

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 No. IT-05-87/1-T
Date: 9 April 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision of: 9 April 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF WRITTEN EVIDENCE OF WITNESS K81 IN LIEU OF
ORAL TESTIMONY PURSUANT TO RULE 92BIS**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

I. BACKGROUND

1. On 28 October 2008, the Prosecution filed "Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* with Public Annex A and Confidential Annex B" in compliance with the Pre-Trial Judge's Order of 10 October 2008.¹ On 16 March 2009, the Chamber issued its Decision on the Motion² ("Decision") in which it noted that it was not in the possession of the previous statements of Witness K81 which relate directly to the testimony of this Witness in the *Milutinović et al.* trial, and that in the absence of this material, the testimony was incomplete.³ The Chamber reserved its Decision with respect to the evidence of K81 until it was in the possession of such further material.⁴ On 18 March 2009, the Prosecution informed the Chamber that it had uploaded the statements of K81 into e-court.⁵
2. This decision is in respect of the proffered evidence of Witness K81.

II. SUBMISSIONS

3. The Chamber has sufficiently summarized the submissions of the parties pertaining generally to the admission of evidence of the proposed Rule 92*bis* witnesses subject of the Motion in its Decision and will not repeat them here in full.⁶ The Prosecution submitted that the proffered evidence of the proposed Rule 92*bis* witnesses does not go to proof of acts and conduct of the Accused as charged in the Indictment, is relevant and reliable, concerns largely crime-base evidence concerning the impact of crimes upon victims, and is cumulative of other evidence that will be heard orally at trial.⁷ The Defence submissions with respect to Witness K81 are that his statements are inconsistent with regard to the events he describes, that he is the only witness who will testify about events in the village of Vladovo/Lladově, and that he claims to have seen "many events" with his own eyes, through binoculars.⁸ For these reasons, the Defence submits, Witness K81 should be called for cross-examination.⁹

¹ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, "Confirmatory Order on Submission of Motions Pursuant to Rules 92*bis*, 92*ter*, and 92*quater* and Further Scheduling Rule 65*ter* Conferences", 10 October 2008, p 2.

² *Prosecutor v Đorđević*, Case No. IT-05-87/1-T, "Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis*", 16 March 2009.

³ Decision, para 17.

⁴ Decision, para 41.

⁵ Rule 65*ter* number 02268.

⁶ Decision, paras 6-13.

⁷ Motion, paras 9, 12, 15.

⁸ Supplemental Motion, Confidential Annex A, p 6.

⁹ Supplemental Motion, Confidential Annex A, p 6.

III. LAW

4. The Chamber recalls that it has reviewed the applicable law relating to the admission of evidence pursuant to Rule 92*bis* in two previous decisions in this case and shall not discuss the law in this decision.¹⁰

IV. DISCUSSION

5. K81 gave a statement to the Office of the Prosecutor of the ICTY on 30 May 1999 and on 1 February 2002. He testified in the case of *Milutinović et al.* on 21 November 2006. His evidence includes, *inter alia*, a description of the entry of the “Vojska Jugoslavije” (“VJ”) accompanied by civilians into the village of Vladovo/Lladovë in the municipality of Gnjilane/Gjilan on 25 March 1999, his subsequent flight to a nearby mountain where he stayed for two weeks, and his observations, from his position on this mountain, of crimes committed by what he describes as VJ soldiers and Serb civilians in the village of Vladovo/Lladovë and the neighbouring villages of Žegra/Zhegër and Laštica/Llashtice. He further provides hearsay accounts of the murder of a number of individuals in the village of Žegra/Zhegër, none of which are scheduled in the Indictment. Witness K81 also provides evidence that he joined a group of about 1000 people to the border of Macedonia, that this convoy was escorted by VJ and police, and that the police searched the group and took away their ID papers and passports.

6. The Chamber notes that the Indictment does not charge the Accused with the attack on these specific villages as such, yet alleges that thousands of displaced persons from villages such as, *inter alia*, Žegra/Zhegër and Vladovo/Lladovë sought shelter in the village of Donja Stubë/Stubëlle E Poshtme in Vitina municipality, and that from there, many of the persons from Gnjilane/Gjilan municipality crossed Kosovo’s boundary with Serbia where some of them suffered harassment before entering Macedonia.¹¹

7. The Chamber recalls that Rule 92*bis* does not authorize the admission of written evidence in lieu of *viva voce* testimony where such evidence goes to proof of the acts and conduct of the accused. This does not apply to Witness K81’s evidence, which deals primarily with his observations of generally identified forces in a number of villages. The Chamber does not consider that there are any factors against the admission of the evidence of Witness K81 in written form, as identified in Rule 92*bis*(A)(ii) of the Rules. It is relevant to the charges in the Indictment in

¹⁰ Decision, para 14; see also *Prosecutor v Dorđević*, Case No. IT-05-87/1-T, “Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*,” 11 February 2009, (“First Rule 92*bis* Decision”), paras 4-8.

¹¹ *Prosecutor v Dorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 18 July 2008, para 72(i).

accordance with Rule 89(C). The Chamber therefore considers that the evidence of this Witness is admissible in principle. It will now examine, pursuant to its discretion under Rule 92bis(C) of the Rules, whether it shall require Witness K81 to appear for cross-examination.

8. The Defence submits that Witness K81's evidence is inconsistent with respect to the events he describes, but, as noted, does not specify what these inconsistencies may be. The Chamber has reviewed the proffered material. It notes that the Witness provides inconsistent evidence in his statement of 30 May 1999 and his testimony in the *Milutinović et al.* trial pertaining to the description of the forces involved in the burning and looting of houses in the villages of Vladovo/Lladovë and Laštica/Llashtice, as viewed by the Witness through his binoculars from his position on a nearby mountain. Particularly in relation to the Witness's observations of forces present in the village of Laštica/Llashtice which, according to the Witness, were setting houses on fire, burning the mosque and looting, the Witness's evidence is unclear. In his statement, Witness K81 names a number of local men from the village of Žegra/Zhegër who were allegedly involved in the attacks and directed the soldiers where to look for LDK activists. The Witness describes that these men were civilians, but that he saw two of them wearing dark blue with grey police uniforms. Further, in his statement, K81 refers to police action in the context of deportation only. In *Milutinović et al.*, when referring to his observations of the forces in Laštica/Llashtice, he testified that he saw "the army and the police" but did not see their insignia. The evidence with respect to when and where the Witness saw the police involved in any of the events he describes is unclear. Moreover, in line with the Chamber's criteria set out in its previous Decision on the remainder of the Rule 92bis Motion, the fact that K81 lists by name a number of individuals who were involved in the attacks further warrants the appearance of this Witness for cross-examination. It is the view of this Chamber that the Defence should have an opportunity to test the Witness's evidence concerning the specific point of forces involved in crimes he witnessed, as it concerns the acts of individuals for whom the Accused is alleged to be responsible pursuant to Articles 7(1) and 7(3) of the Statute. The Chamber therefore considers it to be in the interests of justice that Witness K81 appears for cross-examination.

9. The Chamber notes that in its Motion, the Prosecution requests leave to add two documents tendered through Witness K81 to the Rule 65ter list.¹² Having determined that these documents form an inseparable and indispensable part of the testimony as required by Tribunal jurisprudence, the Chamber grants this request. The Prosecution may tender these documents when the Witness appears for cross-examination at which time the Defence will have an opportunity to propose the inclusion of further exhibits it considers relevant to the evidence of Witness K81.

¹² Motion, Confidential Annex B, pp 15-16.

V. DISPOSITION

10. For the foregoing reasons, and pursuant to Rule 92*bis* of the Rules, the Chamber **GRANTS** the Motion with respect to Witness K81 and **ORDERS** that Witness K81 appears for cross-examination.

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



Judge Kevin Parker
Presiding

Done this ninth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]