



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-98-29/1-T

Date: 27 February 2007

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Decision of: 27 February 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON PROSECUTION MOTION FOR
ADMISSION OF WRITTEN STATEMENTS PURSUANT
TO RULES 92 *bis* AND *ter* OF THE RULES OF
PROCEDURE AND EVIDENCE WITH CONFIDENTIAL
ANNEX A**

The Office of the Prosecutor:

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I. INTRODUCTION

1. Trial Chamber III 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”) is seized of the Prosecution Motion For Admission of Written Statements Pursuant to Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence, together with Confidential Annex thereto, filed on 11 January 2007 (“Motion”).

II. SUBMISSIONS

2. In the Motion, the Prosecution seeks to have admitted into evidence the written statements of seven witnesses pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”) and without requiring cross-examination of the witnesses (“92 *bis* Statements”).¹ The Prosecution further seeks the admission into evidence of the statements of 22 witnesses pursuant to Rule 92 *ter* of the Rules.²

3. According to the Prosecution, the 92 *bis* Statements do not go to proof of the acts and conduct of the Accused or to a critical issue in the Prosecution’s case and the statements will corroborate anticipated *viva voce* testimony.³ The Prosecution argues that it lies within the Trial Chamber’s discretion to decide whether a statement is admissible or not. In this regard, the Trial Chamber should be guided by whether the evidence sought to be admitted is pivotal to the Prosecution’s case and how proximate to the Accused the person is whose acts or conduct are described in the statement.⁴

4. The Prosecution submits that the 92 *bis* Statements it seeks to have admitted contain so called “crime-base”-evidence, that is, descriptions of sniping or shelling fire witnessed by the person giving the statement. According to the Prosecution, a problem with respect to admission of this type of evidence arises only when the evidence includes an opinion as to the source of fire and then only if the evidence is the “vital link in demonstrating that the shell [...] was fired from a gun emplacement manned by immediately proximate subordinates of the accused”, but that none of the

¹ Motion, para. 1. The Prosecution seeks admission of statements by witnesses W-2, W-67, W-77, W-80, W-102, W-120 and W-123. Provisional admission is requested until the formal requirements pursuant to Rule 92 *bis* (B) have been met.

² Motion, para. 2. The Trial Chamber admitted the 22 statements pursuant to Rule 92 *ter* in its Oral Decisions of 19 January 2007 and 25 January 2007 (T. 696 and T. 1059).

³ Motion, paras 1 and 9.

⁴ Motion, para. 4.

statements the Prosecution seeks to have admitted fall within such a category.⁵ The Prosecution further submits that the 92 *bis* Statements do not go to the acts and conduct of the immediate subordinates of the Accused.⁶

5. The Defence, in its Response of 24 January 2007, objects to the admission of three of the 92 *bis* Statements.⁷ According to the Defence, these three witness statements contain an opinion as to the source of fire and hence, in accordance with the case law of the Tribunal, cannot be admitted into evidence.⁸ However, the Defence does not object to these witnesses giving evidence under Rule 92 *ter* of the Rules.⁹

6. In its Reply filed on 29 January 2007,¹⁰ the Prosecution explains that, with regard to the statements of Witnesses W-80 and W-102, it agrees to redact any reference or evidence that may pertain to the origin of fire, rendering them admissible pursuant to Rule 92 *bis* without cross-examination.¹¹ With respect to the statement of Witness W-77, the Prosecution submits that it will file a motion to request the admission of this statement pursuant to Rule 92 *ter*, and to have the witness testify via video link.¹²

III. APPLICABLE LAW

7. Any evidence admitted pursuant to Rule 92 *bis* must satisfy the fundamental requirements for the admissibility of evidence, as set out in Rule 89 (C) and (D), namely that the evidence is relevant and has probative value.¹³ Pursuant to Rule 92 *bis*, a Trial Chamber may admit a written statement or a transcript of previous testimony of a witness 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.¹⁴ If such a statement meets this formal requirement and thus can be found to be admissible, the Trial Chamber

⁵ Motion, paras 5-6.

⁶ Motion, para. 9.

⁷ Response to Prosecution's motion for Admission of Written Statements (Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence), 24 January 2007, ("Response"). The Defence objects to the admission of the statements of witnesses W-77, W-80 and W-102.

⁸ Response, paras 7-8.

⁹ Response, para. 10.

¹⁰ Prosecution's Reply to the Defence Response to Prosecution's motion for Admission of Written Statements Pursuant to Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence ("Reply"). The Prosecution seeks leave to reply to the Response in accordance with Rule 126 *bis* of the Rules.

¹¹ Reply, para. 2.

¹² Reply, para. 3.

¹³ See e.g., *Prosecutor v. Stanislav Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 ("Galić Appeal Decision"), para. 12, in which the Appeals Chamber considered that the "intention of Rule 92 *bis* ... [was] to qualify the previous preference in the Rules for 'live, in court' testimony, and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable".

¹⁴ Rule 92 *bis*(A) of the Rules.

must use its discretion and determine whether admission is appropriate.¹⁵ Additionally, even if admission is considered to be appropriate, the Trial Chamber must decide whether the witness giving the evidence should still be required to appear for cross-examination in accordance with Rule 92 *ter*.¹⁶

8. As to the first step of the Trial Chamber's consideration pursuant to Rules 92 *bis*, the particular phrase "acts and conduct of the accused" has been interpreted in the case law of the Tribunal as an expression which should be given its "ordinary" meaning: deeds and behaviour of the accused.¹⁷ The Appeals Chamber further established that Rule 92 *bis* excludes any written evidence which goes to proof of any act or conduct of the accused which the Prosecution relies upon to establish:

- a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or
- b) that he planned, instigated or ordered the crimes charged, or
- c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
- d) that he was a superior to those who actually did commit the crimes, or
- e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
- f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.¹⁸

9. Rule 92 *bis* should thus not be read to exclude "acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible."¹⁹ However, the fact that a statement relates to the acts and conduct of an alleged subordinate of the accused is relevant to the exercise of the Chamber's discretionary power under Rule 92 *bis*, either to exclude the statement altogether, or to require the witness to appear for cross-examination. In exercising its discretion, the Trial Chamber will determine whether the individual whose acts and

¹⁵ Rule 92 *bis*(A) reads in its relevant parts "a Trial Chamber *may* dispense with the attendance of a witness in person, [...] in whole or in part", (emphasis added). Rule 92 *bis*(A)(i) and (ii) lists certain factors to be considered in favour or against admitting the evidence, however, the factors mentioned are not exclusive.

¹⁶ Rule 92 *bis*(C) of the Rules.

¹⁷ *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002 ("*Milošević* Decision"), para. 22, in which the Trial Chamber held that "[the phrase] should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so."

¹⁸ *Galić* Appeal Decision, para. 10.

¹⁹ *Ibid.*, para. 9.

conduct are described in the statement, is so proximate to the accused or whether the evidence is so pivotal to the Prosecution case, that the evidence should not be admitted in written form at all.²⁰

10. The Appeals Chamber in *Galić*, a case substantially similar to the instant case, although relating to an earlier time period, held that a written statement containing conclusions by a witness “as to the direction from which the particular shell had been fired, could [...] be of substantial importance to the Prosecution case if it is the vital link in demonstrating that the shell [...] was fired from a gun emplacement manned by immediately proximate subordinates of the accused.”²¹

11. In determining whether to require a witness whose statement is admitted pursuant to Rule 92 *bis* to appear for cross-examination, a Trial Chamber should consider, *inter alia*, the overriding obligation to ensure the accused a fair trial under Articles 20 and 21 of the Statute and whether the statement goes to proof of “a critical element of the Prosecution’s case”²² or, as was said in *Milošević*, whether the evidence in question relates to a “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.”²³

IV. DISCUSSION

12. Having reviewed the 92 *bis* Statements of Witnesses W-67, W-120 and W-123, which the Defence did not object to, the Trial Chamber makes the following findings. The statements refer to specific shelling incidents specified in the Indictment Schedules²⁴ and describe the witnesses’ experience of seeing and/or being hit by exploding shells. The Trial Chamber also notes that these statements are cumulative to *viva voce* or Rule 92 *ter* testimony at trial regarding the same scheduled incidents. The Trial Chamber finds that the evidence contained in the statements is relevant and has probative value. Further, the statements do not go to the acts or conduct of the Accused. The statements do not indicate the direction from which the particular shell had been fired, thus not revealing any vital links to the Accused or his immediate subordinates. Since the statements do not bear directly upon the Accused’s responsibility and are not considered to relate to

²⁰ *Ibid.*, paras 13-15: in cases where the crimes charged involves criminal conduct by subordinates of the accused, “there is often but a short step from a finding that [...] the accused knew or had reason to know that those crimes were about to be or had been committed by [his subordinates].” (para. 14). See also *Prosecutor v. Brđanin & Talić*, IT-99-36-T, Confidential Decision on the Admission of Rule 92 *bis* Statements, 1 May 2002, para 14.

²¹ *Ibid.*, para. 18.

²² *Prosecutor v. Duško Sikirica*, IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001, para. 4.

²³ *Milošević* Decision, para. 24. See also *Prosecutor v. Mile Mrkšić et al.*, IT-95-13/1-T, Decision on the Motion of the Defence of the Accused Veselin Šljivančanin for Admission of Written Statements in Lieu of Viva Voce testimony Pursuant to Rule 92 *bis*, 6 October 2006, para. 3.

²⁴ See Second Schedule to the Amended Indictment, 18 December 2006. The statements concern the shelling incidents on 28 June 1995 (W-67 and W-120) and 1 July 1995 (W-123).

a critical element of the Prosecution's case, the Trial Chamber finds that the statements fulfil the requirements for admission into evidence under Rule 92 *bis* of the Rules, without requiring the witnesses to appear for cross-examination.

13. With regard to the statements of Witness W-2,²⁵ the Trial Chamber notes that the witness' testimony includes information about the presence of military targets in the targeted shelling area,²⁶ hence revealing information that pertains to a critical issue of the Prosecution's case. The Trial Chamber notes that this evidence is cumulative with other testimony and that the Defence did not object to the admission of the statement. The Trial Chamber will not require this witness to appear for cross-examination, but will only allow the admission of the statement pursuant to Rule 92 *bis* of the Rules in its redacted form, as set out in Annex A, so as not to include the information pertaining to the presence of military targets in the shelled area.

14. With regard to the statements of Witnesses W-80 and W-102, the Trial Chamber makes the following findings. The statements refer to specific shelling incidents specified in the Indictment Schedules²⁷ and they contain descriptions of the witnesses' experience of seeing and/or being hit by exploding shells. As such, the statements do not go to the acts and conduct of the Accused. In addition, the evidence is cumulative in nature. The Trial Chamber finds that the content of the evidence is relevant and has probative value. However, unlike the statements mentioned in paragraph 12 above, the statements contain references to the direction of fire.²⁸ The Trial Chamber agrees with the parties and finds that these parts of the statements should be redacted. In addition, the Trial Chamber notes that the statement of Witness W-102 includes an opinion about the existence of military establishments.²⁹ As mentioned above, the Trial Chamber finds that this information relates to a critical issue of the Prosecution's case. The Trial Chamber will therefore admit the statements under Rule 92 *bis* without the requirement of cross-examination, provided they are redacted as suggested by the Prosecution³⁰ and directed by the Trial Chamber in Annex A to this decision.

²⁵ The statements (dated 22 February 1996 and 27 April 2006) concern the shelling incident on 8 November 1994, see Second Schedule to the Amended Indictment, 18 December 2006.

²⁶ Statement of Witness W-2, dated 22 February 1996, p. 2, para. 3.

²⁷ The statements (dated 13 March 1997 [W-80], 8 March 1997 and 24 April 2006 [W-102]) concern the shelling incidents on 23 July 1995 and 1 July 1995, respectively, see Second Schedule to the Amended Indictment, 18 December 2006.

²⁸ Statement of witness W-80, 13 March 1997 p. 3, para. 5 and statements of witness W-102, 8 March 1997, para. 4, and 24 April 2006, p. 2, para. 9.

²⁹ Statement of witness W-102, 24 April 2006, p. 3, para. 13.

³⁰ Reply, para.2.

15. The Trial Chamber understands that the Prosecution has withdrawn its request for admission of the statements of Witness W-77 pursuant to Rule 92 *bis* and that it will submit a new application for admission pursuant to Rule 92 *ter* with respect to that witness.³¹ The Trial Chamber therefore considers the application for admission of the statements of Witness W-77 pursuant to Rule 92 *bis* to be withdrawn.

V. DISPOSITION

For the foregoing reasons, and pursuant to Rules 89, 92 *bis* and 126 *bis* of the Rules, the Trial Chamber hereby **GRANTS** the Prosecution's Request for Leave to Reply, **GRANTS** the Motion **IN PART** and **ORDERS** as follows:

1. The written statements of Witnesses W-67, W-120 and W-123 are hereby admitted into evidence;
2. The written statements of Witnesses W-2, W-80 and W-102 are admitted into evidence in their redacted form, as set out in Annex A to this decision;
3. The admission of all the statements above is subject to compliance with the Rule 92 *bis*(B) certification procedure; and
4. The Trial Chamber requests the Registry to assign exhibit numbers to the statements in their redacted form upon compliance with the Rule 92 *bis*(B) certification procedure.

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



Judge Patrick Robinson
Presiding

Dated this twenty-seventh day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

³¹ Reply, para. 3.