



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: 27 October 2006
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French

TRIAL CHAMBER III

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

Registrar: Mr Hans Holthuis

Decision of: 27 October 2006

THE PROSECUTOR

v.

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

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**DECISION ON THE PROSECUTION MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULES 92 *bis* and *quater* 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 Murphy 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 (“the 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 (“the Tribunal”) has been seized of the “Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* (A) and (D) and 92 *quater* (REDACTED),” filed confidentially by the Office of the Prosecutor (“Prosecution”) on 19 September 2006 (“Motion”) in which the Prosecution requests that the Chamber, pursuant to Rules 92 *bis* (A), 92 *bis* (D) and 92 *quater* of the Rules of Procedure and Evidence (“Rules”) (1) admit as evidence the transcripts of evidence of (REDACTED) who testified in closed session in the case of *The Prosecutor v. Tihomir Blaškić* (“*Blaškić* case”) (REDACTED) and who is now deceased¹ (“Testimony”) and (2) grant to this witness the same protective measures under which he testified in the previous case.²

II. PROCEDURAL BACKGROUND

2. On 4 April 2006, Trial Chamber II issued its confidential “Decision on the Admission of Rule 92 *bis* Written Statements” in which it denied the Prosecution Motion of 5 December 2005 requesting that the transcripts of evidence of seven witnesses heard in previous cases before the Tribunal, which included the Testimony, be admitted into evidence. The Chamber based its decision on the fact that it considered it premature at that stage of the proceedings to admit the proposed evidence under Rule 92 *bis* of the Rules since it was not in a position to assess whether the information contained in the written statements was of a cumulative nature or was directly related to the acts and conduct of the Accused. With a view to guaranteeing an expeditious trial, the Chamber did however make a point of assigning a new pseudonym to the witness who gave the Testimony, namely pseudonym AR.³

3. On 28 September 2006, Counsel for the six Accused (“Defence”) filed confidentially the “Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A), 92 *bis* (D) and Rule 92 *quater* of the Rules (REDACTED)” (“Response”), in which the Defence objects to the admission of the Testimony.⁴

¹ *Blaškić* case, (REDACTED).

² Motion, paras. 1 and 15.

³ *The Prosecutor v. Prlić et al*, Case No. IT-04-74-PT, Decision on the Admission of Rule 92 *bis* Written Statements, 4 April 2006, p. 5 and Confidential Annex I (“Decision of 4 April 2006”).

⁴ Response, para. 14.

III. ARGUMENTS OF THE PARTIES

4. In its Motion, in accordance with Rule 92 *bis* (A) and (D) and Rule 92 *quater* of the Rules, the Prosecution invites the Chamber to admit the Testimony. In support of its Motion, the Prosecution points out that (1) the relevance of the Testimony to the *Prlić* case is identical to its relevance in the *Blaškić* case, in particular insofar as the background, context and issues raised in the two cases, that is, the existence of an international armed conflict, the partition of Bosnia and Herzegovina and its partial annexation with the Republic of Croatia, are identical;⁵ (2) the Testimony corroborates the evidence given by Mr Peter Galbraith on many points, such as the territorial ambitions of Franjo Tudjman, among others, concerning Bosnia and Herzegovina, the Banovina, a “Greater Croatia”, the partition of Bosnia and Herzegovina between Croats and Serbs and the intervention of the Republic of Croatia and the Croatian army in Bosnia and Herzegovina;⁶ (3) the Testimony does not go to the acts or conduct of one of the Accused;⁷ and (4) the Testimony bears sufficient indicia of reliability.⁸ Lastly, the Prosecution requests that (REDACTED) be given the same protective measures under which he testified in the *Blaškić* case, at least until the Prosecution has made additional inquiries with the United States Government with respect to keeping those protective measures in place.⁹

5. In its Response, the Defence objects to the admission of (REDACTED)’s testimony on the grounds that (1) it would not have the opportunity to cross-examine the said witness even though his testimony goes to the heart of the allegation of a joint criminal enterprise against these Accused;¹⁰ (2) the issues at stake in the *Blaškić* case were different from those concerning the Accused because Tihomir Blaškić had a different level of responsibility in a specific and limited context and the scope of the cross-examination in the *Blaškić* case focused on the allegation of an international armed conflict and not on the allegation of the joint criminal enterprise as alleged in the *Prlić et al.* case;¹¹ (3) in late 1997, a large number of relevant documents, including the transcripts of presidential meetings, were made available to the Tribunal, documents which the cross-examination of (REDACTED), had it occurred, would

⁵ Motion, para. 6.

⁶ Motion, para. 7.

⁷ Motion, para. 9.

⁸ Motion, para. 13.

⁹ Motion, para. 15.

¹⁰ Response, para. 3.

¹¹ Response, paras. 7 and 8.

have had to take into account,¹² (4) (REDACTED);¹³ and (5) (REDACTED)'s testimony differs considerably from that of Mr Peter Galbraith.¹⁴

IV. DISCUSSION

6. The Chamber would first recall that further to a decision taken at the Tribunal's extraordinary plenary session on 13 September 2006, Rule 92 *bis* of the Rules was amended and Rule 92 *quater* was adopted. The amended version of Rule 92 *bis* and new Rule 92 *quater* entered into force on 22 September 2006. Insofar as only the Prosecution's written submissions were recorded before that date, the Chamber will apply new Rule 92 *quater* to the proceedings in this case.

7. The Chamber will first set out the conditions for Rule 92 *quater* of the Rules to apply and, in view of those conditions, then decide whether the Testimony should be admitted.

A. Applicable Law

8. Rule 92 *quater* states that:

A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

i) is satisfied of the person's unavailability as set out above; and

ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

The Chamber notes that this new provision replaces former Rule 92 *bis* (C) (i) and (ii) of the Rules. The Chamber first notes that new Rule 92 *quater* (A) does not fundamentally differ from former Rule 92 *bis* (C) in that it also requires that two conditions of a cumulative nature be satisfied, namely the unavailability of the author of the written statement or transcript of evidence and the reliability of the evidence contained therein. The Chamber however notes that

¹² Response, paras. 9 and 10.

¹³ (REDACTED).

¹⁴ Response, para. 13.

contrary to the case law relating to the application of former Rule 92 *bis* (C) of the Rules,¹⁵ new Rule 92 *quater* of the Rules in principle permits the admission of a written statement or transcript of evidence which goes to demonstrate the acts or conduct of an accused. New Rule 92 *quater* (B) clearly states however that this is a factor which can argue against such admission in whole or in part. Moreover, the Chamber finds that Rule 92 *quater* of the Rules now follows a procedure governing the admission of evidence which is autonomous and distinct from Rule 92 *bis* of the Rules.

9. In view of the above, the Chamber must therefore first decide whether it is satisfied that the author of the statement or transcript is unavailable for the reasons set out in Rule 92 *quater* (A) of the Rules.

10. The Chamber must then examine whether, in view of the circumstances in which it was given, the evidence contained in the written statement or transcript of evidence is reliable.¹⁶ In this respect, the Chamber will take account in particular the following indicia of reliability: the fact that the statement was made under oath, that it was the subject of cross-examination or that it is corroborated by any other evidence.¹⁷

11. Third, using its discretionary power in the matter, the Chamber will decide whether or not to admit the written statement or the transcript of evidence at issue. In its examination, the Chamber will keep several factors in mind. First, as provided in Rule 89(C) of the Rules, “[a] Chamber may admit any relevant evidence which it deems to have probative value”. Accordingly, the Chamber will examine whether the written statement or transcript of evidence has a degree of relevance and probative value. The Chamber notes, however, that since reliability is a component of the probative value of a piece of evidence, it will not be re-examined at this stage insofar as an examination has already been made within the context of Rule 92 *quater* (A) (ii) of the Rules.

12. The Chamber will then consider whether the written statement or transcript of evidence at issue contains a reference to the acts and conduct of the Accused named in the Indictment. In

¹⁵ *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 *bis* (C), 7 June 2002 (“*Galić Decision*”), paras. 23-25.

¹⁶ Under the case law of the Tribunal, “[r]eliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed”, *The Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-A *bis*, 8 April 2003, para. 57 citing *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and 96-23/1-T, Decision on Motion for Acquittal, 3 July 2000, para. 7.

¹⁷ *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2 –AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, para. 27.

this regard, the Chamber recalls that within the framework of a joint criminal enterprise, the terms “acts or conduct of the Accused” must be understood as any act or conduct of the Accused on which the Prosecution relies in order to establish that the Accused participated in the joint criminal enterprise or shared with the effective perpetrator of the crimes charged the requisite intent for these acts.¹⁸ Moreover, the Chamber will review “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.”¹⁹ The Chamber considers that this latter factor and the circumstance that the testimony goes to proof of the acts or conduct of an accused, are factors which may argue that it not be admitted.

B. Examination of the Merits

13. Since the Chamber is satisfied that (REDACTED), as is deceased, is unavailable within the meaning of Rule 92 *quater* of the Rules, it will focus on the indicia of reliability of the Testimony and the other factors which might warrant or, on the contrary, argue against its admission as set out above.

14. First, in respect of the Defence submissions that the Defence in this case is not necessarily pursuing the same interests as those of Counsel for the Accused Blaškić, new documents are currently available and (REDACTED), the Chamber finds that, although established, these consideration are not such, *in the current case*, that they affect the reliability of the Testimony. At the very most, a greater latitude in the way (REDACTED) might have been able to respond to the questions put to him in the *Blaškić* case would have, if necessary, made it possible to raise a greater number of issues and, consequently, broaden the cross-examination conducted by Counsel for the Accused Blaškić. Similarly, the availability of new documents might have made it possible to refresh (REDACTED)’s memory and broaden the scope of his cross-examination. The Chamber notes however that it will bear these arguments in mind when evaluating the definitive probative value to accord to the Testimony.

15. The Chamber also notes that (REDACTED) took an oath and was cross-examined in the *Blaškić* case. Furthermore, the Testimony largely corroborates the testimony of Mr Peter

¹⁸ *Galić* Decision, para. 10. See also *The Prosecutor v. Prlić*, 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 citing the *Galić* Decision, para. 10

¹⁹ *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. See also *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002, para. 7.

Galbraith who has already been heard in this case, in particular in respect of the political views of Franjo Tudjman, President of the Republic of Croatia at the time, on Bosnia and Herzegovina and his opinion on the Muslims in Bosnia and Herzegovina. (REDACTED).

16. In view of the above, the Chamber is satisfied that the Testimony demonstrates indicia of reliability.

17. Moreover, the Chamber considers that the Testimony is relevant for this case insofar as it concerns both the historical and political background of the case and the role which the Republic of Croatia played in the sequence of the events alleged in the Amended Indictment of 16 November 2005 (“Indictment”), as set out, for example, in paragraphs 23 and 232 of the Indictment. The Chamber notes moreover that the Defence does not dispute the relevance of the Testimony.²⁰

18. The Chamber considers moreover that the Testimony makes no mention of the acts and conduct of any of the six Accused within the meaning defined above in the *Galić* Decision. In particular, the Chamber notes that the Testimony does not deal with the alleged participation of the Accused in a joint criminal enterprise.

19. Similarly, in the view of the Chamber, the Testimony does not go to proof of facts so fundamental to this case that it would be unfair to the Defence to authorise its being tendered into evidence in written form since it would not be possible for the Defence to cross-examine the author of the Testimony.

20. In conclusion, the Chamber finds that the Testimony is admissible in accordance with Rule 92 *quater* and Rule 89(C) of the Rules.

21. As regards the request of the Prosecution that the protective measures be maintained, the Chamber recalls that, at the request of the Prosecution, by Decision of 14 April 2006, it already made a point of assigning a new pseudonym to the witness who is the author of the Testimony, namely the pseudonym AR. Consequently, the Chamber decides that this part of the Prosecution Motion has become moot.

²⁰ Response, para. 3.

V. DISPOSITION**FOR THESE REASONS**

IN APPLICATION of Rules 89(C) and 92 *quater* of the Rules,

GRANTS the Motion and admits the testimony of (REDACTED) who has been assigned the pseudonym AR in this case and who was heard (REDACTED) in the case *The Prosecutor v. Tihomir Blaškić*,²¹ **AND**

FINDS that the request of the Prosecution concerning the protection of the said witness' anonymity is moot.

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

Judge Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of October 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

²¹ (REDACTED).