



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-02-54-T
Date: 9 June 2005
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision: 9 June 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION MOTION
FOR VOIR DIRE PROCEEDING**

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused:

Mr. Slobodan Milošević

Court Assigned Counsel:

Mr. Steven Kay, QC
Ms. Gillian Higgins

Amicus Curiae:

Prof. Timothy McCormack

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 (“International Tribunal”), is seized of a “Prosecution Motion for a Voir Dire Proceeding”, filed 2 June 2005 (“Motion”), and hereby renders its decision thereon,

Procedural history

NOTING the following:

- (1) after Prosecution challenges to the evidence of Defence Witness Dragan Jasović (“witness”), the Trial Chamber issued its “Decision on Testimony of Defence Witness Dragan Jasović”, on 15 April 2005, wherein it ordered as follows: (a) the witness may be examined in connection with statements he had taken from declarants in Kosovo (“statements”); (b) the statements the Accused sought to tender into evidence through the witness were admissible, if they were found to have sufficient indicia of reliability; (c) determination of the admissibility of a statement would only be made after it had been translated and the evidence of the witness had been concluded; and (d) the Trial Chamber would make further orders in respect of the witness and the statements as necessary;
- (2) the witness testified on direct-examination on 25-27 April 2005;
- (3) the Trial Chamber decided that the witness should return for cross-examination at a later date in order to afford the Prosecution adequate time to prepare;¹
- (4) at the hearing held on 27 May 2005, the Prosecution requested that the Trial Chamber conduct a voir dire proceeding to enable the Prosecution to challenge the reliability of the witness’ proposed evidence; and
- (5) the Trial Chamber instructed the Prosecution to file its submissions in writing,²

CONSIDERING that, although arguments of the parties during the hearing on 27 May 2005 were initially conducted in private session at the request of the Prosecution,³ the stated reason for the requested private session no longer exists,⁴ and the subsequent filings of the parties were filed publicly; the Trial Chamber thus will request the Registry of the International Tribunal to make this material public,

¹ See “Order Rescheduling Cross-Examination of Defence Witness Dragan Jasović”, issued 11 May 2005.

² T. 40066 (27 May 2005).

³ T. 40041-40054 (27 May 2005).

⁴ See T. 40041-40042 (27 May 2005).

Arguments of the parties

NOTING the following:

- (1) the Prosecution's request, set forth in the Motion, that the Trial Chamber grant the Prosecution's request to conduct a voir dire (or "trial within a trial") to determine whether evidence prepared by the witness should be excluded pursuant to Rule 95 of the Rules of Procedure and Evidence ("Rules");⁵ and
- (2) the following arguments, *inter alia*, set forth in the Motion:⁶ (a) in order for Rule 95 of the Rules to have any effect, the Trial Chamber must permit a party challenging the reliability of evidence produced by an opposing party to present evidence, in certain circumstances, demonstrating the unreliability of the material offered for admission;⁷ and (b) admission of the proposed evidence would seriously damage the integrity of the proceedings pursuant to Rule 95 of the Rules,⁸

NOTING the "Assigned Counsel Reply to Prosecution's Submission Concerning a 'Voir Dire' Proceeding to Establish the Reliability of Defence Evidence", filed 3 June 2005 ("Response"), in which Assigned Counsel, *inter alia*,

- (1) submit that the voir dire proceeding proposed by the Prosecution is not the appropriate means by which to challenge the admissibility of the proposed evidence in the circumstances of this case;⁹
- (2) argue that, (a) although there is scope pursuant to Rule 54 of the Rules for a voir dire proceeding by which a party may challenge the admissibility of evidence pursuant to Rule 95 of the Rules,¹⁰ (b) the Prosecution must fulfil the stringent requirements of Rule 95 of the Rules beyond reasonable doubt in order to exclude the proposed evidence, and (c) the proposed evidence that the Prosecution seeks to call during the voir dire proceeding would not fulfil either of the Rule 95 limbs, namely that there is substantial doubt as to the reliability of the evidence or that it is antithetical to and would seriously damage the integrity of the proceedings;¹¹

⁵ Motion, at para. 6.

⁶ The Trial Chamber has also considered the arguments set forth in the "Prosecution's Submissions Concerning a 'Voir Dire' Proceeding to Establish the Reliability of Defence Evidence", filed 30 May 2005.

⁷ Motion, at para. 2.

⁸ Motion, at para. 3.

⁹ Response, at para. 19.

¹⁰ Response, at paras 5, 10-12.

¹¹ Response, at paras 5-6, 13-14.

- (3) remind the Trial Chamber of frequent attempts by the Prosecution to adopt strategies for the introduction of material in cross-examination which the Prosecution objected to during its own case-in-chief;¹² and
- (4) submit that, in the circumstances where statements have been prepared for current litigation before this Tribunal, such statements are admissible only if tendered pursuant to Rules 89(F) and 92*bis* of the Rules,¹³

NOTING the “Prosecution’s Reply to ‘Assigned Counsel Reply to Prosecution’s Submissions Concerning a “Voir Dire” Proceeding to Establish the Reliability of Defence Evidence””, filed 6 June 2005 (“Reply”), in which the Prosecution requests further oral argument on this matter (“Request for Further Oral Argument”) and argues, *inter alia*, the following:

- (1) the proposed voir dire proceeding fits squarely within the scope of Rules 95 of the Rules;
- (2) the Motion does advance the correct legal standard of Rule 95 of the Rules, *i.e.*, a “balance of the probabilities”;
- (3) Assigned Counsel’s argument that the burden of proof that the Prosecution must meet under Rule 95 of the Rules is unsupported and would render Rule 95 of the Rules a “dead letter”; and
- (4) although Assigned Counsel assert that the voir dire proceeding proposed by the Prosecution is not the appropriate means by which to challenge the admissibility of the proposed evidence in the circumstances of this case, they provide no explanation of what may ever be an appropriate method of establishing the unreliability of a party’s evidence,¹⁴

Discussion

NOTING the provisions of Rules 89 and 95 of the Rules,

CONSIDERING the following:

- (1) the voir dire is a procedure that may be used in trials at ICTY;¹⁵

¹² Response, at para. 17.

¹³ Response, at para. 16.

¹⁴ Reply, at paras 4-12.

¹⁵ *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-A, “Judgement”, 20 February 2001, at para. 543 (stating that “this procedure is not expressly provided for in the Rules. However, this does not mean that it would be unsuitable for a Trial Chamber to utilise it if in a particular case it thought it appropriate”).

- (2) in determining whether that procedure is to be used, account is to be taken of its origin in common law jurisdictions, where, generally, it is a preliminary examination to test the admissibility of evidence in the absence of the jury, the purpose being to avoid contaminating the minds of the jury with material that might never become evidence in the case;¹⁶
- (3) there being no jury in trials before the International Tribunal, there is less need for the procedure of a voir dire than in a common law jurisdiction; a challenge to the reliability of evidence through Rule 95 of the Rules can be dealt with through the normal procedure for the adduction of evidence; the matter is thus one for the exercise of the Trial Chamber's discretion in the light of the particular circumstances of each case; although the procedure may be applicable both to statements of witnesses and confessions by the Accused, the Trial Chamber is of the view that there is a stronger case to utilise it in respect of statements such as a confession by an Accused;¹⁷
- (4) the issue to be addressed in the exercise of discretion in this case is whether it is necessary and appropriate that the Trial Chamber should, during the Defence case, hear additional evidence from Prosecution witnesses as to the reliability of the proposed evidence;
- (5) the Prosecution has carried out extensive inquiries to enable it to conduct an effective cross-examination of the witness with a view to demonstrating that the circumstances justify exclusion of the evidence under Rule 95 of the Rules, and the Prosecution may, if it considers its case to be unfairly prejudiced by admission of the material, apply at the rebuttal phase to lead evidence to justify the exclusion of the evidence; and
- (6) the Trial Chamber has been composed of experienced Judges and thus is able to deal with all issues in the trial affecting the evidence, including those arising under Rule 95 of the Rules,

¹⁶ Examples of circumstances in which the voir dire procedure may be used include determining the admissibility of the defendant's previous guilty plea to the offence for which he is currently on trial, the admissibility of a confession by the Accused, the admissibility of identification evidence, the admissibility of *res gestae* statements, the competence of witnesses, questioning by a judge of an unwilling witness, and whether the jury should be directed that they may draw inferences against a defendant who fails to give evidence. See Archbold 2003, at paras 4-288 to 4-291.

¹⁷ An example is the procedure to be followed in England and Wales under section 76 of the Police and Criminal Evidence Act 1984, where the reliability of a confession is challenged in court. Under that Act, where the prosecution proposes to give evidence of a confession, the court can require the prosecution to prove that the confession was not obtained as mentioned above as a pre-condition to it being admitted into evidence, which must be done in a voir dire.

Disposition

PURSUANT to Rules 54, 89, 95, and 126*bis* the Rules,

HEREBY ORDERS as follows:

- (1) **REQUESTS** that the Registry alter the status of the procedural hearing on 27 May 2005 (transcript pages 40041-40054) from private to open;
- (2) **GRANTS** the Prosecution leave to file the Reply;
- (3) **DENIES** the Request for Further Oral Argument; and
- (4) **DENIES** the Motion.

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



Judge Robinson
Presiding

Dated this ninth day of June 2005
At The Hague
The Netherlands

[Seal of the Tribunal]