



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-02-65-PT  
Date: 22 October 2004  
Original: ENGLISH

**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge O-Gon Kwon  
Judge Iain Bonomy

**Registrar:** Mr. Hans Holthuis

**Decision of:** 22 October 2004

**PROSECUTOR**

v.

**ŽELJKO MEJAKIĆ  
MOMČILO GRUBAN  
DUŠAN FUŠTAR  
DUŠKO KNEŽEVIĆ**

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**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF TRIAL  
TRANSCRIPTS AND STATEMENTS PURSUANT TO RULE 92*bis* AND RULE 89(F) AND  
PROTECTIVE MEASURES**

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**The Office of the Prosecutor:**

Ms. Ann Sutherland

**Counsel for the Accused:**

Mr. Jovan Simić, for Željko Mejačić  
Mr. Branko Lukić, for Momčilo Gruban  
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar  
Ms. Slobodanka Nedić, for Duško Knežević

**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 (“the International Tribunal”),

**BEING SEISED** of a “Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92 *bis* and Rule 89 (F) and Protective Measures”, filed by the Office of the Prosecutor (“Prosecution”) on 17 December 2003 (“First Motion”), followed by a “Corrigendum to 17 December 2003 Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92 *bis* and Rule 89 (F) and Protective Measures” filed on 6 January 2004, and an “Addendum to Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92 *bis* and Rule 89 (F) and Protective Measures” filed on 30 August 2004 (together “Prosecution Motion”),

**NOTING** that the Mejakić Defence filed a confidential “Defence Response to Prosecution’s Motion for the Admission of Statements pursuant to Rule 92 *bis* and 89 (F) of the Rules of Procedure and Evidence” on 30 January 2004, that the Defence of Momčilo Gruban filed a confidential “Defense of Momcilo Gruban Response to Prosecution Motion for Listing Written Statements as Exhibits (Rule 92*bis* pursuant to Rule 89F of the Rules of Procedure and Evidence)” on 30 January 2004, followed by a confidential “Joinder Defence Response to Addendum to Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92*bis* and 89(F) and Protective Measures”, jointly filed by the Defence of Željko Mejakić and Momcilo Gruban on 30 September 2004, in which counsel for the accused generally request to be allowed to cross-examine all Prosecution witnesses in order to ensure full compliance with the rights of the accused,

**NOTING** that the Defence of Dušan Fuštar filed a confidential “Dusan Fustar’s Response to Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92*bis* and Rule 89(F) and Protective Measures” on 30 January 2004, requesting that the Prosecution Motion be dismissed with respect to all but one witness, and also objecting to protective measures requested with respect to two witnesses enjoying trial related protective measures in other proceedings before the Tribunal,

**NOTING** that the Defence of Duško Knežević filed a confidential “Dusko Knezevic’s Response to Prosecution’s Motion for Admission of Trial Transcripts and Statements pursuant to Rule 92*bis* and Rule 89(F) and Protective Measures” on 30 January 2004, together with a confidential “Dusko Knezevic’s Response to Addendum to Prosecution’s Motion for Admission Trial

Transcripts and Statements pursuant to Rule 92 *bis* and Rule 89 (F)", filed on 30 September 2004, in which the Defence, *inter alia*, submits that the Prosecution Motion should be entirely dismissed essentially on the basis that the admission of evidence in written form conflicts in fundamental ways with the rights of the accused,

*Admission of Evidence pursuant to Rules 92 bis and 89 (F) of the Rules*

**NOTING** that the Prosecution Motion is concerned with the evidence of 46 witnesses already on the witness list, and 4 additional witnesses that the Prosecution seeks to have added to its current witness list in a separate application; generally, the Prosecution proposes to introduce the evidence of these witnesses as follows:

- (a) 40 statements and prior testimonies (transcripts) are sought to be admitted pursuant to Rule 89(F) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and
- (b) subject to the application to add four witnesses to the witness list, ten statements and prior testimonies (transcripts) are sought to be admitted pursuant to Rule 92 *bis* (D) of the Rules,

**NOTING** the Prosecution submission that, in relation to statements and testimonies sought to be admitted pursuant to Rule 89(F) of the Rules, no prejudice will be caused to the accused because cross-examination will be allowed wherever the evidence goes to the acts and conduct of the accused; however, in all other circumstances, where the witness has been previously cross-examined on the issue, the accused should be made to make a showing before further cross-examination is allowed,

**NOTING** that with respect to the additional four witnesses sought to be added to the witness list, the Prosecution submits that it does not intend to call these witnesses to testify *viva voce*, but seeks to have their evidence admitted pursuant to Rule 92 *bis* (D) of the Rules, and asserts that none of the witnesses give direct evidence against the accused,

**NOTING** that all four accused have opposed, in principle, the admission of evidence in written form, including statements and prior testimony of witnesses; alternatively, counsel for the accused generally request to be allowed to cross-examine all Prosecution witnesses in order to ensure full compliance with the rights of the accused,

**CONSIDERING** that Rule 89 (F) of the Rules provides that “A Chamber may receive the evidence orally or, where the interests of justice allow, in written form”,

**CONSIDERING** that Rule 92 *bis* (D) of the Rules allows a Chamber to admit a transcript of evidence given by a witness in proceedings before the Tribunal, if it goes to proof of a matter other than the acts and conduct of the accused; as the Appeals Chamber in *Galić*<sup>1</sup> made clear, there are three steps in any decision under Rule 92 *bis* of the Rules: (i) whether the transcript *is capable of admission* under Rule 92 *bis* of the Rules (if it goes to proof of acts and conduct of the accused, as charged in the indictment, it is inadmissible); (ii) if capable of admission, whether there are any other reasons why, in the exercise of the Trial Chamber’s discretion, the transcript ought not to be admitted; and (iii) if the transcript is admissible, whether the witness whose evidence is contained in the transcript should be required to appear for cross-examination,<sup>2</sup>

**NOTING** that the Prosecution Motion is seeking to present over eighty percent of its case in written form, including evidence going to “core matters”, that is, evidence that goes to the acts and conduct of the accused,<sup>3</sup>

**CONSIDERING** that while it is plainly the duty of the pre-trial Judge and the pre-trial Chamber to take any measure necessary to prepare the case for a fair and expeditious trial,<sup>4</sup> the Trial Chamber is of the view that a determination of the Prosecution Motion, involving as it does a critical examination of the content of the evidence and manner in which it is to be presented at trial, must be left to the Trial Chamber that would hear the case; indeed, a determination of the Prosecution Motion would require the Trial Chamber to decide whether it is in the “interests of justice” to admit evidence in written form under Rule 89 (F) of the Rules, a matter which must be left for determination at trial, for such a determination would have to be made in relation to each individual witness, in light of not only the surrounding circumstances, but also the evidence to be given by the witness;<sup>5</sup> furthermore, where a statement or transcript is capable of admission under Rule 92 *bis* of the Rules, the Trial Chamber must still exercise its discretion whether to exclude it, and determine

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<sup>1</sup> *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C)”, 7 June 2002.

<sup>2</sup> Rule 92 *bis* (E) expressly provides that a Trial Chamber shall determine whether the witness should appear in court for cross-examination.

<sup>3</sup> *Prosecutor v. Slobodan Milosević*, Case No. IT-02-54-AR73.4, Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber’s Decision dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements, 31 October 2003, para. 2.

<sup>4</sup> Rule 65 *ter* (B) & (M).

<sup>5</sup> *Prosecutor v. Slobodan Milosević*, Case No. IT-02-54-AR 73.4., “Decision on Admissibility of Evidence-in-Chief in the form of Written Statements”, 30 September 2003, para. 21.

still whether evidence admitted in written form requires the witness to attend for cross-examination, a matter best left for determination by the Chamber trying the case,

**NOTING** also the referral of this case to a special Chamber to determine its suitability for referral to a State court under Rule 11*bis* of the Rules,

**CONSIDERING** that Rule 65 *ter* (K) of the Rules provides that “[...] A motion made before trial shall be determined before trial unless the [pre-trial] Judge, for good cause, orders that it be deferred for determination at trial”, the Trial Chamber is of the view that there is good cause for deferring this matter for determination at trial

*Protective Measures*

**NOTING** that the Prosecution Motion seeks:

- (a) that protective measures be granted under Rule 75 (F) of the Rules for **6 witnesses** enjoying trial related protective measures in other proceedings before the Tribunal who it is proposed will testify in this case (confidential Annex B, Part II); and
- (b) that certain trial related protective measures be granted under Rule 75 of the Rules for **6 other witnesses**, including:
  - (i) pseudonym and image distortion for **2 witnesses** (set out in confidential Annex B, Part I (i));
  - (ii) pseudonym, image and voice distortion for **2 witnesses** (set out in confidential Annex B, Part I (ii)); and
  - (iii) closed session for **2 witnesses** (set out in confidential Annex B, Part I (iii))

**NOTING** that the Defence for the accused Fuštar, the only accused to have responded to the requests for protective measures, does not object to the protective measures sought save for two witnesses who were granted closed session protection in other proceedings before the Tribunal (set out in (a) above); for these witnesses, the defence submits that the Prosecution has not provided sufficient reasons for the closed session protection to be extended in this case,

**CONSIDERING** the provisions of Rule 75 (F) of the Rules by which protective measures ordered in respect of a victim or witness in any proceedings before the International Tribunal continue to have effect in any other proceedings before the International Tribunal,

**CONSIDERING** that the protection granted to such witnesses may be prejudiced if the same pseudonym is used in these proceedings as in the previous proceedings,

**CONSIDERING** that with regard to the objection of the accused Fuštar, the only remedy available to a party seeking to rescind or vary the protective measures already in place for these witnesses would be to follow the procedure set out in Rule 75 (G) of the Rules,

**CONSIDERING** that with respect to the remaining 6 witnesses for whom protective measures are sought, witness numbered 42 on the Prosecution witness list was granted pseudonym and image distortion in earlier proceedings, the Prosecution now seeks, in addition, voice distortion; witness numbered 53 on the Prosecution witness list was granted pseudonym and image distortion in earlier proceedings, the Prosecution is now seeking closed session protection for the witness; it follows that, for these two witnesses, the Prosecution should apply to the Trial Chamber that granted the protective measures in the first place, pursuant to Rule 75 (G) of the Rules,

**CONSIDERING** that the remaining issue concerns the Prosecution requests for trial related protective measures for four witnesses, including:

- (i) pseudonym and image distortion for **2 witnesses** (set out in confidential Annex B, Part I (i));
- (ii) (ii) pseudonym, image and voice distortion for **1 witness** (set out in confidential Annex B, Part I (ii)); and
- (iii) closed session for **1 witness** (set out in confidential Annex B, Part I (iii));

**CONSIDERING** that the Trial Chamber finds acceptable the bases identified in the Prosecution Motion for the granting of a pseudonym to the witnesses, and requires the Prosecution to make any application for trial related protective measures closer to the time the witness is intended to testify or, at any rate, at a time closer to the commencement of the trial,

**PURSUANT TO** Rules 54, 65 *ter* and 75 of the Rules of Procedure and Evidence of the International Tribunal,

**HEREBY ORDERS** as follows:

- (1) the Prosecution Motion in so far as it relates to the admission of evidence pursuant to Rules 92*bis* and 89 (F) of the Rules is deferred for determination by the Chamber trying the case,
- (2) The Prosecution may refer to the 12 witnesses identified in confidential Annex B, Parts I and II of the First Motion by the pseudonyms listed therein when addressing matters in public, and
- (3) Applications for trial related protective measures for Prosecution witnesses identified in confidential Annex B, Part I of the First Motion shall be made, where appropriate, at a time closer to the time at which it is intended the witness should testify or to the commencement of the trial.

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



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Patrick Robinson  
Presiding

Dated this DRAFT day of October 2004  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**