



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: 22 January 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr John Hocking, Registrar

Decision: 22 January 2010

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTIONS FOR
ADMISSION OF EVIDENCE PURSUANT TO ICTY RULE 92ter**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. Background

1. Trial Chamber II (“Chamber”) of the International Criminal 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 seized of “Vlastimir Đorđević’s Motion for the Admission of Evidence Pursuant to ICTY Rule 92*ter*” filed publicly with confidential Annex A (“Motion”) on 4 January 2010, whereby Counsel for Vlastimir Đorđević (“Defence”) seeks the admission into evidence pursuant to Rule 92*ter* of the Rules of Procedure and Evidence (“Rules”) of statements and transcripts of prior testimony of 22 witnesses listed in confidential Annex A to the Motion. On 18 January 2010, the Prosecution filed the “Prosecution’s Response to Defence’s Motion for the Admission of Evidence Pursuant to ICTY Rule 92*ter*” (“Response”), opposing the Motion in part.

2. Submissions

2. The Defence submits that the proposed transcripts and statements are relevant and have probative value.¹ It submits that the witnesses will be called to attest to their previous written evidence and will be available for cross-examination and questioning by the Chamber. It envisages a brief oral examination of each witness in court “similar to the manner employed by the Prosecution in its case” to supplement and clarify any outstanding issues. It contends that the admission of the proposed evidence in the mode of Rule 92*ter* “will significantly expedite the proceedings by reducing unnecessary repetition”.² The Defence submits that it may also seek to admit all underlying exhibits that form an integral part of a transcript when the transcript is used as a prior statement. The Defence indicates that it will seek to tender these exhibits in the course of the evidence of its proposed Rule 92*ter* witnesses.³

3. The Prosecution opposes in part the admission into evidence pursuant to Rule 92*ter* of the witness statement of Slobodan Petković. The Prosecution argues that paragraph 9 and a portion of paragraph 20 of the proposed statement contain information that is not relevant to the Indictment and that paragraphs 11-14, 16 to 19, and 22 constitute expert testimony.⁴ Therefore, the Prosecution requests that the aforementioned paragraphs be redacted.⁵

¹ Motion, para 5.

² Motion, para 6.

³ Motion, para 7.

⁴ Response, para 2.

⁵ Response, para 7.

4. The Prosecution further submits that the witness statement of Vlatko Vuković contains detailed reference to two protected witnesses and requests that it be tendered by the Defence in redacted version for public disclosure and in an unredacted version under seal.⁶ In the event that a transcript listed in Annex A of the Motion contains private or closed sessions, it be tendered under seal and/or supplemented with a redacted version for public disclosure.

3. Law

5. The admissibility of evidence, whether in oral or in written form, is governed by Rule 89(C) of the Rules which provides that a Chamber may admit any relevant evidence which it deems to have probative value. Pursuant to Rule 89(D) evidence will not be admitted if its probative value is substantially outweighed by the need to ensure a fair trial. By Rule 89(F) evidence may only be received in written form where the interests of justice allow this.

6. Rule 92*ter* provides:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

7. The Tribunal's case law allows for exhibits accompanying written statements or transcripts to be admitted into evidence pursuant to Rule 92*ter*, provided that they form an "inseparable and indispensable part" of the witness's testimony.⁷ In order to satisfy this requirement the witness's

⁶ Response, paras 5-6.

⁷ *Prosecutor v. Paško Ljubičić*, Case No.: IT-00-41-PT, "Decision on Prosecution's Motion for Admission of Transcripts Pursuant to Rule 92 bis (D) of the Rules", 23 January 2004, p 3; *Prosecutor v. Mladen Naletilić and Vinko 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; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.: IT-98-32/1-T, "Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 ter", 9 July 2008, ("Lukić and Lukić Decision"), para 15; *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 bis", 22 February 2007, ("Milošević Decision"), para 23.

testimony must actually discuss the document, and the document must be one without which the witness's testimony would become incomprehensible or of lesser probative value.⁸

8. The evidence sought to be admitted pursuant to Rule 92 *ter*, whether a written statement or a transcript of oral testimony, must also fulfill the general requirements of admissibility.⁹ That is, the proposed 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.¹⁰

4. Discussion

9. The evidence proposed for admission pursuant to Rule 92*ter* in the Motion consists of witness statements and transcripts of testimony given by witnesses in the cases of *Prosecutor v. Milan Milutinović et al.*, and *Prosecutor v. Slobodan Milošević*.

10. The Chamber notes that the proposed evidence of Zoran Anđelković, Vukašin Andrić, Rade Čučak, Đorđe Čurčin, Božidar Delić, Miloš Došan, Milutin Filipović, Radomir Gojović, Živadin Jovanović, Branko Krga, Danica Marinković, Dušan Mladenović, Vlade Nonković, Milorad Obradović, Milan Radoičić, Spasoje Smiljanić, Momir Stojanović, Zdravko Vintar, Milovan Vlajković, and Vlatko Vuković relates to events immediately preceding the events alleged in the Indictment or to events taking place at the time of the events alleged in the Indictment and is relevant to one or more issues of significance in the present case. All these witnesses have given evidence under oath in other proceedings before this Tribunal. The Chamber is satisfied, therefore, that the written statements and transcripts pertaining to these witnesses are of sufficient relevance and probative value to be admitted into evidence.

11. The Prosecution objects to the admission of portions of the written statement of Slobodan Petković. It submits that paragraph 9 and a portion of paragraph 20 of the witness statement relate to events outside of the scope of the Indictment. It also alleges that paragraphs 11-14, 16 to 19 and 22 on Slobodan Petković's witness statement constitute evidence expert in nature as they provide specialized knowledge of a technical nature which goes far beyond what Slobodan Petković

⁸ *Lukić and Lukić* Decision, para 15; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No.: IT-03-69-T, "Decision on Prosecution's Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex", 16 May 2008, para 19; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No.: IT-04-84-R77.4, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter*", 2 September 2008, ("*Haraqija and Morina* Decision"), para 12.

⁹ *Lukić and Lukić* Decision, para 20; *Haraqija and Morina* Decision, para 13.

¹⁰ Rule 89 (C) and (D) of the Rules.

observed during the Indictment period and impart highly specialized information and resulting opinion.¹¹

12. Paragraph 9 of the witness statement of Slobodan Petković refers to ammunitions used by NATO in areas of the Federal Republic of Yugoslavia not including Kosovo. The first portion of paragraph 20 of the statement relates to bombs used by NATO in Niš.¹² The Chamber notes that the Accused is charged with crimes allegedly committed in the territory of Kosovo from 1 January 1999 and continuing until 20 June 1999.¹³ The locations referred to in paragraphs 9 and in the first portion of paragraph 20 of the statement beginning with the words “On 7 May 1999” and ending with the words “15 people were killed and 60 wounded”, are situated outside of the territory of Kosovo. Therefore, the Chamber agrees with the Prosecution that the evidence contained at paragraph 9 and in the first portion of paragraph 20 beginning with the words “On 7 May 1999” and ending with the words “15 people were killed and 60 wounded” of Slobodan Petković’s written statement does not appear to be of relevance to the Indictment.

13. The Chamber notes further that paragraph 11 to 12 of Slobodan Petković’s statement consist of, *inter alia*, description of the chemical composition of the DU missiles and the ways by which contamination may occur. In paragraph 13 of the statement, Slobodan Petković expresses opinions on the health risks associated with exposure to DU and provides a list of diseases and health conditions. Paragraph 14 of the statement contains information pertaining to the number of rockets fired and amount of rocket fuel, expressed in litres of carbon dioxide, released into the air during the NATO air strike. Paragraphs 16 to 19 of the statement pertain to the type of chemicals used in the fabrication of the bombs and the environmental impact of the chemicals it releases. Paragraph 22 of the statement pertains to the chemical composition of cluster bombs, their radioactivity and mechanism of activation and their effect (penetrative, fragmentational or incendiary). This information includes specialized opinions of a scientific and medical nature gathered from secondary sources. It is not apparent that the proposed witness possesses the expertise and qualifications required to give evidence of this nature. The Chamber accepts that the evidence in paragraphs 11-14, 16-19 and 22 of the statement constitutes expert testimony and on that basis cannot be admitted.

14. However, the Chamber is of the view that there is apparent relevance in the remaining evidence of Slobodan Petković to issues in the indictment and that it has probative value. Further, its nature is such as to make the application of Rule 92*ter* appropriate. Accordingly, the Chamber

¹¹ Response, para 4.

¹² Response, para 3.

¹³ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 9 July 2008.

holds that Slobodan Petković's written statement shall be admitted pursuant to Rule 92ter, subject to the redaction of paragraphs 9, 11,-14, the first portion of paragraph 20 beginning with the words "On 7 May 1999" and ending with the words "15 people were killed and 60 wounded" and paragraph 22. For similar reasons the Chamber will admit pursuant to Rule 92ter the transcript of Slobodan Petković's evidence in the case of *Prosecutor v Milutinović*, however, for reasons similar to those expressed in paragraphs 12 and 13 of this decision, the Chamber will not treat those portions of that transcript which concern areas targeted outside of Kosovo, as part of the evidence admitted pursuant to this decision.¹⁴

15. The Defence also proposes for admission pursuant to Rule 92ter the transcript of the prior evidence in proceedings before the Tribunal of Vukašin Jokanović. While portions of the proposed evidence relate to political events in Kosovo in 1989 and the following years and, therefore, are relevant to background allegations in the present Indictment, the Chamber notes that significant portions of the proposed evidence relate to events preceding by decades the events charged in the Indictment and are at best of questionable relevance to the case against Vlastimir Đorđević. Considering that only portions of the proposed evidence of this witness are admissible, the Chamber deems it practical that this witness be called to give his evidence before the Chamber *viva voce*, testifying only to issues of significance to the present case.

5. Disposition

16. For the foregoing reasons, and pursuant to Rules 89 and 92ter of the Rules, the Chamber

GRANTS the Motion in **PART** in that it:

- **DECIDES** to admit the written statements and transcripts of prior evidence of witnesses Zoran Anđelković, Vukašin Andrić, Rade Čučak, Đorđe Čurčin, Božidar Delić, Miloš Došan, Milutin Filipović, Radomir Gojović, Živadin Jovanović, Branko Krga, Danica Marinković, Dušan Mladenović, Vlade Nonković, Milorad Obradović, Milan Radoičić, Spasoje Smiljanić, Momir Stojanović, Zdravko Vintar, Milovan Vlajković and Vlatko Vuković as listed in Annex A to the Motion, subject to compliance with the conditions stipulated in Rule 92ter of the Rules, including that the witnesses be available for cross-examination and questioning by the Judges;

¹⁴ Examples include: Doc ID D010-2503, "*Prosecutor v. Milutinović*", Case IT-05-87-T, Transcript of 28 September 2007, T 16609, line 12-19; T 16610, line 16-25; T 16611, line 1-11; T 16619, line 13-25; T16620, line 1-9; T 16629, line 16-22.

- **DECIDES** that witness Vukašin Jokanović shall be heard in the ordinary way, with an examination-in-chief;
- **DECIDES** to admit the evidence of Slobodan Petković, to the extent identified in paragraph 14 above, subject to compliance with the conditions stipulated in Rule 92ter of the Rules, including that the witness be available for cross-examination and questioning by the Judges;
- **ORDERS** that the witness statement of Vlatko Vuković be tendered by the Defence in redacted version for public disclosure and in unredacted version under seal and that transcripts listed in Annex A to the Motion containing private or closed sessions shall be tendered under seal and supplemented by a redacted version for public disclosure.

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

Dated this twenty-second day of January 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]