February 2003:

As to the fact that the motion from 4 February 2003, asking for the appointment of a presiding officer under Rule 92 *bis* and that this motion is called "urgent" and it calls for an instant or immediate answer, and we have to point out that before we can decide on this, no doubt, we need the names

² Judge Schomburg, T. 11750.

and the reasons why you believe that those statements would be falling under Rule 90 *bis* (A) especially.³

NOTING the response by the Prosecution the same day:

[I]n order for us to respond to the motion on Rule 92 *bis*, we need to know what the statements are going to say. And we - - at the moment, we don't have it. When the Defence had to respond to our motions, we had written signed statements from each of the witnesses.⁴

NOTING FURTHER that the deadline of 17 February 2003 for any Defence motion to admit statements under Rule 92 *bis* was reiterated by Judge Schomburg on 7 February 2003:

So therefore, we will proceed Monday, the 17th of February, 2003. And I want to alert the Defence that that is the latest day for any 92 *bis* motion, and especially with the necessary prerequisites to be found in the Rules of Procedure and Evidence under 92 *bis* (A) as we previously ruled.⁵

CONSIDERING that the Practice Direction on Rule 92 *bis* envisions that a party seeking to have one or more statements admitted as written evidence pursuant to Rule 92 *bis* should first "submit a request to the Registrar to appoint a Presiding Officer", and then provide the certified statements to the Chamber for a decision on their admissibility under Rule 92 *bis*,⁶

CONSIDERING, however, that since (i) the Defence have not yet initiated the appropriate procedure for admission of written statements under the Rules and (ii) the Defence case is scheduled to conclude on 21 March 2003, in order to save time, it is appropriate that the Chamber – after having heard the Prosecution – first identify, on the basis of information to be provided by the Defence, those witnesses whose statements would not, in any event, be suitable for admission under Rule 92 *bis*, based on the criteria set out in Rule 92 *bis* (A),

CONSIDERING that, on the basis of the provisional proffers provided by the Defence, the Chamber is already in a position to exclude the possibility that statements from the following witnesses could be admitted under Rule 92 *bis*, for the reason that their evidence goes directly to proof of the acts and conduct of the accused as charged in the indictment: Rule 65 *ter nos.* 23, 25, 34, 36, 39, 43, 55, 58, 77 and 89,

³ Judge Schomburg, T. 11767 – 11768 (from the uncorrected, unofficial version of the transcript). It should read "92 *bis* (A)".

⁴ Nicholas Koumjian, T. 11768.

⁵ T. 12061.

⁶ See Practice Direction on Procedure for the Implementation of Rule 92 *bis* (B) of the Rules of Procedure and Evidence, dated 20 July 2001, IT/192.

HEREBY ORDERS the Defence:

- (i) by 17 February 2003, at 1200 hours, to file with the Registry a list of the witnesses whose statements it intends to introduce by way of Rule 92 *bis*, along with a detailed description of the areas that will be covered by each witness in his or her Rule 92 *bis* statement;
- (ii) once the Chamber has had an opportunity to review the material identified in paragraph (i) and to hear the Prosecution on this issue, to immediately apply to the Registrar for the appointment of a Presiding Officer, as set out in the aforementioned Practice Direction for Rule 92 *bis*, to certify those statements which the Chamber has identified as suitable for admission under Rule 92 *bis* (A);
- (iii) to provide the Prosecution and the Chamber with certified copies of the statements under Rule 92 *bis* no later than 3 March 2003; and
- (iv) to clarify the name of witness Rule 65 *ter* No. 006 (discrepancy between the witness list and the proffer), and

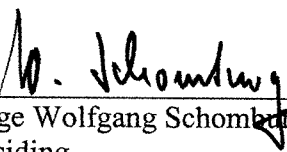
HEREBY REQUESTS the Registry to prepare for an application from the Defence for a Presiding Officer to be appointed under Rule 92 *bis*, and deployed as from no later than 21 February 2003, bearing in mind the deadline for the conclusion of the Defence case, as set out above.

The Chamber expects the Prosecution to indicate within seven days of receiving the certified Rule 92 *bis* statements from the Defence, whether it seeks to call any of the witnesses for cross-examination.

Moreover, the Chamber reserves the right, to call live any of the witnesses whose statements are admitted under Rule 92 *bis*, if, in the interests of justice, it deems it necessary.

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

Done this twelfth day of February 2003
At The Hague,
The Netherlands


Judge Wolfgang Schomburg,
Presiding

[Seal of the Tribunal]