



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: 10 July 2008

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: 10 July 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON BEARA'S REQUESTS FOR ADMISSION OF WRITTEN
EVIDENCE IN LIEU OF *VIVA VOCE* TESTIMONY**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojčić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell 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 “Ljubiša Beara’s Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 92 *ter*, and 92 *quater*”, filed confidentially on 19 May 2008 (“Motion”);

NOTING that the Trial Chamber has also received the following relevant pleadings: “Notice of Accused Ljubiša Beara of Disclosure of a List of Witnesses Pursuant to Rule 65 *ter*”, filed confidentially on 1 May 2008 (“1 May 2008 Notice”); “Prosecution Response to ‘Ljubiša Beara’s Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 92 *ter*, and 92 *quater*’”, filed on 30 May 2008 (“First Prosecution Response”) wherein the Prosecution submitted that the Trial Chamber should not grant the relief requested as Beara failed to provide statements for the witnesses whose evidence he sought to have admitted by the Motion;¹ “Notice of Filing of Ljubiša Beara’s Amended Rule 92 *bis* Witness List and Draft Witness Statements”, filed confidentially on 26 May 2008 (“26 May 2008 Notice”); “Prosecution Response to the ‘Notice of Filing of Ljubiša Beara’s Amended Rule 92 *bis* Witness List and Draft Witness Statements’”, filed confidentially on 9 June 2008 (“Second Prosecution Response”); “Defence Motion Seeking Leave to Reply and Reply to Prosecution Response to Confidential Motion on Behalf of Ljubiša Beara Seeking Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*”, filed confidentially on 16 June 2008 (“Reply”); “Defence Motion for Leave to Amend 65 *ter* List of Witnesses”, filed confidentially on 30 June 2008 (“Beara Motion to Amend 65 *ter* List”), with which Beara for the first time provided English drafts of many of the proposed statements to the Trial Chamber; “Supplemental Motion for Leave to Amend Rule 65 *ter* Witness List”, filed confidentially by Beara on 2 July 2008 (“Beara Supplemental 65 *ter* Motion”); “Ljubiša Beara’s Motion and Notice of Filing of Two Additional Witness Statements Pursuant to Rule 92 *bis*”, filed confidentially on 7 July 2008;

NOTING that in the Motion, Beara requested the admission without cross-examination of written evidence pursuant to Rule 92 *bis* of thirty one witnesses,² and that Beara amended this list in the 26 May 2008 Notice and the Reply to thirty eight and then thirty six witnesses, respectively;³

¹ First Prosecution Response, para. 1.

² Motion, paras. 1, 17, 23.

³ Notice, paras. 1–26; Reply, paras. 9, 15, 20, 23.

NOTING that Beara acknowledged in the Reply that the following eight witnesses, namely Witnesses 2DW-4, 2DW12, 2DW15, 2DW-32, 2DW-92, 2DW-93, 2DW-26, 2DW-94, have been withdrawn from its 1 May 2008 Notice;⁴

NOTING that in the Second Prosecution Response the Prosecution does not object to the admission of the statements of ten proposed witnesses without cross-examination, namely Witnesses 2DW-1, 2DW-2, 2DW-6, 2DW-13, 2DW-22, 2DW-23, 2DW-29, 2DW-31, 2DW-57 (also identified provisionally as 2D-PW-12) and 2DW-67, and that on 25 June 2008 the Trial Chamber orally announced that the statements are appropriate for admission and it would be admitting the statements of these ten witnesses without cross-examination;⁵

NOTING that the Prosecution does not object to the admission of the statements of a further fourteen proposed witnesses without cross-examination, namely Witnesses 2DW-33, 2DW-40, 2DW-45, 2DW-46, 2DW-47, 2DW-58, 2DW-62,⁶ 2DW-64, 2DW-65, 2DW-66, 2DW-96,⁷ 2DW-97,⁸ 2DW-98⁹ and 2DW-105;¹⁰

NOTING that in the Second Prosecution Response the Prosecution objects to the admission of the statements of three¹¹ witnesses and requests the Trial Chamber to order that these witnesses appear *viva voce*, or in the alternative for cross-examination, arguing that:

- a. the statement of Witness 2DW-10 “contains evidence relating to the claimed correct behaviour of the Security Organ in general, and Beara in particular”,¹² is inappropriate

⁴ Reply, paras. 20–21.

⁵ Second Prosecution Response, para. 1; Reply, para. 9; T. 22758 (25 June 2008). *See also* Prosecution’s Consolidated Response to Accused Beara’s Motions Pursuant to Rules 65 *ter* and 92 *bis*, and Prosecution’s Motion to Exclude Irrelevant and Cumulative Testimony and for Further Relief, 8 July 2008, para. 3.

⁶ Beara filed the English translation of this statement with the Trial Chamber on 7 July 2008. Ljubiša Beara’s Notice of Filing of the English Translation of One Witness Statement Pursuant to Rule 92 *bis*, 7 July 2008, Annex A.

⁷ The Trial Chamber notes that Witness 2DW-96 appeared in the Reply as a witness which Beara would “potentially” seek to convert from *viva voce* to Rule 92 *bis*, and that the witness appeared in the Beara Motion to Amend 65 *ter* List as one to which the Prosecution objected. Reply, para. 23; Beara Motion to Amend 65 *ter* List, para. 12. On 2 July 2008, the Prosecution orally submitted that it does not object to the admission of this statement without cross-examination. T. 23225 (2 July 2008).

⁸ The Prosecution’s position on the first eleven witnesses in this list was submitted orally on 2 July 2008. T. 23224 (2 July 2008). *See also* Prosecution’s Consolidated Response to Accused Beara’s Motions Pursuant to Rules 65 *ter* and 92 *bis*, and Prosecution’s Motion to Exclude Irrelevant and Cumulative Testimony and for Further Relief, 8 July 2008, para. 3.

⁹ Ljubiša Beara’s Motion and Notice of Filing of Two Additional Witness Statements Pursuant to Rule 92 *bis*, 7 July 2008, para. 8. On 8 July 2008, the Prosecution orally submitted that it has no opposition to the admission of this witness’s statement. T. 23505 (8 July 2008).

¹⁰ Ljubiša Beara’s Motion and Notice of Filing of Two Additional Witness Statements Pursuant to Rule 92 *bis*, 7 July 2008, para. 8. On 8 July 2008, the Prosecution orally submitted that it has no opposition to the admission of this witness’s statement. T. 23505 (8 July 2008).

¹¹ The Trial Chamber notes that the Prosecution objected to the admission of the statements of six witnesses. Second Prosecution Response, para. 1. However, it appears from the Beara Supplemental 65 *ter* Motion that Beara now

for admission pursuant to Rule 92 *bis* and, in the alternative, the witness should be required to appear for cross-examination “as his evidence pertains to a live and important core issue, namely the role and conduct of the Security Organ”,¹³

- b. the statement of Witness 2DW-19 is part of Beara’s alibi defence and “as such, concerns the acts and conduct of the Accused [and] [...] is not appropriate for admission pursuant to 92 *bis*” and, in the alternative, the witness should be required to appear for cross-examination “concerning his statement that he was not aware of any Main staff officers coming to Bratunac”,¹⁴ and
- c. the statement of Witness 2DW-20, like that of 2DW-19, relates to Beara’s alibi defence and likewise concerns the acts and conduct of the Accused such that the statement should not be admitted pursuant to Rule 92 *bis* and that, in the alternative, the witness should be required to appear for cross-examination on this issue;¹⁵

NOTING that in his Reply, Beara challenges the Prosecution’s objections to the proposed statements of these three witnesses, and contends that the statements are relevant to the historical background and of a cumulative nature, and that facilitating the expediency of the proceedings should mitigate in favour of the admission of the statements without cross-examination;¹⁶

NOTING that, in addition to the three witnesses opposed by the Prosecution in the Second Prosecution Response, the Prosecution also orally objected to the proposed statement of one additional witness, submitting that it seeks to cross-examine Witness 2DW-59 on the substance of the proposed statement, arguing that it wishes to “check the dates and the sequence of events” regarding his capture and detention;¹⁷

NOTING that, pursuant to Rule 92 *bis*, a Trial Chamber may admit the written statement or transcript of previous testimony of a witness in lieu of oral testimony where the evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment and that, where the evidence does not pertain to the acts and conduct of the accused, Rule 92 *bis*(A)(i)

proposes to call three of these witnesses for *viva voce* testimony (Witnesses 2DW-8, 2DW-9 and 2DW-11). Beara Supplemental 65 *ter* Motion, Annex A, p. 1.

¹² Second Prosecution Response, para. 17.

¹³ *Ibid.*, para. 19.

¹⁴ *Ibid.*, para. 22.

¹⁵ *Ibid.*, paras. 24–26.

¹⁶ Reply, paras. 14–19.

¹⁷ T. 23224–23225 (2 July 2008).

and (ii) provide non-exhaustive lists of factors which may guide the Trial Chamber in the exercise of its discretion whether to admit evidence pursuant to the rule;¹⁸

NOTING that, pursuant to Rule 92 *ter*, a Trial Chamber may admit the written statement or transcript of previous testimony of a witness in lieu of oral testimony where the evidence goes to proof of a matter that concerns the acts and conduct of the accused as charged in the indictment;

CONSIDERING that the Trial Chamber has reviewed the twenty-four proposed statements to which the Prosecution does not object, and that the Trial Chamber considers each of them to be appropriate for admission pursuant to Rule 92 *bis* without cross-examination as none of them concerns the acts and conduct of any Accused as charged in the Indictment, and that the Trial Chamber does not find it necessary to require any of these witnesses to appear for cross-examination as their statements do not concern any live and important issue between the parties;

CONSIDERING, as to the four statements to which the Prosecution objects, that:

- a. the statements of Witnesses 2DW-10, 2DW-19 and 2DW-20 concern live and important issues between the parties and, therefore, that requiring the witnesses to appear for cross-examination is appropriate; and
- b. the statement of Witness 2DW-59 does not concern any live and important issue between the parties and, therefore, it is not necessary to require the witness to appear for cross-examination;

PURSUANT TO Rule 89, 92 *bis* and 92 *ter* of the Rules,

The Trial Chamber **HEREBY GRANTS** the Motion in part, and **ORDERS**:

1. Beara is granted leave to file the Reply.
2. The statements of the following witnesses are provisionally admitted without requiring the witnesses to appear for cross-examination, pending receipt of the statements in a form which fully satisfies the requirements of Rule 92 *bis*(B):

Witnesses 2DW-1, 2DW-2, 2DW-6, 2DW-13, 2DW-22, 2DW-23, 2DW-29, 2DW-31, 2DW-33, 2DW-40, 2DW-45, 2DW-46, 2DW-47, 2DW-57 (also identified provisionally as 2D-PW-12), 2DW-58, 2DW-62, 2DW-64, 2DW-65, 2DW-66, 2DW-67, 2DW-96, 2DW-97, 2DW-98 and 2DW-105.

¹⁸ Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006, paras. 7–16.

3. The statements of Witnesses 2DW-10, 2DW-19 and 2DW-20 may be admitted pursuant to the provisions of Rule 92 *ter*.
4. By majority decision (Judge Agius dissenting), the statement of Witness 2DW-59 is provisionally admitted without requiring the witness to appear for cross-examination, pending its receipt in a form which fully complies with the requirements of Rule 92 *bis*(B).

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



Carmel Agius
Presiding

Dated this tenth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]