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17 DECEMBER 2008

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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-05-88-T

Date: 17 December 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:** **17 December 2008**

**PROSECUTOR**

**v.**

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

***PUBLIC***

# DECISION ON PANDUREVIĆ'S MOTION FOR ADMISSION OF WRITTEN EVIDENCE PURSUANT TO RULES 92 *BIS* AND 92 *TER*

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Mr. Peter McCloskey

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Mr. Zoran Živanović and Ms. Mira Tapušković for Vujadin Popović
Mr. John Ostojić 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** the "Motion on Behalf of Vinko Pandurević for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *ter*", filed partly confidentially on 16 May 2008 ("Motion"), in which Pandurević requests the admission of the written evidence of four witnesses (Witnesses 7DW-7, 7DW-10, 7DW-15 and 7DW-19) pursuant to Rule 92 *bis* and three witnesses (Witnesses 7DW-1, 7DW-6 and 7DW-13) pursuant to Rule 92 *ter*, and the "Motion on Behalf of Vinko Pandurević for Admission of Additional Evidence Pursuant to Rule 92 *bis*", filed partly confidentially on 19 May 2008 ("Second Motion"), in which Pandurević requests the admission of the written evidence of one additional witness (Witness 7DW-14 [PW-unallocated])[1] for whom protective measures will be sought, pursuant to Rule 92 *bis*;

**NOTING** the "Prosecution Response to Partly Confidential 'Motion on Behalf of Vinko Pandurević for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *ter*'", filed confidentially on 30 May 2008 ("Response"), in which the Prosecution does not object to the admission of the written evidence but requests that Witnesses 7DW-19 and 7DW-10 appear for cross-examination in accordance with Rule 92 *bis* (C);[2]

**NOTING** the "Application by the Accused Pandurević for Leave to Reply and Reply to the Prosecution's Response to the Defence filing pursuant to Rules 92 *bis* and 92 *ter*", filed confidentially on 9 June 2008 ("Reply");

**NOTING** that with regard to Pandurević's request for the admission of the written statement of Witness 7DW-19, he argues that:

a. the evidence, regarding four exchanges of prisoners of war or dead soldiers under the command or supervision of Pandurević between October 1992 and December 1992, does not go to the acts and conduct of Pandurević as charged in the Indictment because the

[1] The Trial Chamber notes that Pandurević attached annexes to the Motion and the Second Motion disclosing the statements of each of the witnesses except Witness 7DW-13. Pandurević also included a redacted statement for Witness 7DW-14 [PW-unallocated] that does not reveal the witness's identity, and states that a motion for protective measures for Witness 7DW-14 [PW-unallocated] will be filed. The Trial Chamber also notes that Pandurević provided a CD with a video-clip as additional material attached to the statement of Witness 7DW-19.

[2] Response, paras. 1, 5–11.

witness' evidence pertains only to the character of Pandurević pursuant to (A)(i)(e) of Rule 92 *bis*;[3] and

b. the evidence concerns events prior to those described in the Indictment and on that basis the evidence pertains only to matters other than the acts and conduct of the Accused;[4]

**NOTING** that with regard to Pandurević's request for the admission of the written statement of Witness 7DW-10, he argues that:

a. the evidence, regarding Pandurević's relationship with the civilian authorities of the Zvornik Municipality and the security organs of the Drina Corps Command prior to 1995, constitutes relevant political and military background pursuant (A)(i)(a) and (A)(i)(b) of Rule 92 *bis*;[5]

b. the evidence is cumulative in nature in so far as it supports the evidence of prosecution witnesses who have been cross-examined in this case;[6] and

c. the evidence goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment;[7]

**NOTING** that the Prosecution argues that:

a. Witness 7DW-19's testimony directly implies that Pandurević lacked ethnic animus towards Bosnian Muslims and the ethnic bias of the Accused is a "live and important issue" bearing directly on the *mens rea* necessary for the commission of the crimes charged in the Indictment;[8]

b. taking into account the seriousness of the crimes committed against Bosnian Muslims in Višegrad in 1992 whilst Pandurević was a senior officer on duty and operating in that area, the credibility of Witness 7DW-19's evidence must be tested so that the Trial Chamber may adjudge the appropriate weight, if any, to be attributed to the evidence;[9]

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[3] Motion, p. 3; Reply, para. 8.
[4] Motion, p. 3.
[5] Motion, p. 3; Reply, para. 11.
[6] Motion, p. 4.
[7] Motion, p. 4.
[8] Response, paras. 5–6.
[9] Response, para. 6.

c. Witness 7DW-19's statement fails to address the nature and extent of his activities as a member of the VRS in 1995 and this may have a significant bearing on his credibility as a witness and the reliability of his evidence;[10]

d. Witness 7DW-10's evidence pertaining to an alleged "silent war" between Pandurević and the security organ, in so far as it touches on the relationship between the security organ and the brigade is "a critical and heavily contested issue in the case;"[11] and

e. if witness 7DW-10's evidence is left untested then the relevance and probative value of the statement concerning the supposed "silent war" is unclear, specifically because the basis of Witness 7DW-10's knowledge cannot be discerned from the statement and the nature and extent of the "silent war" is not detailed;"[12]

**NOTING** that Pandurević in his Reply argues that:

a. Witness 7DW-19's evidence does not relate to Pandurević's ethnic animus or lack thereof, rather, it summarises the acts and conduct of Pandurević in a period prior to that in the Indictment to offer a depiction of Pandurević's character;[13]

b. the arguments raised by the Prosecution, in relation to Witness 7DW-19's evidence, would pertain, and could be put, to other witnesses whom the defence intends to call *viva voce* in its case, including Pandurević himself;[14]

c. in relation to Witness 7DW-10's evidence, the nature and extent of the relationship between Pandurević and the Zvornik Brigade security organ has been demonstrated by Prosecution Witnesses PW-168 and Miodrag Dragutinović, the latter specifically in relation to Pandurević's failed attempt to extend his control over the security organ;[15] and

d. the evidence of both witnesses meet the requirements set out by the Trial Chamber, as both statements pertain to events prior to the acts and conduct described in the Indictment, are cumulative in nature, and not ambiguous in content;[16]

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[10] Response, para. 7.
[11] Response, paras. 8–9.
[12] Response, para. 10.
[13] Reply para. 8-9. Pandurević states that the purpose of the statement is "to offer a depiction of Pandurević's character (the professional and respectful way in which he conducted the negotiations with the other side, his concern for civilians and the way in which he organised the exchanges)". *Ibid.*, para. 9.
[14] Reply, para. 10.
[15] Reply, paras. 12–13.
[16] Reply, para. 16.

**NOTING** the requirements of Rule 92 *bis* (A) and the Trial Chamber's "Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", issued on 12 September 2006;[17]

**NOTING** that, pursuant to Rule 92 *bis*, a Trial Chamber may admit the statement 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) 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 a Trial Chamber may admit the written statement of a witness in lieu of oral testimony, even where the evidence goes to proof of the acts and conduct of an Accused, provided the requirements of Rule 92 *ter* are satisfied;

**CONSIDERING** that the Trial Chamber has reviewed the proposed statements of Witnesses 7DW-7, 7DW-14 [PW-unallocated] and 7DW-15—to which the Prosecution does not object—and that it considers all of them to be appropriate for admission pursuant to Rule 92 *bis* without cross-examination as none of them concern 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** that the statement of Witness 7DW-19 relates to the relevant character of Pandurević, in particular whether he exhibited ethnic bias, and that this evidence is of sufficient importance to merit cross-examination of the witness;

**CONSIDERING** that the statement of Witness 7DW-10 address live and important issues between the parties and that it is appropriate to require the witness to appear for cross-examination;

**CONSIDERING** that the Prosecution does not object to the admission of the statements of Witnesses 7DW-1, 7DW-6 and 7DW-13[19] pursuant to Rule 92 *ter*, and that the statements are appropriate for admission under the terms of Rule 92 *ter*;

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[17] 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 ("12 September 2006 Rule 92 *bis* Decision").

[18] 12 September 2006 Rule 92 *bis* Decision, paras. 7–16.

[19] As the Trial Chamber noted in footnote 1, Pandurević has not yet provided the written statement of Witness 7DW-13.

**PURSUANT TO** Rules 89, 92 *bis* and 92 *ter*,

**HEREBY GRANTS** the Motion in **PART** and **ORDERS** as follows:

1. Pandurević is granted leave to file the Reply.
2. The statements of Witnesses 7DW-7, 7DW-15 and 7DW-14 [PW-unallocated] are provisionally admitted without requiring the witnesses to appear for cross-examination, provided the statements are presented to the Trial Chamber in a form which fully satisfies the requirements of Rule 92 *bis*(B).
3. The statements of Witnesses 7DW-1, 7DW-6, 7DW-10, 7DW-13 and 7D-19 may be admitted pursuant to the requirements of Rule 92 *ter*.

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

Carmel Agius
Presiding

Dated this seventeenth day of December 2008
At The Hague
The Netherlands

**[Seal of the Tribunal]**