



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-04-74-T
Date: 28 September 2006
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: **Mr Hans Holthuis**

Decision of: **28 September 2006**

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

**DECISION ON THE PROSECUTION MOTION FOR ADMISSION OF
TRANSCRIPT OF EVIDENCE PURSUANT TO
RULE 92 BIS OF THE RULES**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Daryl Mundis

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Peter Murphey for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

I – INTRODUCTION

1. **TRIAL CHAMBER III** (“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 seised of the “Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (A) and (D) (Mesić)” filed on 14 July 2006 (“Prosecution Motion”) by the Office of the Prosecutor (“Prosecution”) whereby the Prosecution requests the admission of the transcript, pursuant to Rule 92 *bis* (A) and (D) of the Rules of Procedure and Evidence (“Rules”), of Stjepan Mesić’s testimony (“Testimony”) and related exhibits tendered during his testimony in the period 16 to 19 March 1998 in *The Prosecutor v. Tihomir Blaškić*.

II – PROCEDURAL BACKGROUND

2. On 20 July 2006 the six accused¹ in this case jointly filed “Slobodan Praljak’s Motion for Extension of Time to File a Response to Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) and (D) (Mesić)”. On 26 July 2006, Duty Judge Wolfgang Schomburg rendered an “Order Granting Extension of Time” up to 25 August 2006. In its oral decision of 23 August 2006 the Chamber granted further extension up to 28 August 2006.²

3. On 28 August 2006, Counsel for the six Accused (“Defence”) filed the “Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A), (C) and (D) (Mesić)” (“Defence Response”) wherein the Defence opposes the admission of Stjepan Mesić’s testimony and requests to be allowed to cross-examine the witness. Alternatively, should the Chamber admit the Testimony and the related exhibits tendered during his testimony, the Defence requests that the Testimony be partly redacted.

¹ Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić (“Accused”).

² T. 5446.

III – SUBMISSIONS OF THE PARTIES

4. In its Motion, the Prosecution invites the Chamber to admit the Testimony pursuant to Rule 92 *bis* (A) and (D) of the Rules. In support of its Motion the Prosecution submits that the Testimony fully meets the requirements of Rule 92 *bis* (A) and (D) in that it will not go to proof of the acts and conduct of the Accused.³ The Prosecution also submits that, in accordance with recent Tribunal jurisprudence, the acts and conduct of an accused may not include evidence relating to the existence or operation of a joint criminal enterprise or to the conduct of other persons.⁴ Furthermore, the Prosecution relies on the fact that the Testimony corroborates the statements of other witnesses heard in this case, including Josip Manolić and Stjepan Ključić.⁵ The Prosecution also submits in a footnote that any reference to the acts and conduct of the Accused has been redacted from the Testimony attached to the Prosecution Motion.

5. Finally, the Prosecution submits that Stjepan Mesić was a credible witness since his Testimony was cited in the *Blaškić* Trial Judgement of 30 March 2000 and Appeal Judgement of 29 July 2004.⁶ Moreover, the Prosecution submits that during his cross-examination Stjepan Mesić was extensively questioned on issues identical to those arising in this case. The Prosecution concludes that these arguments not only support the admission of the Testimony but also that it is not necessary for the Defence to cross-examine the witness in this case.⁷

6. Therefore, the Prosecution requests the Chamber to admit the Testimony, possibly in the redacted version attached to the Motion, and submits that the witness will not be required to appear for cross-examination.⁸

7. In its Response, the Defence opposes the admission of the Testimony and submits that Stjepan Mesić was one of the most significant participants in Croatian politics during the period relevant to the Amended Indictment (“Indictment”) and that the Testimony “goes to the very heart of the case against these Accused”.⁹ Therefore, it considers that the Testimony should not to be admitted under Rule 92 *bis* of the

³ Prosecution Motion, para. 3.

⁴ Prosecution Motion, para. 3.

⁵ Prosecution Motion, para. 6.

⁶ Prosecution Motion, p. 10.

⁷ Prosecution Motion, paras. 9 and 10.

⁸ Prosecution Motion, para. 11.

⁹ Defence Response, para. 2.

Rules. The Defence requests, at a minimum, for the Chamber to authorise it to cross-examine the witness, otherwise the right of the Accused to a fair trial would be violated.¹⁰

8. In order to justify a cross-examination, the Defence insists that the issues in the *Blaškić* Case were not the same as those facing the Accused.¹¹ The Defence also questions the integrity and competences of Counsel who conducted the cross-examination at the time and refers to the request for review of the *Blaškić* Appeal Judgement of the public redacted version of 10 July 2006.¹²

9. While noting that the request for review does not concern the Testimony, the Defence nevertheless submits that it would be premature for the Chamber to rule on the Prosecution Motion since a review could expand the area to include the Testimony.¹³

10. Moreover, the Defence cites a conflict of interests between Counsel for the Accused Blaškić who conducted the cross-examination of the witness Stjepan Mesic and the witness himself (Counsel had previously been the witness's lawyer). On this basis, the Defence submits that it cannot be asserted that the cross-examination was "objective, thorough, and motivated".¹⁴

11. Furthermore, the Defence submits that the unavailability in 1998 of such documents as the presidential transcripts, which are available today, might have seriously hindered the cross-examination.¹⁵

12. Finally, if the Chamber grants the admission of the Testimony, the Defence alternatively submits that certain passages expressly mentioned in the Defence Response be redacted as they go to the acts and conduct of the Accused.¹⁶

¹⁰ Defence Response, paras. 2-5.

¹¹ Defence Response, paras. 2 and 8.

¹² Defence Response, paras. 13 and 15.

¹³ Defence Response, footnote no. 3.

¹⁴ Defence Response, para. 14.

¹⁵ Defence Response, paras. 2 and 12.

¹⁶ Defence Response, paras. 2, 17-22.

IV – DISCUSSION

13. First, the Chamber notes that the Tribunal's Extraordinary Plenary held on 13 September 2006 adopted an amended Rule 92 *bis* and a new Rule 92 *ter* of the Rules. The amended Rule 92 *bis* and the new Rule 92 *ter* entered into force on 22 September 2006. Since the submissions of the parties were registered before that date, the Chamber shall apply the old Rule 92 *bis* and the relevant jurisprudence. Therefore, all reference to Rule 92 *bis* refers to the old Rule 92 *bis*.

14. The Chamber shall first (A) recall the conditions for the application of Rule 92 *bis* (A), (D) and (E) of the Rules in the context of the Tribunal's jurisprudence; and then, (B) in light of these conditions, it shall decide whether to admit all or part of the Testimony and proceed with the cross-examination of the witness.

A. Applicable Law

15. Rule 92 *bis* (A) of the Rules states that “[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment”.¹⁷ Rule 92 *bis* (D) reads as follows: “A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused”.¹⁸

16. The Appeals Chamber confirmed the Tribunal's case-law when it indicated that Rule 92 *bis* (A) of the Rules excludes the admission of written statements which go to proof of the acts and conduct of the accused as charged in the indictment.¹⁹ Any written statement or transcript of evidence which goes to proof of a joint criminal enterprise with which the accused is charged cannot be admitted if the prosecution relies on it “to establish – (a) that he [the accused] had participated in that joint

¹⁷ Rules, Rule 92 *bis* (A).

¹⁸ Rules, Rule 92 *bis* (D).

¹⁹ *The Prosecutor v. Stanislav Galic*, Case No. IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C)”, 7 June 2002, para. 9 (“Galic Decision”). See also *The Prosecutor v. Slobodan Milošević*, Case No. IT-O2-54-T, “Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*”, 21 March 2002, para. 22.

criminal enterprise, or (b) that he [the accused] shared with the person who actually did commit the crimes charged the requisite intent for those crimes".²⁰

17. In the event that a Trial Chamber concludes that a written statement or transcript of evidence makes no reference to the acts and conduct of the accused, the second question the Trial Chamber faces is whether to exercise its discretionary power and admit the transcript of evidence. In order to do so, it relies on the non-exhaustive set of factors listed in Rule 92 bis (A)(i) and (ii) of the Rules.²¹

18. In this regard, the cumulative nature of a transcript of evidence – *i.e.* the fact that other witnesses have given or will give oral testimony of facts similar to those raised in the transcript – militates in favour of it being admitted.²² Conversely, the Chamber will not admit transcripts which it considers unreliable or if it is not in the interests of justice or if all other factors justify the appearance of the witness for cross-examination.²³

19. Moreover, in the *Galić* Case the Appeals Chamber stated that:

The proximity to the accused of the acts and conduct which are described in the written statement [...] would also be relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all. Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form.²⁴

20. The Chamber considers, as was recognised by the Trial Chamber in the *Milutinović et al.* Case pursuant to Rule 92 bis (A)(ii)(c) and Rule 92 bis (E) of the Rules, that a transcript of evidence pivotal to the Prosecution may be admitted provided the Defence be given the possibility to cross-examine the witness.²⁵

²⁰ *Galić* Decision, para. 10. See also *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, "Decision on the Admission of Prosecution Testimony Pursuant to Rule 92 bis (A), (C) and (D) of the Rules", 13 September 2006, p. 6, quoting from *Galić* Decision, para. 10, ("Prlić Decision").

²¹ *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts", 30 June 2003, para. 14 ("Milošević Decision").

²² Rules, Rule 92 bis (A)(i)(a).

²³ Rules, Rule 92 bis (A)(ii)(a), (b) and (c).

²⁴ *Galić* Decision, para. 13, quoted in the *Milošević* Decision, para. 15.

²⁵ *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, "Decision on Prosecution's Rule 92 bis Motion", 4, July 2006, para. 7 ("Milutinović Decision"), quoting the *Milošević* Decision, para. 25.

21. Finally, pursuant to Rule 92 bis (E) of the Rules, the Trial Chamber must also decide “whether to require the witness to appear for cross-examination”.

22. In that regard, the Chamber, which is bound to ensure that the accused is given a fair trial, must consider “whether the transcript goes to proof of a critical element of the Prosecution's case against the accused and whether the cross-examination of the witness in the other proceedings dealt adequately with the issues relevant to the defence in the current proceedings”.²⁶

23. The present Chamber supports the afore-mentioned case-law of the Tribunal and finds that the proximity of the described acts and conduct to those of the Accused, the pivotal importance of the testimony for the Prosecution as well as the content of cross-examination are factors to be taken into consideration in deciding whether to conduct a cross-examination.

24. Finally, regarding the admission of exhibits tendered with a transcript of testimony, the Chamber recalls, as already noted, that even though Rule 92 *bis* of the Rules does not provide for it, the admission of such exhibits is justified in the interests of justice and a fair trial if they were argued during the witness testimony.²⁷

B. The Merits

25. The Chamber shall first examine whether the Testimony goes to proof of the acts and conduct of the Accused. The Chamber shall then, pursuant to its discretionary power, analyse whether the Testimony is to be admitted and whether the witness is to appear for cross-examination.

a) Acts and Conduct of the Accused

26. The Chamber first reviewed the Testimony in light of the arguments of the Parties in order to ascertain that there was no reference to the acts and conduct of any

²⁶ *The Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, “Decision on Prosecution’s Application to Admit Transcripts Under Rule 92 bis”, 23 May 2001, paras. 4 and 35 (“Sikirica Decision”). See also *The Prosecutor v. Slobodan Milošević*, Case No. IT-O2-54-T, “Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 bis”, 21 March 2002, para. 7.

²⁷ Prlić Decision, p. 7.

of the six of the Accused. The Prosecution provided a redacted version of the Testimony. Nevertheless, according to the Chamber and what is partly affirmed by the Defence, the redacted version still contains passages which go to proof of the acts and conduct of the Accused.

1. The Creation of Herceg-Bosna

27. The Chamber considers that the passage in the Testimony on the creation of Herceg-Bosna does not go to proof of the acts and conduct of the Accused except for a specific passage as stressed by the Defence. Hence, the passage from page 7157, line 11, to page 7158, line 1, of the English version shall be redacted from the Testimony in order for it to be admitted.

2. Events in Mostar

28. Contrary to what the Defence submits, the Chamber considers that the passage in the Testimony on the events which took place in Mostar from page 7164, line 23, to page 7166, line 8, of the English version of the transcript makes no mention of the acts and conduct of the Accused.

3. Links between the Croatian authorities, the HVO and Herceg-Bosna

29. The Chamber agrees with the Defence and considers that the passage on the joint command of the Croatian Army and the HVO mentions the acts and conduct of at least one of the Accused. Therefore, the passage from page 7173, line 10, to page 7174, line 6, of the English version of the transcript must be redacted from the Testimony.

30. The Chamber agrees with the Defence and considers that the passage in the Testimony on the movement from one army to the other, between the Croatian Army and the HVO, mentions the acts and conduct of at least one of the Accused. Therefore, the passage from page 7275, line 4, to page 7275, line 11, of the English version of the transcript must be redacted from the Testimony.

31. Contrary to the claims of the Defence, however, the Chamber does not consider that the passage on the “orders from Zagreb”, from page 7313, line 24, to page 7314, line 18 of the English version of the transcript, makes reference to any act with which the Accused have been charged.

b) Discretionary Power of the Chamber to Admit the Testimony in Part and Authorise the Cross-examination of the Witness

32. Pursuant to Rule 92 *bis* (A)(i) of the Rules, the Chamber considers that the Testimony, in the version where all reference to the acts and conduct of the Accused has been redacted, corroborates, as submitted by the Prosecution, the testimony of Josip Manolić and Stjepan Ključić (except for part of the cross-examination of the latter) who have already been heard in this case. The Chamber notes that the Testimony also corroborates the testimony of Peter Galbraith who has already been heard in this case. To be more precise, the Testimony corroborates this other testimony with regard to the political views and actions of the Republic of Croatia towards Bosnia and Herzegovina, *i.e.* those of Franjo Tuđman and Gojko Šušak.

33. Considering the submissions of the parties and as argued by the Defence, the Chamber concludes that the witness Stjepan Mesić was a key political figure in the period relevant to the Indictment. Moreover, the Testimony deals with elements essential to the Prosecution, namely the determining role of the Croatian authorities of the Republic of Croatia in the sequence of events alleged in the Indictment. Even though this factor could argue for the dismissal of the Testimony pursuant to Rule 92 *bis* (A)(ii)(c) of the Rules, the Chamber considers that by authorising the Defence to cross-examine Stjepan Mesić, it fully protects the right of the Accused to a fair trial. The Chamber has therefore decided to admit a redacted version of the Testimony.

34. As stressed by the Defence in its Response²⁸, the cross-examination carried out at the time did not deal with the same issues confronting the Accused. Furthermore, the conflict of interests between Counsel at the time and his client, as well as the existence of a request for a review of the Blaškić Appeal Judgement, militate in favour of a new cross-examination. Finally, the same can be said for the availability of new documents which could help refresh the witness's memory.

35. In conclusion, the Chamber considers that in order for the Testimony to be admitted, it must be redacted of all references to the acts and conduct of the Accused. Given the pivotal importance of the witness to the Prosecution since his testimony touches the very heart of its case, *i.e.* the existence and functioning of a joint criminal enterprise, the Chamber authorises the Defence to cross-examine the witness.

36. Finally, bearing in mind the cross-examination and possible supplementary questioning, the Chamber will not decide on the admission of evidence tendered with the Testimony until it has heard the witness.

V – The Disposition

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 92 *bis* (A), (D) and (E) of the Rules,²⁹

HEREBY GRANTS the Prosecution Motion in part and admits in part the testimony of Stjepan Mesić heard in *The Prosecutor v. Tihomir Blaškić* from 16 to 19 March 1998, in its redacted version hereto attached;

AUTHORISES the Defence to cross-examine the witness Stjepan Mesić; and

STAYS its decision on the admission of exhibits tendered into evidence during the testimony of Stjepan Mesić in *The Prosecutor v. Tihomir Blaškić* from 16 to 19 March 1998 until they have been presented to the witness and debated before this Chamber.

²⁸ See paras. 9 to 12 of this Decision on the Defence submissions on this point.

²⁹ The applicable Rules were those in force on the date the parties filed their submissions.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this twenty-eighth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]