

IT-00-39-T
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24 AUGUST 2006

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UNITED
NATIONS



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-00-39-T

Date: 24 August 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Decision of: 24 August 2006

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**DECISION ON DEFENCE MOTION PURSUANT TO RULE 85 (A)(iv) –
INCLUDING REASONS FOR DENIAL IN PART**

Office of the Prosecutor

**Mr Mark Harmon
Mr Alan Tieger**

Counsel for the Defence

**Mr Nicholas Stewart, QC
Mr David Josse**

I. BACKGROUND

1. On 30 June 2006, the Defence filed the “Defence motion pursuant to Rule 85 of the Rules” (“Motion”), in which it sought up to two full court days to call viva voce evidence and to submit written testimonials.¹
2. The Prosecution responded on 12 July 2006 and stated that it “reserves its position as to the admissibility of material to be submitted by the Defence under Rule 85(A)(vi)”.²
3. On 14 July 2006, the Trial Chamber orally denied the motion in so far as it relates to viva voce evidence.³ The reasons are set out in part II.2 of this decision.
4. With respect to written documentation relating to sentencing matters, the Trial Chamber stated on 14 July 2006 that it was not in a position to make a determination on admissibility until the proposed material was further identified.⁴
5. On 10 August 2006, the Defence annexed to its Motion two written testimonials. The first testimonial is a letter from René Daniel Boudin, dated 12 February 2004, and addressed to the then President of the Tribunal. The letter was also sent to the then Prosecutor of the Tribunal in 1998.⁵ The Defence informed the Chamber that the Prosecution has no objection to the admission of this letter.⁶
6. The second testimonial is a letter from Judita Albahari-Krivokuća, dated 23 August 2005 and addressed to lead counsel for the Defence, Mr Stewart.⁷ Passages of this second letter, annexed in Serbo-Croatian, have been translated into English and were submitted to the Chamber on 13 August 2006.⁸
7. On 22 August 2006, the Prosecution informed the Trial Chamber that it had no objection to the admission of the letter by Ms Albahari-Krivokuća.⁹

¹ Motion, para. 2-5.

² Prosecution’s response to Defence motion concerning Rule 85, 12 July 2006, para. 2.

³ T. 27214.

⁴ T. 27214.

⁵ Written documentation presented pursuant to Rule 85(A)(vi) of the Rules of Procedure and Evidence (“Annex”), para. 2, letter of Mr Boudin, p. 6.

⁶ Annex, para. 2.

⁷ Annex, para. 3.

⁸ Annex, letter of Ms Albahari-Krivokuća, pp. 9-10.

⁹ Email to the legal officer of the Chamber, 22 August 2006.

II. DISCUSSION

1. Legal framework

8. According to Rule 85(A)(vi) of the Rules, each party is entitled to present any relevant information that may assist the Trial Chamber in determining an appropriate sentence if an accused is found guilty on one or more charges of the indictment.

9. Material which is admissible under of Rule 85(A)(vi) of the Rules does not have to meet the criteria set out in Rules 89(F) and Rule 92 bis of the Rules.

10. According to Rule 85(A) of the Rules, material relating to sentencing issues shall be received last in sequence, unless the Chamber orders otherwise in the interests of justice. The Trial Chamber must consider whether the presentation of such material would require a court hearing.

2. Reasons for denying viva voce evidence

11. In its Motion, the Defence does not specify what the two witnesses it wishes to call would be expected to testify about. It explains neither how their testimony could assist the Trial Chamber in determining an appropriate sentence if the Accused were found guilty, nor why it wishes to hear these witnesses viva voce.

12. The Defence filed its Motion as late as 30 June 2006. At that time, the Defence phase had already been concluded¹⁰ and witnesses called by the Trial Chamber had started testifying. The long-standing schedule did not provide for any further testimony after Chamber witnesses had been heard.

13. The scheduling in this case has been a subject of many orders and decisions of the Trial Chamber.¹¹ The Trial Chamber has repeatedly adjusted the schedule and accommodated Defence motions for adjournments and postponements during the Prosecution and the Defence phases. It notified the Defence on 18 November 2005 that the absence of a well-developed schedule for presentation of evidence might impact on the possibility to deviate from a previously set schedule.¹² The Chamber repeated this caution in its decision of 23 May

¹⁰ The last day of the testimony of Mr Krajišnik was 22 June 2006.

¹¹ Reasons for denying Defence motion for time to call additional witnesses, 16 August 2006.

¹² T. 18799.

2006.¹³ The Defence was put on notice that its case would close on the last day of Mr Krajišnik's testimony and that the testimony of the Chamber witnesses would conclude the evidence-hearing phase in this case.

14. The Defence had the possibility to call the two witnesses during the Defence phase, but instead opted for calling other witnesses and spending more time on the testimony of Mr Krajišnik. The Defence does not assert that the two witnesses whom it wishes to call were not available to testify during the Defence phase.

15. For the foregoing reasons, the Chamber denied the Motion in so far as it related to viva voce evidence.

3. Written testimonials

16. In her letter, Ms Albahari-Krivokuća, who claims to have been a long-time colleague of the Accused in the company "Energoinvest", describes the character and the attitudes of the Accused towards other ethnicities.¹⁴ This information is not without relevance and may assist the Trial Chamber in determining an appropriate sentence if the Accused were found guilty.

17. In his letter, Mr Boudin briefly describes two incidents in which the Accused was very cooperative: bus transportation of prisoners out of Srebrenica in June 1995 and release of captured French pilots in September or October 1995.¹⁵ Mr Boudin concludes that Mr Krajišnik did not seem to him "like a criminal" and that he does "not recognise" the Accused in the indictment.¹⁶ Mr Boudin's impression of Mr Krajišnik is not without relevance as it refers to the character of the Accused and may assist the Trial Chamber in determining an appropriate sentence if the Accused were found guilty.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

HAVING ALREADY DENIED THE MOTION IN PART,

GRANTS the motion insofar as the two written testimonials are concerned,

ADMITS into evidence:

¹³ T. 24604.

¹⁴ Annex, letter of Ms Albahari-Krivokuća, pp. 9-10.

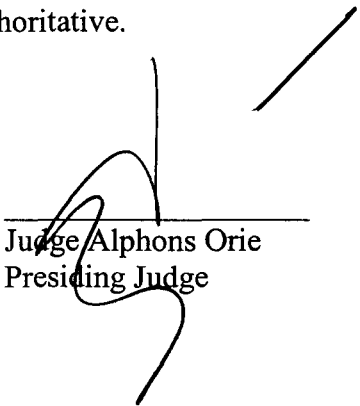
¹⁵ Annex, letter of Mr Boudin, pp. 5-6 (English version); pp. 7-8 (French version).

¹⁶ Annex, letter of Mr Boudin, p. 6.

- 1) letter from René Daniel Boudin, dated 12 February 2004 and addressed to the then President of the Tribunal;
- 2) letter from Judita Albahari-Krivokuća, dated 23 August 2005 and addressed to lead counsel for the Defence, Mr Stewart; and

INSTRUCTS the Registrar to assign exhibit numbers to items 1) and 2).

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



Judge Alphons Ori
Presiding Judge

Dated this 24th day of August 2006
At The Hague,
The Netherlands