



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-03-68-T  
Date: 15 September 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge Hans Henrik Brydensholt  
Judge Albin Eser

**Registrar:** Mr. Hans Holthuis

**Decision of:** 15 September 2005

**PROSECUTOR**

v.

**NASER ORIĆ**

**DECISION ON DEFENCE MOTION FOR THE ADMISSION OF  
THE WITNESS STATEMENT OF AVDO HUSEJNOVIĆ  
PURSUANT TO RULE 92 *bis***

**The Office of the Prosecutor:**

Mr. Jan Wubben

**Counsel for the Accused:**

Ms. Vasvija Vidović  
Mr. John Jones

**TRIAL CHAMBER II** (“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 (“Tribunal”);

**BEING SEISED OF** the Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92*bis* (“Motion”), to which is attached Annex A containing the statement of Avdo Husejnović dated 24 June 2005 (“Statement”);<sup>1</sup>

**NOTING** that the Defence seeks to submit the Statement in reliance upon Rule 92*bis*(A) of the Rules of Procedure and Evidence (“Rules”);

**NOTING** that pursuant to Rule 92*bis* of the Rules 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;

**NOTING** the Defence submissions that the Statement (i) does not go to the acts and conduct of the accused Naser Orić (“Accused”), and (ii) is reliable;<sup>2</sup>

**NOTING** also the other submissions raised by the Defence in support of admission of the Statement;<sup>3</sup>

**NOTING** the Prosecution’s Response to the Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92*bis* (“Response”), to which is attached Annex A containing the statement of Avdo Husejnović dated 24 June 2005, and Annex B containing a prior statement of Avdo Husejnović dated 12 May 2005 (“Prior Statement”);<sup>4</sup>

**NOTING** that the Prosecution opposes the admission of the Statement in its entirety on the basis of Rule 92*bis*(E) of the Rules;

**NOTING** the Prosecution submissions that the Statement (i) goes to the acts and conduct of the Accused, (ii) concerns an important issue in the case for determining the alleged responsibility of the Accused, and (iii) is unreliable;<sup>5</sup>

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<sup>1</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92*bis*, 29 August 2005.

<sup>2</sup> Motion, paras 7 and 11-14.

<sup>3</sup> Motion, paras 5-6, 9-10 and 15.

<sup>4</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Prosecution’s Response to the Defence Motion for the Admission of the Witness Statement of Avdo Husejnović Pursuant to Rule 92*bis*, 5 September 2005.

<sup>5</sup> Response, paras 4, 6 and 9.

**NOTING** also the other submissions raised by the Prosecution against the admission of the Statement;<sup>6</sup>

**RECOGNISING** this Tribunal's jurisprudence confirming that the phrase "acts and conduct of the accused as charged in the indictment" in Rule 92bis(A) of the Rules is a plain expression and should be given its ordinary meaning, that is, deeds and behaviour of the accused;<sup>7</sup>

**RECOGNISING** also that according to the jurisprudence of this Tribunal the phrase "acts and conduct of the accused as charged in the indictment" should be interpreted to include any act or conduct of the accused upon which the Prosecution relies to establish that the accused was a superior to those who actually did commit the crimes, or that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts;<sup>8</sup>

**CONSIDERING** that the Accused is charged with direct individual criminal responsibility under Article 7(1), and with superior responsibility under Article 7(3), of the Statute of the Tribunal ("Statute");<sup>9</sup>

**CONSIDERING** that the alleged responsibility of the Accused under Article 7(3) of the Statute is, *inter alia*, for murder and cruel treatment of Serb detainees by members of the Military Police;<sup>10</sup>

**CONSIDERING** that the Statement refers to a diary submitted by the Prosecution as exhibit P561, and alleged by the Prosecution to have been written by the Bosnian Military Police of Srebrenica ("Diary");<sup>11</sup>

**CONSIDERING** that the Diary is relevant to the question of whether or not, and to what extent, there was in existence a functioning Military Police in Srebrenica in the time period relevant to the Indictment;<sup>12</sup>

**CONSIDERING** that paragraphs 10-13 of the Statement could provide information on the military command structure and composition in the area and time period relevant to the Indictment, but that

<sup>6</sup> Response, paras 7-8 and 10-13.

<sup>7</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92bis, 21 March 2002, para.22.

<sup>8</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras 10-11.

<sup>9</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Third Amended Indictment, 30 June 2005, paras 22-26.

<sup>10</sup> Third Amended Indictment, paras 22-26.

<sup>11</sup> A copy of the diary was tendered by the Prosecution as exhibit P458. Nikola Popović, T. 2805-2811, 9 December 2004.

<sup>12</sup> Motion, para.5.

neither these paragraphs, nor any other parts of the Statement, contain evidence that goes to the proof of acts and conduct of the Accused as charged in the Indictment;

**CONSIDERING** that pursuant to Rule 92bis(A) of the Rules a Trial Chamber has discretion whether or not to admit a written statement, in whole or in part, even if the statement meets the admissibility threshold under Rule 92bis(A);

**NOTING** that Rule 92bis(A) of the Rules includes a non-exhaustive list of factors in favour of admitting evidence in the form of a written statement, and that the Defence admits that none of those factors are apposite to the issue at stake;<sup>13</sup>

**NOTING** that Rule 92bis(A) of the Rules also includes a non-exhaustive list of factors against admitting evidence in the form of a written statement. Among these factors are the following:

“...whether:

(a) ...

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.”;

**CONSIDERING** that the Statement does contain information relevant to the question of the authenticity and reliability of the Diary, and that paragraphs 10-13 of the Statement might provide information on the military command structure and composition in the area and time period relevant to the indictment;<sup>14</sup>

**CONSIDERING** that the Statement touches upon a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue;<sup>15</sup>

<sup>13</sup> Motion, para.8.

<sup>14</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras 10-11 and 14-16, *Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Public Version of “Decision on Prosecution’s Motion for Provisional Admission of Witness Statements under Rule 92bis” Dated 13 October 2004, 15 December 2004, paras 5 and 15, and *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Motion for Admission of Written Statement of Deceased Witness Pursuant to Rule 92bis(C), 25 July 2005, pp 3-4.

<sup>15</sup> *The Prosecution v. Slobodan Milosević*, Case No. IT-02-54-T, Decision on Prosecution’s Request To Have Written Statements Admitted Under Rule 92bis, 21 March 2002, paras 24-25.

The Tribunal’s case-law has held that if a statement touches upon a live and important issue between the parties, cross-examination should be granted.

**CONSIDERING** that the authenticity and reliability of the Diary, which is alleged to have been written by the Bosnian Military Police of Srebrenica, and to contain information on Bosnian Serb detainees, could possibly become a pivotal issue in this case,<sup>16</sup> especially since it appears that Avdo Husejnović gave a Prior Statement to the Prosecution, which the Prosecution contends is in contradiction to the Statement that the Defence seeks to submit under Rule 92bis,<sup>17</sup> and that the Defence does not seek to submit the Prior Statement under Rule 92bis;

**CONSIDERING** that it is not in the interest of justice that evidence which may rebut the authenticity and reliability of the Diary be given in a written form;

**FOR THE FOR GOING REASONS**

**PURSUANT TO** Rule 92bis of the Rules,

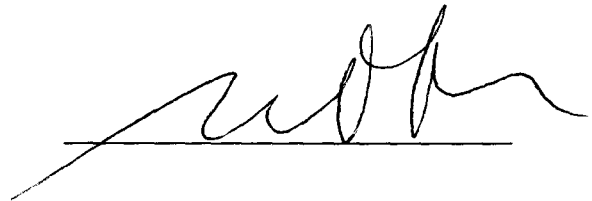
**HERBY DENIES the Motion.**

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

Dated this fifteenth day of September 2005,

At The Hague,

The Netherlands.



**Carmel Agius**  
Presiding Judge

[Seal of the Tribunal]

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<sup>16</sup> Nikola Popović, T. 2805-2811, 9 December 2004. The testimony of Nikola Popović includes references to names of Serbs that were held as prisoners and are mentioned in the Diary.

<sup>17</sup> Response, para.9.