



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: 26 August 2005  
Original: ENGLISH

**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. Hans Holthuis

**Decision:** 26 August 2005

**PROSECUTOR**

v.

**SLOBODAN MILOŠEVIĆ**

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**DECISION ON ADMISSION OF DOCUMENTS IN  
CONNECTION WITH TESTIMONY OF  
DEFENCE WITNESS DRAGAN JASOVIĆ**

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**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 (“Tribunal”), is seized of motions from both the Accused and Prosecution to admit documents in connection with the testimony of Defence witness Dragan Jasović (“witness”), and hereby renders its decision thereon.

#### **A. Procedural history**

1. After Prosecution challenges to the evidence of the witness, the Trial Chamber issued its “Decision on Testimony of Defence Witness Dragan Jasović”, on 15 April 2005, wherein it ordered that (a) the witness could 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. 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.<sup>1</sup> During this hiatus, the Trial Chamber issued on 9 June 2005 its “Decision on Prosecution Motion for Voir Dire Proceeding”, denying 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 of the Tribunal (“Rules”).<sup>2</sup> The witness testified on cross-examination on 15-17 and 20 June 2005 and on re-examination on 20-21 June 2005.

#### **B. Submissions of the parties**

3. In response to an oral Order of the Trial Chamber,<sup>3</sup> the Prosecution filed its “Prosecution Submissions on the Admissibility of Potential Defence and Prosecution Exhibits Concerning Dragan Jasović”, on 27 June 2005 (“Prosecution Motion”), wherein it requests that the Trial Chamber (a) grant it leave to exceed the page limit; (b) exclude the entirety of the Jasović material<sup>4</sup>

<sup>1</sup> See, e.g., Order Rescheduling Cross-Examination of Defence Witness Dragan Jasović, issued 11 May 2005.

<sup>2</sup> See also Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, issued 20 June 2005 (denying the Prosecution’s motion for certification of an interlocutory appeal of the voir dire decision).

<sup>3</sup> T. 41112 (21 June 2005).

<sup>4</sup> Fifty-eight statements (tabs 1.1–1.58) of named individuals who gave the witness information in the course of his duties as inspector on terrorism matters at the Uroševac/Ferizaj Secretariat of Internal Affairs (“Uroševac SUP”); thirty official notes and records of operative information (tabs 2.1–2.30); a record of receipt of a criminal complaint dated 27

pursuant to Rules 89 and 95; or, (c) alternatively, should the Chamber decide to admit all or part of the Jasović material, admit some or all of the Prosecution material<sup>5</sup> used during cross-examination of the witness.

4. The Prosecution argues that (a) the Jasović material is hearsay and, as such, must be reliable for it to be admitted; (b) the reliability of a document goes to the issue of admissibility first and then, if the document is admitted, to its weight; and (c) it has demonstrated during the cross-examination of the witness that the Jasović material is unreliable.<sup>6</sup>

5. The Prosecution argues that (a) the Jasović material is inadmissible under Rule 95 on the basis that it was obtained under duress, using methods contrary to internationally protected human rights, and/or is otherwise manifestly unreliable; (b) “sufficient information is already in the possession of the Trial Chamber in oral evidence and/or already admitted exhibits to trigger the application of Rule 95 and exclude Jašović’s material from the record . . .” (footnote omitted); and (c) the Trial Chamber should make its determination by applying the legal standard of a balance of the probabilities, not beyond reasonable doubt.<sup>7</sup>

6. “The Prosecution submits that the Trial Chamber can rely on the [Prosecution material] to reach a decision on admissibility of Jašović’s material. However, should the Trial Chamber decide that it can only rely on the material that is ‘on the record’, the Prosecution submits that sufficient evidence is available for Jašović’s material to be excluded.”<sup>8</sup>

7. The Prosecution (a) sets forth the factual environment in which the witness operated, referencing already-admitted Prosecution exhibits and the Prosecution material, not yet admitted, and (b) argues that this material shows that the Jasović material was obtained in a manner that either makes it unreliable or contrary to the provisions of Rule 95.<sup>9</sup>

8. Apart from the materials that the Prosecution put to the witness, the Prosecution (a) sets forth multiple, detailed arguments and examples in connection with the witness’ testimony and documents in order to demonstrate that the Jasović material lacks the requisite indicia of reliability

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December 1998 (tab 3); and a criminal complaint dated 10 October 1998 (tab 4) (hereinafter referred to collectively as “Jasović material”).

<sup>5</sup> Tabs 1-21, organised into five parts with multiple subtabs and annexes (herein referred to collectively as “Prosecution material”). Tabs 20-21 are previously admitted material.

<sup>6</sup> Prosecution Motion, paras. 4-6.

<sup>7</sup> Prosecution Motion, paras. 7-9.

<sup>8</sup> Prosecution Motion, p. 4, note 21.

<sup>9</sup> Prosecution Motion, paras. 10-15, 27.

and (b) argues that inconsistencies and implausible statements in the witness' own evidence independently prevent the Jasović material from being admissible.<sup>10</sup>

9. During oral argument on this matter on 29 June 2005,<sup>11</sup> Assigned Counsel argued in favour of the Trial Chamber admitting the Jasović material, advancing the position that (a) the statements contained within the Jasović material were not prepared for purposes of proceedings before the Tribunal, but arose as part of an official record, and (b) the material thus can be considered to have a level of independence from the proceedings. As support, Assigned Counsel cited the fact that the Chamber admitted into evidence official notes of interviews taken by police investigators that constituted information available to Prosecution witness Dragan Karleusa, who headed a working group investigating the refrigerator lorry incident in Kosovo.<sup>12</sup>

10. Assigned Counsel argued that, during the Prosecution case, the Accused attempted to move into evidence "cross-examination ammunition and material" after having put it to a witness, but was unsuccessful, being told by the Trial Chamber that he would have to adduce such evidence during his Defence case. As support, Assigned Counsel cite the cross-examination of Prosecution witness Vesna Bosanac, who was director of the Vukovar medical centre and who testified about the events at Vukovar Hospital.<sup>13</sup>

11. Assigned Counsel finally argued that a consistent approach to the admission of evidence during cross-examination should be applied by the Trial Chamber to do justice between the parties and to ensure that the parties are treated the same.<sup>14</sup>

12. During the hearing,<sup>15</sup> the Prosecution (a) disagreed with Assigned Counsel's argument that there is a general practice of admitting documents that are considered to be "official", in circumstances where they otherwise do not meet admission standards; rather, admission of a document is a case-by-case determination; (b) pointed out the difference between (i) the examples cited by Assigned Counsel (Karleusa, Bosanac) and (ii) the present situation where the witness is confronted by a substantial body of material contradicting his evidence; and (c) repeated its position, as set forth in the Prosecution Motion, that the standard of proof is a balance of the probabilities, but that the burden of proof is on the party tendering the documents as evidence.

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<sup>10</sup> Prosecution Motion, paras. 16-25.

<sup>11</sup> T. 41499-41504 (29 June 2005).

<sup>12</sup> T. 8344-8364 (22 July 2002).

<sup>13</sup> T. 15655-15680 (5 February 2003). *See also* T. 40809-40814 (15 June 2005).

<sup>14</sup> Assigned Counsel also raised other matters relating to specific exhibits, and the Prosecution responded in detail to these points. The Trial Chamber has considered these arguments when deciding on the admission of Jasović and Prosecution materials.

<sup>15</sup> T. 41504-41508, 41511-41512 (29 June 2005).

13. During the hearing,<sup>16</sup> the Accused argued that (a) the Jasović material consists of public and contemporaneous documents of the Ministry of the Interior and that none were created for the purposes of this trial; (b) the witness worked at the Ministry of the Interior and has been a crime investigator for several decades, during which time there has never been any criticism of his work; and (c) the Jasović material “contain[s] countless facts, countless names, descriptions of events, and it’s simply unbelievable for anyone who is a Homo sapiens to imagine that this was all a product of imagination.”

14. The Accused (a) pointed out that the witness was brought to his attention by the Prosecution itself; (b) argued that the evidence of the witness made it clear that the declarants in the Prosecution material contradicted their earlier statements in the Jasović material because their lives were in danger; and (c) submitted that the Prosecution has falsified evidence and has deliberately distorted the truth.

15. Finally, the Accused argued, “There is nothing in [the Prosecution’s] evidence to refute the official records and the official statements collected by Mr. Jasovic as an official authorised officer that need to be exhibited, and the evidence collected by [the Prosecution] to shake the credibility of this witness should, in my opinion, be rejected because it doesn’t meet a single criterion of authenticity.”<sup>17</sup>

### C. Discussion

#### 1. Admissibility of the Jasović material under Rule 95

16. The Trial Chamber will first deal with the Prosecution’s argument that the Jasović material is inadmissible under Rule 95. Despite questioning by the Prosecution, the witness adhered to his position that the statements were not given under duress. Although the Prosecution, in paragraphs 16-25 of the Motion, pointed to what it considered to be inconsistencies and implausibilities in the evidence of the witness, the Chamber has not been persuaded that the criteria set out in Rule 95 for excluding the evidence have been satisfied. The evidence given by the witness during cross-examination will be carefully considered by the Trial Chamber when the time comes to assess the weight that can be attributed to the Jasović material. It may very well be that serious consideration of the Jasović material will have to be confined to its status as public documentation within the Ministry of the Interior. However, that is something that should be considered by the Chamber

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<sup>16</sup> T. 41509-41511 (29 June 2005).

<sup>17</sup> T. 41511 (29 June 2005).

during final deliberations in light of its consideration of all the evidence relating to the reliability of the Jasović material.

## 2. Admissibility of the Jasović material under Rule 89

17. The Trial Chamber will now deal with the admissibility of the material under Rule 89 and the jurisprudence of the Tribunal regarding hearsay.

18. Rule 89(C) provides that “[a] Chamber may admit any relevant evidence which it deems to have probative value.” Moreover, the Appeals Chamber has held that

[i]t is well settled in the practice of the Tribunal that hearsay evidence is admissible. . . . Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, . . . the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is “first-hand” or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.<sup>18</sup>

The Appeals Chamber has also held that “evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C)”.<sup>19</sup> The Trial Chamber considers that reliability of a hearsay statement is a necessary prerequisite for probative value under Rule 89(C).<sup>20</sup> The Chamber will apply the law as set out in these statements.

19. As pointed out by Assigned Counsel and to a certain extent by the Accused, the witness took the statements in the course of his official duties, and the statements are official documents of the Ministry of the Interior. The Jasović material relates to the crimes alleged in paragraph 66(a) of the Kosovo Indictment: the events in Račak on 15 January 1999, specifically the identities of the alleged victims and their status as either civilians or members of the KLA. As such, it is both

<sup>18</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision On Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (citing *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996, paras. 15-19 & Separate Opinion of Judge Stephen on the Defence Motion on Hearsay, pp. 2-3; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to Its Reliability, 21 January 1998, paras. 10, 12) (footnotes omitted).

<sup>19</sup> *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 35.

<sup>20</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996, para. 15 (holding that “if evidence offered is unreliable, it certainly would not have probative value”). This statement in *Tadić* thus indicates that evidence having probative value is necessarily reliable.

relevant and has probative value. For the foregoing reasons, the Chamber finds that the Jasović material meets the tests set out in paragraph 18 of this Decision and thus are admissible. The evidence given by the witness during cross-examination will be considered when the Chamber assesses the weight to be given to the Jasović material and the credibility of the witness.

### 3. Phoenixes of Liberty

20. The document *Phoenixes of Liberty, The Kosovo Liberation Army Martyrs* (Kosovo Liberation Army Veterans Association, Priština, 2002)<sup>21</sup> was disclosed to the Accused by the Prosecution under Rule 68.<sup>22</sup> The Prosecution used the document in its cross-examination of the witness<sup>23</sup> and did not object to its admission.<sup>24</sup> The Accused re-examined the witness in relation to this document as well.<sup>25</sup> In these circumstances, the Trial Chamber decides that it is appropriate to admit the document as a Defence exhibit.

### 4. Exhibits of Defence witness Obrad Stevanović

21. The Trial Chamber notes that some of the Jasović material was tendered as evidence in connection with the testimony of Defence witness Obrad Stevanović.<sup>26</sup> Any such document was denied admission in the Trial Chamber's "Decision on Admission of Documents in Connection with Testimony of Defence Witness Obrad Stevanović", issued 8 July 2005 ("Stevanović Decision"), on the basis that it would be dealt with in this Decision.

22. Three documents in the Prosecution Račak Binder<sup>27</sup> were tendered as evidence through Defence witness Stevanović, but were not admitted through that witness because they were not referred to during his testimony. However, because the Prosecution subsequently included them in its materials in relation to Defence witness Jasović, thus indicating its lack of objection to their admission, the Trial Chamber will hereby admit them into evidence, via this Decision, which may be considered as modifying the Stevanović Decision.

### 5. Admissibility of the Prosecution material

23. Much of the Prosecution material consists of interviews of the declarants in the Jasović material taken by Prosecution investigators during the hiatus in the witness' testimony. The

<sup>21</sup> This document was referred to in court as "Fallen Heroes" and "Phoenix". T. 40796 (15 June 2005), 40956 (16 June 2005), 41018 (17 June 2005), 41162, 41165, 41171, 41175 (20 June 2005), 41200 (21 June 2005).

<sup>22</sup> T. 41204-41206 (21 June 2005).

<sup>23</sup> T. 40769 (15 June 2005), 40956-40957 (16 June 2005), 41016-41018 (20 June 2005).

<sup>24</sup> T. 41204 (21 June 2005).

<sup>25</sup> T. 41162-41176 (20 June 2005), 41199-41206 (21 June 2005).

<sup>26</sup> Prosecution Motion, paras. 3, 26. Some of the Jasović material was also tendered as evidence in connection with the testimony of Defence witness Danica Marinković.

Prosecution submits that “the totality of the credible evidence demonstrating the unreliability of Jašović’s material, including his evasive and inconsistent responses to questions from the Trial Chamber and from the Prosecution, justifies the admission of some or all of the previously unadmitted material contained in the [Prosecution material], regardless of whether Jašović acknowledged the truthfulness of the Prosecution material” and that “[o]n this occasion and in these particular circumstances, the Trial Chamber is urged to reconsider the appropriateness of following the approach taken in the *Hadžihasanović* case, as supported by the Prosecution in earlier submissions”.<sup>28</sup>

24. The Trial Chamber has recently held that in circumstances where, during cross-examination, the Prosecution has put an assertion (based on a document or other material) to a witness, in response to which the witness has either not adopted the assertion, rejected it outright, or was not in a position to say anything meaningful about it . . . , . . . the potential evidence is inadmissible, lacking as it is in any probative value. If, by the witness’ response to questioning about a piece of potential evidence, the content of that potential evidence is not adopted, there is no way of introducing it without the Prosecution leading evidence of its own. This is something the Prosecution cannot do during the course of the Defence case, its case having closed.<sup>29</sup> In challenging the evidence adduced by the Defence, the Prosecution may put material to Defence witnesses, so long as it does so in accordance with Rule 90(H) of the Rules,<sup>30</sup> but this does not allow it to have that material admitted into evidence where no basis for its admission has been made out.<sup>31</sup>

The Chamber discerns no reason to depart from this approach in the present circumstances, and the Prosecution’s request that the Chamber reconsider the Decision on Reconsideration is thus rejected.

25. Due to the fact that the witness consistently did not adopt, rejected outright, or was not in a position to say anything meaningful about the documents put to him by the Prosecution during cross-examination, the Prosecution material is denied admission into evidence.

<sup>27</sup> No. 15 – D299, tab 384; No. 24 – D299, tab 386; No. 36 – D299, tab 401.

<sup>28</sup> Prosecution Motion, paras. 29-31 (footnotes omitted).

<sup>29</sup> Rule 85 of the Rules provides a clear structure for the presentation of evidence in proceedings before the International Tribunal.

<sup>30</sup> Rule 90(H) of the Rules provides the following:

(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.


<sup>31</sup> See Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobre Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, issued 18 May 2005 (“Decision on Reconsideration”), para. 9.



**D. Disposition**

26. Pursuant to Rules 54 and 89 of the Rules, the Trial Chamber hereby ORDERS as follows:
- (a) The Jasović material is GRANTED admission into evidence.
  - (b) *Phoenixes of Liberty*, including the translation of the Foreword, is GRANTED admission into evidence as a Defence exhibit.
  - (c) The Stevanović Decision is hereby MODIFIED so that exhibit D299, tabs 384, 386, and 401 are admitted into evidence; and the Registry of the Tribunal shall include them in the record of the proceedings.
  - (d) The Prosecution material is DENIED admission into evidence.
  - (e) The Prosecution is GRANTED leave to exceed the page limit.

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



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Judge Robinson  
Presiding

Dated this twenty-sixth day of August 2005  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**