



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-04-83-T
Date: 13 November 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 13 November 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION
OF EVIDENCE PURSUANT TO RULE 92 *BIS***

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Matthias Neuner
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused

Ms. Vasvija Vidović
Mr. Nicholas David Robson

1. Trial Chamber I (“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”) is seised of the “Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*” filed confidentially on 19 October 2007 (“Motion”),¹ and hereby renders its Decision.²

I. SUBMISSIONS

A. Prosecution

2. The Prosecution requests the Trial Chamber to dispense with the attendance of eight witnesses and seeks admission into evidence of one or more certified statements of Zakir Alispahić, Luka Babić, Amir Krivokapa, Mesud Šadinlija, Arijana Saračević, Branko Šikanić, Milan Todorović and Sead Žerić (“Proposed Statements”),³ pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”). The Prosecution submits that each of the Proposed Statements contains evidence that goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment.⁴ Moreover, the Prosecution requests that a number of documents that are referred to in the respective Proposed Statements be admitted into evidence.

3. The Prosecution contends that a number of factors militate in favour of admission of the Proposed Statements, as spelled out in Rule 92 *bis*(A)(i):

- a) The tendered evidence, or much of it, is, in whole or part, cumulative of or related to oral testimony and other evidence concerning or related to similar facts;
- b) Parts of the evidence ‘relates to relevant historical, political or military background;’
- c) The tendered evidence, in whole or part, ‘concerns the impact of crimes upon the victims.’⁵

4. The Prosecution claims that none of the factors against admission as provided by Rule 92 *bis*(A)(ii) applies to the Proposed Statements. It submits that “the evidence is reliable, and the probative value outweighs any possible prejudicial effect”.⁶ Moreover, “the cumulative nature

¹ On 8 November 2007, the Prosecution filed confidentially its “Submission of English Translations of Rule 92 *bis* Statements”.

² Although all pleadings in this matter were made confidentially, the present Decision does not contain any protected information and is therefore issued publicly.

³ Motion, Annex A.

⁴ Motion, para. 1. The Prosecution further submits that the Proposed Statements contain crime-base evidence and that they generally “describe the actions of soldiers, police officers, and other persons, but not the actions of the Accused himself. Moreover, other witnesses who will be available for cross-examination will describe factual findings, such as autopsies, made of evidence after the crimes were committed”, Motion, para. 6.

⁵ Motion, paras 3, 7. The Prosecution also submits that “it is fair and in the interest of efficient proceedings to receive this evidence”, Motion, para. 3.

⁶ Motion, para. 9.

of the evidence supports its reliability”, and “there is no overriding public interest in oral presentation of this evidence” as “the public will have access to the oral testimony of other witnesses on the issues addressed by the proposed 92 *bis* witnesses”.⁷

5. According to the Prosecution, there is no need for cross-examination of the witnesses in question as “the Trial Chamber has heard considerable evidence related to the same or similar points or aspects of the tendered evidence”.⁸ It further submits that the right to cross-examination should be balanced against the need to conduct the proceedings efficiently and expeditiously. As a consequence, “the Defence should only be permitted to require these witnesses to travel to The Hague, if a *bona fide* and particularized (rather than vague or generic) showing can be made that clearly makes it necessary and worthwhile”.⁹

6. The Prosecution further submits that each of the Proposed Statements directly relates to the crimes alleged in Counts 1-4 of the Indictment, and that each of them is relevant to the case¹⁰

B. Defence

7. On 31 October 2007, the Defence filed confidentially the “Defence Response to Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *bis*” (“Response”) whereby it partly opposes the Motion. As a preliminary point, the Defence objects to the admission of any documents referred to in the Proposed Statements on the grounds that the Prosecution, save for Witness Branko Šikanić, has not provided copies of any such documents.¹¹

8. The Defence neither objects to the admission of the written statements, nor requests their presence for cross-examination, of the following individuals: Mesud Šadinlija, Arijana Saračević and Branko Šikanić.¹² The Defence further does not oppose the admission of the written statements of Milan Todorović and Sead Žerić, even if an agreement with the Prosecution on some redactions proposed by the Defence has not been reached.¹³

9. The Defence however opposes the admission of the following written statements pursuant to Rule 92 *bis*, and proposes that the witnesses be called *viva voce*:

⁷ Motion, paras 9-10.

⁸ Motion, para. 14. The Prosecution further points out that “courtroom witnesses have already been fully cross-examined and, in many instances, extensively questioned by the Judges”.

⁹ Motion, paras 16-19.

¹⁰ Motion, para. 12.

¹¹ Response, para. 13.

¹² Response, para. 14.

¹³ Response, paras 15-16. On 6 November 2007, the Defence informed the Trial Chamber’s Legal Officer by way of e-mail that an agreement with the Prosecution as to the proposed redactions had not been reached, but nonetheless, the Defence does not oppose the statements of Milan Todorović and Sead Žerić being admitted into evidence under Rule 92 *bis* without cross-examination.

- a) **Zakir Alispahić.** The Defence objects to the Prosecution's request to tender only two out of three written statements given by this witness and claims that this would present only a "selective version of the witness' evidence".¹⁴ As the two statements are said to be in contradiction on a material issue with the third statement—which is not part of the Proposed Statements—the Defence submits it would be prejudiced should the two statements be admitted into evidence.¹⁵ Finally, the Defence argues that the statements of Zakir Alispahić make reference to numerous documents copies of which were not attached to the Motion. Admitting the statements without the documents would "create significant confusion" which is a factor militating against admission of the statements pursuant to Rule 92 *bis*(A)(ii).¹⁶
- b) **Luka Babić.** The Defence challenges the authenticity of the diary referred to in the statement of the witness.¹⁷ Moreover, the Defence argues that the evidence of this witness touches upon a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue" and that no factors favouring admission pursuant to Rule 92 *bis*(A)(i) are applicable.¹⁸
- c) **Amir Krivokapa.** The Defence submits that the statements of this witness go to proof of acts and conduct of the Accused in that their contents are relevant to whether he "knew or had reason to know that those crimes were about to be or had been committed by his subordinates" and because the witness in one statement identifies the voice of the Accused.¹⁹ According to the Defence, there are a number of ambiguities in the witness' statements all of which militate against admission of his statements pursuant to Rule 92 *bis*.²⁰

II. APPLICABLE LAW

10. Rule 92 *bis* of the Rules governs the procedure for admission into evidence of written statements or transcripts in lieu of oral testimony of a witness. As a general rule, the evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.²¹ A written statement must be accompanied by a declaration of the

¹⁴ Response, paras 18, 19. The Defence further argues that Witness Zakir Alispahić gave his Rule 92 *bis* attestation in respect only to the last two statements.

¹⁵ Response, para. 20.

¹⁶ Response, para. 21.

¹⁷ Response, para. 23; Response, Annex A.

¹⁸ Response, para. 25.

¹⁹ Response, paras 27, 32.

²⁰ Response, paras 27-32.

²¹ Rule 89 of the Rules; *see also Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 ("*Galić* Decision"), para. 31.

provider that its contents are true and correct to the best of that person's knowledge and belief. This declaration must be witnessed and verified in writing by an authorised person.²²

A. The Acts and Conduct of the Accused

11. Rule 92 *bis* of the Rules stipulates that the material sought to be admitted must not go to proof of the acts and conduct of the accused as charged in the indictment. The Appeals Chamber in *Galić* made a clear distinction here between a) the acts and conduct of others who commit the crimes for which the indictment alleges that the accused is individually responsible, and b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those other persons. The Appeals Chamber found that evidence going to proof of the latter renders material inadmissible under Rule 92 *bis*,²³ such as:

- (a) that the accused committed (that is, personally physically perpetrated) any of the crimes charged himself or herself, 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 that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.²⁴

B. Acts and Conducts of Others – Proximity to the Accused

12. When the evidence sought to be admitted under Rule 92 *bis* goes to proof of the acts and conduct of others as opposed to those of the accused, the Trial Chamber must still exercise its discretion under Rule 92 *bis* and take into account the proximity of such acts and conduct to the accused. This is particularly relevant in cases as the present one which concerns charges arising solely under Article 7(3) of the Statute. As stated by the Appeals Chamber:

[I]t may well be that the subordinates of the accused (or those alleged to be his subordinates) are so proximate to the accused that *either* (a) the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92 *bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form, *or* (b) the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event.²⁵

²² Rule 92 *bis*(B) of the Rules.

²³ *Galić* Decision, para. 9.

²⁴ *Galić* Decision, para. 10.

²⁵ *Galić* Decision, para. 15 (emphasis in original). The Appeals Chamber further points out that "Rule 92*bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts

C. Factors in Favour and Against Admitting Evidence Pursuant to Rule 92 bis

13. Rule 92 bis(A) introduces a non-exhaustive list of factors that may be taken into account by the Trial Chamber in favour or against admission of a transcript or written statement. Factors in favour of admission include where the evidence in question is of cumulative nature, relates to relevant historical, political or military background, consists of an analysis of the ethnic composition of the population, concerns the impact of crimes upon the victims, relates to issues of the character of the accused or relates to the sentencing factors. Factors militating against admission include where there is an overriding public interest in such evidence being presented orally, a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value, or there are any other factors which make it appropriate for the witness to attend for cross-examination.

D. Non-Admittance and Appearance for Cross-Examination

14. The proximity to the accused of the acts and conduct described in the written evidence is a factor to be taken into account by the Trial Chamber in deciding whether the evidence is so pivotal to the prosecution case that it should not be admitted in written form at all.²⁶ Another factor to be considered by the Trial Chamber is whether the evidence in question relates to “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue”.²⁷ Rule 92 bis(C) allows a Trial Chamber to call the provider of a written statement for cross-examination.

E. Associated Exhibits

15. It is well-established in the jurisprudence of the Tribunal that “exhibits accompanying written statements or transcripts form an inseparable and indispensable part of the testimony and can be admitted along with statements or transcripts”.²⁸

and conduct of what may be described as the accused’s immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know”, *Galić* Decision, para. 16.

²⁶ See *Galić* Decision, para. 15. If the witness was cross-examined in the previous proceedings, the Trial Chamber should also determine whether cross-examination in those proceedings adequately dealt with the issues relevant to the defence in the current proceedings, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for the Admission of Written Evidence Pursuant to Rule 92 bis of the Rules, 16 January 2006 (“*Martić* Decision”), para. 15.

²⁷ *Martić* Decision, para. 15; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 bis, 21 March 2002, paras 24-25.

²⁸ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 ter, 22 February 2007, p. 3; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92 bis(D), 9 July 2001, para. 8.

III. DISCUSSION

16. Having carefully reviewed the Proposed Statements the Trial Chamber makes the following findings.

17. **Luka Babić.** The Trial Chamber notes that this witness was a HVO military policeman and that his statement concerns a diary found next to the dead bodies of five Mujahedin, one of whom was the alleged EMD leader Anwar Shaaban. It appears that the evidence contained in the statement itself does not go to proof of the acts and conduct of the Accused or any of his immediate subordinates. Since the Prosecution has not sought to tender the diary, there is no need to determine its authenticity. The Trial Chamber will therefore admit into evidence the statement of Luka Babić pursuant to Rule 92 *bis*.

18. **Mesud Šadinlija.** The two statements of this witness concern the procedures governing the archiving of ABiH wartime documentation. The Trial Chamber agrees with the Prosecution that his evidence does not go to acts and conduct of the Accused nor his immediate subordinates, and does not address critical issues in the present case. As there are no factors militating against the admission of these statements, the Trial Chamber will admit them pursuant to Rule 92 *bis*.

19. **Sead Žerić.** The Trial Chamber notes that the evidence of this witness concerns the structure and procedures of the Travnik District Military Prosecutor, and appears to be of relevance to any judicial measures that were taken in the aftermath of the events in Maline/Bikoši. His evidence does not go to proof of acts and conduct of the Accused and is likely to be corroborated by the testimony of Muris Hadžiselimović. Considering that his statements fulfil the relevant requirements, the Trial Chamber admits into evidence pursuant to Rule 92 *bis* the statements of Sead Žerić.

20. **Branko Šikanić.** The Trial Chamber notes that the statements of the witness concern the observation of crimes committed in Livade and Kamenica Camp. His evidence does not go to the acts and conducts of the Accused. Rather, it is “crime base” evidence cumulative to the testimonies of witnesses Velibor Trivičević and Krstan Marinković. Considering that his evidence fulfils the relevant requirements, the Trial Chamber admits into evidence pursuant to Rule 92 *bis* the statements of Branko Šikanić, jointly with the three sketches drawn by the witness which are attached to one of the statements.

21. **Milan Todorović.** The Trial Chamber observes that the evidence of this witness concerns the identification of Savo Todorović and two other purported victims in the present case. His evidence does not go to proof of the acts and conduct of the Accused. Rather, it is “crime base”

evidence which is suitable for admission pursuant to Rule 92 *bis* of the Rules. Considering that his evidence fulfils the relevant requirements, the Trial Chamber admits into evidence pursuant to Rule 92 *bis* the statements of Milan Todorović, jointly with clear copies of the photographs which are referred to in the statements.

22. **Zakir Alispahić.** The Trial Chamber notes that the background of this witness concerns the Military Police Battalion of the 3rd Corps of the Army of Bosnia and Herzegovina (“ABiH”). In his statements, the witness describes events involving a number of Serb prisoners, a camp of the El-Mujahid Detachment (“EMD”) and contacts with the “security organ” of the EMD, a certain Mr. Aiman. Although the evidence in his statements does not go to proof of the acts and conduct of the Accused, they include information touching upon the relationship between the EMD and the ABiH. The Trial Chamber agrees with the Defence that this concerns a “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue”. The Trial Chamber holds that this fact, in conjunction with the ambiguities alleged by the Defence between the two statements submitted for admission in the Motion on the one hand, and an earlier statement which does not form part of the Proposed Statements on the other, clearly militates in favour of allowing the Defence to cross-examine this witness. The Trial Chamber will therefore admit into evidence the statements of Zakir Alispahić pursuant to Rule 92 *bis*(C), subject to the witness’ appearance for cross-examination.

23. **Amir Krivokapa.** The Trial Chamber observes that the two statements given by this witness concern his employment as photographer at the ABiH 3rd Corps Press Centre and his contacts with the EMD in this capacity. The statements also include evidence regarding encounters between the Accused and members of the EMD or “Abu Zubeir’s group”, as well as an identification of the Accused’s voice at a farewell function for the EMD. This evidence squarely falls within the ambit of “acts and conduct of the accused as charged in the indictment”. For these reasons, the Trial Chamber finds that the statements of Amir Krivokapa cannot be introduced by way of Rule 92 *bis*.

24. **Arijana Saračević.** The Trial Chamber notes that the evidence of this witness concerns an interview with the Accused in September 1995. The scope of this interview includes the military operations carried out at that time by the ABiH, as well as the extent of the Accused’s command and control. In the context of charges brought under Article 7(3) of the Statute, this would fall squarely within the category of “acts and conduct of the accused”. Although the Defence does not object to the admission of this evidence, the Trial Chamber considers itself bound by the overriding obligation to ensure that the Accused receives a fair trial, a reflection of which are the requirements

of Rule 92 *bis*. Therefore, the Trial Chamber finds that the statements of Arijana Saračević cannot be introduced by way of Rule 92 *bis*.

IV. DISPOSITION

25. For the reasons set out above, and pursuant to Articles 20 and 21 of the Statute and Rules 54, 89, 92 *bis* and 92 *ter* of the Rules, the Trial Chamber hereby

GRANTS the Motion **IN PART**,

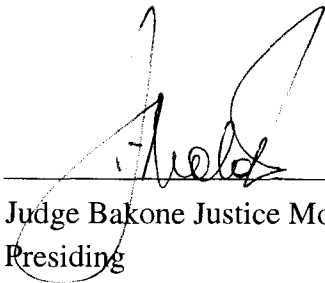
DECIDES as follows:

1. The statements of Luka Babić, Mešud Šadinlija, Sead Žerić and Zakir Alispahić are admitted into evidence;
2. The statements of Branko Šikanić are admitted into evidence together with the three sketches attached to one of them;
3. The statements of Milan Todorović are admitted into evidence, together with clear copies of photos discussed by the witness in his statements;
4. Witness Zakir Alispahić is to appear for cross-examination by the Defence;

DENIES the remainder of the Motion; and

REQUESTS the Registry to assign exhibit numbers to the documents admitted into evidence.

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



Judge Bakone Justice Moloto
Presiding

Dated this thirteenth day of November 2007

At The Hague

The Netherlands

[Seal of the Tribunal]