

IT-95-9-T
D10586-D10583
01 AUGUST 2002

10586 AT

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-95-9-T
Date: 1 August 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Sharon A. Williams
Judge Per-Johan Viktor Lindholm

Registrar: Mr. Hans Holthuis

Order of: 1 August 2002

THE PROSECUTOR

v.

**BLAGOJE SIMIĆ
MIROSLAV TADIĆ
SIMO ZARIĆ**

DECISION ON JOINT DEFENCE MOTION TO EXCLUDE EVIDENCE

The Office of the Prosecutor:

Mr. Gramsci Di Fazio
Mr. Phillip Weiner
Ms. Aisling Reidy

Counsel for the Accused:

Mr. Igor Pantelić and Mr. Srdjan Vuković for Blagoje Simić
Mr. Novak Lukić and Mr. Dragan Krgović for Miroslav Tadić
Mr. Borislav Pisarević and Mr. Aleksandar Lazarević for Simo Zarić

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 “Joint Defence Motion to Strike the Testimony of Hasan Subasić”(“Motion”), filed by the defence of Blagoje Simić, Miroslav Tadić and Simo Zarić (“Defence”) on 23 July 2002,

NOTING the “Response of the Prosecution to the Joint Defence Motion to Strike the Testimony of Hasan Subasić” (“Response”) filed by the Office of the Prosecutor (“Prosecution”) on 26 July 2002,

NOTING the arguments of the Defence in their Motion, *inter alia*, that:

- (i) Hasan Subasić’s testimony was in violation of Rule 90(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”): “[T]he viewing of a trial over the Internet by a witness is virtually the same as being ‘present’ when another witness is testifying”;
- (ii) there has been a violation of the pamphlet entitled “Information for Witnesses” provided to each witness by the Victims and Witnesses Section of the Tribunal specifying that witnesses are not allowed to follow the testimonies of other witnesses and that they must not discuss their testimony with anyone;
- (iii) the “in-court identifications of the Defendants by Hasan Subasić were given after Mr. Subasić watched other witnesses identify the Defendants over the Internet”; and
- (iv) the testimony of Hasan Subasić was not elicited in a fair manner and violates Rule 89(B) of the Rules and Article 21 of the Statute of the Tribunal,

NOTING that the Defence in its Motion, requests that the Trial Chamber, “strike the testimony of Hasan Subasić”,

NOTING the arguments of the Prosecution in its Response, *inter alia*, that:

- (i) the “interpretation of Rule 90(C) supported by the Defence counsel has no support in either the jurisprudence of the Tribunal or National Systems”;
- (ii) the claim of the Defence that “the witness watched the testimony of certain witnesses after being advised in a Victim Witness Section’s pamphlet of the Tribunal’s policy of sequestration” is not supported by evidence;
- (iii) “since Hasan Subasić has long known all the defendants, the allegation of tainted identification based on an improper observation of the defendants is neither supported by the facts nor a legitimate issue in this case”; and
- (iv) “since the evidence does not support that either the witness deliberately violated the sequestration order or that the defendants were prejudiced as a result of the witness’[sic] actions, there is no basis to exclude this witness’[sic] testimony”,

NOTING ALSO the submission of the Prosecution in its Response that, “the defendants have long been members of a small community and were known to all citizens” and that “consequently, witnesses are asked to ‘recognize’ people they have known for many years”,

NOTING that Rule 90(C) of the Rules provides, “A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. *However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying*” [emphasis added],

NOTING that this Trial Chamber in its “Reasons for Decision on Admission of ‘Variant A&B’ Document”¹ (“Decision on Admission”) in the present case, observed that:

“The practice of the Tribunal is towards admitting evidence, provided it has probative value. The admissibility of documentary evidence, however, is to be distinguished from the weight that will ultimately be attached to it. The objections relating to hearsay, lack of foundation and authenticity, signature or relevance, or, indeed other objections, are all matters to go to the weight to attached and not to its admissibility. The weight to be attached to documents admitted into evidence is thus assessed when considering the entire evidence at the end of the trial”,

CONSIDERING that the standards observed by this Trial Chamber in the Decision on Admission, apply equally to the admission of testimonial evidence,

CONSIDERING, therefore, that the mere admission of testimonial evidence in this case is no indication of the final weight the Trial Chamber will give to such evidence,

CONSIDERING that in all trials before the Tribunal, the impact of media coverage is a factor to be taken into account in considering the reliability of witnesses, and where this aspect is raised in the cross-examination of a witness, it is the task of the Trial Chamber to consider it as such in its evaluation of the witness’ testimony,²

¹ *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Reasons For Decision On Admission Of “Variant A&B” Document, 22 May 2002, para 12.

² See generally, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, para 544.
Case No. IT-95-9-T

CONSIDERING that evidence on identification is generally viewed with caution³ as it is dependent on several variables and should to be considered together with other evidence adduced in the Prosecution case against an accused person,

CONSIDERING HOWEVER that prior knowledge of those identified is a factor that a Trial Chamber may take into account when considering the reliability of a witness' testimony,⁴

CONSIDERING that it ultimately falls to the Trial Chamber to determine, in light of all the relevant factors, the probative value of Mr. Hasan Subasić's evidence in this case,

HEREBY DENIES the Motion.

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



Judge Florence Ndepele Mwachande Mumba
Presiding Judge

Dated this first day of August 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

³ See generally, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000, paras 8 and 19.

⁴ *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, para. 233.
Case No. IT-95-9-T