



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-05-88-T

Date: 31 May 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 31 May 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON MOTION TO CONVERT *VIVA VOCE* WITNESSES
TO RULE 92 *TER* WITNESSES**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 (“Tribunal”);

BEING SEISED OF the “Prosecution’s Submission to Convert Twelve *Viva Voce* Witnesses to Rule 92 *ter* Witnesses”, filed confidentially on 28 February 2007 (“Motion”), in which the Prosecution requests to convert Witnesses 14, 16, 17, 48, 108, 117, 123, 124, 132, 156, 158, and 168 to Rule 92 *ter* witnesses,¹ and submits that should the Motion be granted, it “will identify and provide copies of the corresponding 92 *ter* statements as soon as possible”;²

NOTING the “Joint Defence Response to the 28 February 2007 Prosecution’s Submission to Convert Twelve *Viva Voce* Witnesses to Rule 92 *ter* Witnesses in Relation to Witnesses 117 and 132”, filed confidentially on 9 March 2007 (“Response”), in which all seven Accused (collectively, “Accused”) raise objections to the request of the Prosecution to convert Witnesses 117, 123 and 132 to Rule 92 *ter* witnesses;³

NOTING that the Prosecution withdrew its request to convert Witnesses 132 and 123 to Rule 92 *ter* witnesses on 4 and 18 April 2007, respectively;⁴

NOTING that the scope of the present Decision is therefore limited to the request to convert Witness 117, and that only submissions of the parties relevant to this witness will be mentioned and considered below;⁵

NOTING the Accused’s submission that the Trial Chamber should deny the Prosecution request to introduce transcripts of audio-recorded interviews as written evidence pursuant to Rule 92 *ter* because:

- i. audio-recorded interviews cannot become written statements for the purpose of Rule 92 *ter* by the simple process of their transcription;⁶
- ii. several of the characteristics of a written statement are all absent in an audio-recorded interview, such as (1) its voluntariness; (2) the knowledge of its purpose; (3) the

¹ Motion, para. 4.

² *Ibid.*, para. 5.

³ Response, paras. 7, 30. The Accused clarify that they do not object to the conversion of Witnesses 14, 16, 17, 48, 124, 156, 158, and 168 to Rule 92 *ter* witnesses. *Ibid.*, paras. 5–6.

⁴ T. 10029 (4 April 2007); 10210 (18 April 2007). Furthermore, following a series of communication with the Defence, the Prosecution agreed to withdraw its request to convert Witness 108 to a Rule 92 *ter* witness. T. 8433–8434 (8 March 2007).

⁵ In this respect, see also the oral decisions rendered by this Trial Chamber with respect to Witnesses 16, 17, 48, 124, 156, 158 and 168 on 13, 20 and 21 March 2007. T. 8747 (13 March 2007); T. 9022 (20 March 2007); T. 9104–9106, 9108–9109 (21 March 2007).

⁶ Response, para. 12.

- preparedness to give evidence for the party who takes the statement; (4) a declaration attesting to its accuracy and truthfulness; and (5) its affirmation by the signature;⁷
- iii. the audio-recorded interviews are interpreted and translated, and the Accused cannot verify their accuracy without access to the original recording;⁸
 - iv. audio-recorded interviews, unlike written statements, do not contain merely the words of the witness, but also those of the interviewer, including his or her “leading questions, expressions of opinions and (mis)statements of fact”;⁹
 - v. audio-recorded interviews “are unstructured and often unintelligible”;¹⁰ and
 - vi. the admission of the transcripts of audio-recorded interviews will not save court time;¹¹

NOTING that on 18 April 2007, pursuant to the Trial Chamber request,¹² the Prosecution provided the Trial Chamber with the proposed Rule 92 *ter* written evidence of Witness 117;

NOTING that Rule 92 *ter* provides the Trial Chamber with discretion to “admit, in whole or in part, the evidence of a witness in the form of a written statement” if the witness is present in court, available for cross examination and any questioning by the judges, and attests that the written statement accurately reflects his or her declaration and what he or she would say if examined;¹³

NOTING that the term “written statement” is not defined in Rule 92 *ter*;

CONSIDERING that the main purpose of Rule 92 *ter* is to foster the efficient and expeditious conduct of trial proceedings in accordance with the rights of the accused, and therefore there is no reason to limit the scope of Rule 92 *ter* to a specific means of documenting evidence and, in general, the requirement of a “written statement” should be considered as fulfilled when the witness’s words are documented and preserved;

CONSIDERING that the Accused’s submissions (ii) to (v) listed above concern the authenticity and veracity of transcripts of audio-recorded interviews, and are satisfied by Rule 92 *ter* which sets out a sufficient framework of safeguards by requiring that the witness will attest in court to the accuracy of his or her written statement and be available for cross-examination;

CONSIDERING further that although a transcript of an audio-recorded interview includes the words of the interviewers, this Trial Chamber is composed of professional judges with the experience and ability to discern the contents of evidence and give it the appropriate weight;

⁷ *Ibid*, paras. 12, 14.

⁸ *Ibid*, para. 15.

⁹ *Ibid*, paras. 13, 16.

¹⁰ *Ibid*, para. 17.

¹¹ *Ibid*, paras. 19–26.

¹² T. 9771 (30 March 2007).

CONSIDERING that the Accused will not be prejudiced as a result of the admission of a transcript of an audio-recorded interview as a written statement pursuant to Rule 92 *ter*, and that excluding the transcript of an audio-recorded interview from the scope of Rule 92 *ter* would be contrary to the underlying rationale of that rule;

CONSIDERING, however, that the Trial Chamber has a discretion as to whether to admit evidence pursuant to Rule 92 *ter*;

NOTING that in its list of witnesses filed under seal on 28 April 2006 pursuant to Rule 65 *ter* the Prosecution estimated that the examination-in-chief of Witness 117 as a *viva voce* witness will last 2 hours, and that in the “Prosecution’s Submission Pursuant to the Trial Chamber’s 19 January 2007 Confidential Order regarding Prosecution’s Estimation as to the Length of Its Case-in-chief”, filed confidentially on 2 February 2007, the Prosecution’s estimate for Witness 117, if converted to a Rule 92 *ter* witness, is 15 minutes;¹⁴

NOTING that the transcript of the audio-recorded interview with Witness 117, which the Prosecution requests to adduce as the written statement of Witness 117 pursuant to Rule 92 *ter*, is 146 pages long;

NOTING the submissions of the Accused¹⁵ that the admission of the proposed written statement of Witness 117 pursuant to Rule 92 *ter* will result in an “unnecessarily long cross-examination”;¹⁶

CONSIDERING that in light of the length and nature of the proposed Rule 92 *ter* statement, and the potential impact on the length of cross examination, the Trial Chamber is not satisfied that the conversion of Witness 117 to a Rule 92 *ter* witness will expedite the proceedings, and therefore does not consider it appropriate;

¹³ Rule 92 *ter*.

¹⁴ On 19 April 2007, the Prosecution provided the Trial Chamber with a document which contained information on the witnesses that the Prosecution proposes to call. In this document, the Prosecution affirmed that its estimate for Witness 117, if converted to a Rule 92 *ter* witness, is 15 minutes.

¹⁵ Response, paras. 19-26.

¹⁶ *Ibid*, para. 24.

PURSUANT TO Rule 92 *ter* of the Rules,

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding

Dated this thirty-first day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]